IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case Number: 44095/12

23/6/2015

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES / ~~NO~~.

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO.

(3) REVISED.

23/06/2015

DATE

SIGNATURE

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA GAUTENG DIVISION, PRETORIA
PRIVATE BAG/PRIVAATSAK X67
PRETORIA 0001
2015 -06- 23
JUDGE'S SECRETARY
REGTERS KLERK
GRIFFIER VAN DIE HOË HOF VAN SUID AFRIKA GAUTENG AFDELING, PRETORIA

In the matter between:

TASIMA (PTY) LTD	APPLICANT
and	
THE DEPARTMENT OF TRANSPORT	1st RESPONDENT
THE DIRECTOR-GENERAL: DEPARTMENT OF TRANSPORT	2nd RESPONDENT
THE MINISTER OF TRANSPORT	3rd RESPONDENT
WERNER EDUARD KOEKEMOER	4th RESPONDENT
ROAD TRAFFIC MANAGEMENT CORPORATION	5th RESPONDENT
COLLINS LETSOALO	6th RESPONDENT
KEVIN JOSHUA KARA-VALA	7th RESPONDENT
MORNER GERBER	8th RESPONDENT
GILBERTO MARTINS	9th RESPONDENT
CHRIS HLABISA	10th RESPONDENT

MAKHOSINI MSIBI 11th RESPONDENT

Coram: HUGHES J

JUDGMENT

Delivered on: 23 June 2015

Heard on: 29, 30 April and 8 May 2015

HUGHES J

Background

1. The applicant was awarded a tender in 2001 to develop, maintain and operate the electronic national traffic information system ('the eNaTIS system'). On 3 December 2001, the applicant and the Department of Transport ('DoT') concluded a Turnkey Agreement ('the agreement'). In terms of the agreement, the applicant commenced with it services to DoT in 2002. The duration of the applicant's services was five years. However, the agreement was extended in 2007 and 2010.

2. For easy reference, DoT is made up of the first to third, sixth and tenth respondents and the fifth and eleventh respondents will be referred to as RTMC.

3. In 2010 the Director General ('DG') of DoT purported to extend the agreement for a further five years and the expiry date in respect of that extension was 30 April 2015. DoT has launched a counter-application in these proceedings and seeks to declare the extension unlawful.

4. The applicant alleges that as far back as 2012 and during the course of this agreement, DoT has been attempting to unlawfully transfer the eNaTIS system away from them, and as a result a dispute arose regarding the duration and status of the

agreement. The culmination thereof was the applicant proceeding on an urgent basis to this court to seek an interim interdict to prevent DoT from breaching the agreement and a declaratory compelling them to comply with the terms of the agreement, pending the outcome of the dispute resolution process encapsulated in the agreement.

5. The urgent application was heard by Mabuse J and he granted an interim order on 17 October 2012 ('the Mabuse order').

6. For completeness I set out the he Mabuse order which reads as follow:

> *"1. That pending the finalisation of the dispute resolution proceedings instituted by the applicant in terms of clause 24 and schedule 13 of the agreement between the applicant and the first respondent dated 3 December 2001, as subsequently amended and extended, the first respondent is hereby directed:*
>
> *1.1 To perform its obligations in terms of the agreement.*
>
> *1.2 Without limiting the generality of 1.1supra, to comply with the payment obligations as defined in paragraph 17 of the applicant's founding affidavit.*
>
> *1.3 To pay the costs of this application."*

7. Following upon the Mabuse order five subsequent contempt orders were granted, either by consent between the parties or by this court. The five orders were that of Strijdom AJ on 26 March 2013; Ebersohn AJ on 15 July 2013; Fabricius J on 27 August 2013; Nkosi AJ on 5 November 2013 and Rabie J on 21 January 2014.

8. I must hasten to add that RTMC was joined in these proceedings in 2013 and became a respondent when Fabricius J presided over the matter. In the application before me, the applicant contends that the previous orders are still in existence and the respondents have breached all these orders.

9. As stated above the extension of the agreement came to an end on 30 April 2015. The applicant had referred the dispute regarding the validity and lawfulness of the extension of the agreement in terms of the dispute mechanism set out in the agreement. By 30 April 2015, when the extension of the agreement came to a head, the dispute had not been attended to nor finalised.

The position at the hearing of this matter.

10. In terms of schedule 15 of the agreement, upon termination, a transfer management plan must be negotiated and agreed between the applicant and DoT. This is to allow for a phased and gradual transfer of functions from the applicant to DoT.

11. The situation that now prevails is that DoT and RTMC are persisting for an immediate handover of the eNaTIS system from the applicant to RTMC. The applicant contends that this is contrary to the transfer management provisions as set out in the agreement.

12. The applicant further, contends that RTMC had commenced advertising positions for staff to take immediate transfer of the eNaTIS system. In addition instructions had been issued by DoT to the provinces that they are not to communicate any longer or co-operate with the applicant except in limited maintenance matters of the eNaTIS system.

The main application and counter-application

13. In light of the transitional management provisions, schedule 15, which has not been implemented and concluded, the applicant urgently seeks to prevent further breaches of the agreement ('the main application'). Especially, the proposed, premature takeover of the eNaTIS system by DoT and RTMC. The respondents oppose the application and dispute the issue of urgency.

14. DoT proceeded to institute a counter-application on an urgent basis. The urgency and competence of this counter-application is disputed by the applicant who

contends that it is purely a collateral review challenge that cannot be brought on an urgent basis.

<u>The relief sought by the applicant in the main application</u>

15. The applicant seeks to enforce the provisions of the orders mentioned above, thus preventing an unlawful and premature transfer of the eNaTIS system.

16. The relief sought by the applicant is lengthy and I summarise same below:

(a) The relief sought by the applicant is sought on an urgent basis;

(b) Declarations of breach and wilful contempt are being sought by the applicant against DoT in respect of specific paragraphs of the prior orders' paragraph 1.1 of the Mabuse Order, paragraph 3 of the Strijdom Order, paragraph 5 and 6 of the Fabricius Order, paragraph 1 of the Rabie Order ;

(c) Declaration that RTMC was in breach and wilful contempt of specific paragraphs of the orders of Fabricius J, Mabuse J, Strijdom AJ , Nkosi AJ and Rabie J;

(d) Declaring the RTMC be bound by all the orders cited in paragraph 27 of the affidavit of Fannie Lynen Mahlangu which supports this application dated 12 March 2015 ("the supporting affidavit");

(e) Declaring that the letters dated 24 February 2015, 25 February 2015 and 4 March 2015 ("the transfer correspondence", which respectively comprise annexes "FM27", "FM25" and "FM28" to the supporting affidavit) constitute a breach of the Turnkey Agreement for the provision of the eNaTIS system (Contract RT1194KA) dated 3 December 2001, as subsequently amended and extended ("the Turnkey agreement") and the instructions contained therein are unlawful and ordering DoT and RTMC to withdraw the instructions contained in the transfer correspondence;

(f) Declaring that RTMC 's advertising for positions pertaining to the rendering of services under the eNaTIS system, which adverts are described in paragraph 104 of the supporting affidavit, is unlawful;

(g) Declaring that the instructions given by DoT and RTMC to the provinces, as described in the meeting summary annexed to the supporting affidavit as "FM29" ("the meeting summary"), or any substantially similar instructions are unlawful and in breach of paragraph 3 of the Strijdom Order and paragraphs 5 and 6 of the Fabricius Order;

(h) Seeking a host of orders to ensure that eNaTIS system and services is not transferred until the transfer management plan envisaged in schedule 15 to the Turnkey agreement is implemented, amongst other orders in respect of the transfer management plan ;

(i) That DoT and RTMC are interdicted from taking any steps to implement the purported transfer alluded to in the transfer correspondence, or to implement any transfer of the eNaTIS, the Services (as defined in the Turnkey agreement) or any related services;

(j) RTMC is to cease and remove all advertising for eNaTIS related positions, and to desist from advertising for any such positions until at least a transfer management plan has been finalised in terms of the Turnkey agreement and other orders in the like pertaining to the provinces;

(k) DoT and RTMC members be committed to imprisonment for a period of 30 days, alternatively, for such period as the Court deems appropriate, this will not come into operation unless there is a breach of the orders above, a warrant of committal is to be issued by this Honourable Court, on the same papers, duly supplemented as necessary, if the first, second and tenth respondents breach the order; and

(l) Ordering the first, second, fifth, tenth and eleventh respondents (as well as any other respondents who oppose this application), jointly and severally, the one paying the others 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; and

17. I propose to first deal with the urgency, the main application, the respondent's counter-application and then address the dispute against RTMC.

Urgency

18. The applicant and the respondents do not dispute that the main application is urgent, as the applicant seeks to secure its contractual and court recognised rights. Further, the parties are *ad idem* that the contract came to an end on 30 April 2015. The matter required determination for the interest of the public at large. The applicant submits that these are contempt proceedings for urgent compliance with several orders already issued by this court, which are being flaunted or there has been non-complied on the part of the respondents.

19. This matter came before Louw J as urgent in March 2015. In term of the practise directive of this division, Louw referred the matter to the DJP for allocation to the special motion court, as there was no judge available to deal with this voluminous (*1300 pages made up of no less than 15 leaver arch files-* extracted from State Attorneys letter to Louw J of 27March 2015) on an urgent basis. The matter was referred to the DJP and he allocated it to the special motion court. In consultation with the parties the DJP set it down for 29 and 30 April 2015 as a special motion court matter.

20. In my view, all the parties having the knowledge that the contract was to expire on 30 April 2015, setting the matter down on the dates previously mentioned was not feasible at all, taking into account the adjudication process. The parties in my view left it a little too late to be dealt with.

The main application

21. From the outset, the applicant persisted with its argument that at the core of the main application is the Mabuse order, the applicability of schedule 15 of the agreement and the relief sought by the applicant.

22. The circumstances that prevailed when the Mabuse order was issued set the tone as to why such an order was made. In light of the dispute between the parties regarding the validity of the extension of the agreement by the DG, the applicant had initiated the dispute resolution procedure as set out in the agreement. The dispute resolution procedure is regulated by clause 24 and Schedule 13 of the agreement.

23. The applicant submits, that DoT's behaviour was contemptuous to say the least, in that the order *"requires the dispute about the validity of the extension to be resolved through the dispute resolution processes under the agreement and requires compliance with the agreement in full, pending the finalisation of the dispute resolution process."*

[Extract from Mabuse Judgment at paragraph 24 and 35; paragraph 23 of applicant's heads]

24. Further, that DoT blatantly disregarded the fact that they had initiated a dispute and flagrantly disregarded the Mabuse order that was in place. This is born out in the previously mentioned orders granted by this court. The respondent does not vigorously dispute such behaviour complained of by the applicant.

25. The contemptuous behaviour complained of by applicant was that prior to the expiration of the agreement DoT had already appointed RTMC to take over from 1 May 2015. RTMC had been appointed prior to the stipulated hand over or transfer period being implemented in terms of clause 15 - *Change control proceedings* and clause 26 - *Transfer management upon termination*, of the agreement. However, DoT contends that it has a right to prepare itself in readiness for when the agreement expires and as such it is not in violation any contractual rights when it was advertising for staff and the like to step into the applicant's shoes ones the agreement came to an end.

26. Though the applicant initiated the dispute proceedings by way of a letter on 20 March 2012 the applicant submits that it was DoT who failed to ensure the

progression of the disciplinary proceedings. DoT on the other hand argues that even though they did not take the dispute any further, this did not preclude the applicant from applying for a default order in terms Schedule 13 clause 2.3.3 which read as set out hereafter :

> *"Nothing contained in this clause 2 shall preclude any party from seeking urgent relief through any court of competent jurisdiction in respect of any matter contemplated herein or from obtaining any interdict."*

27. The applicant argues that all it seeks is to uphold the Mabuse order which makes provision that the agreement to be honoured, especially so in terms of Schedule 15 which deal with the transfer management plan.

28. In the main application the applicant submits that RTMC is bound by the same orders that bind DoT, by virtue of the Fabricius Order, wherein Fabricius J specifically made provision. RTMC submits that it cannot in law be bound by orders that it had not been a party to and it could not be bound by an agreement concluded between the applicant and DoT. The applicant places much reliance upon the Mabuse order, RTMC contends, that it was not even a party in the proceedings when this order was made. RTMC states that it was only a party when the orders of Fabricius J, Nkosi AJ and Rabie J were made. I deal with the dispute against RTMC later in the judgment.

29. I turn to address the main application and in doing so I propose to deal with it under specific headings.

<u>Dispute mechanisms as set out in the agreement</u>

30. Clause 24 of the agreement dictates the manner in which disputes between the parties are to be dealt with. The section reads as follows:

> *"24 Dispute Resolution*
> *The parties accept that disputes may arise between them during the course of the Agreement. Any dispute which cannot be resolved between the respective*

Project Managers of the Parties shall be dealt with in accordance with the provisions of Schedule 13- Dispute resolution."

31. On my reading of Schedule 13 the sections that have application are clause 2.1- *Referral of the dispute to joint committee of the parties*, clause 2.3 - *Submission of the dispute to arbitration* and clause 2.4 - *Appointment of experts or arbitrator by AFSA.*

32. Clause 2.1 of Schedule 13 states that a dispute which arises will be referred to the Steering Committee and if it cannot be resolved then it must be referred to "*a joint committee of the parties*" which is to comprises of the DG and the CEO of the Contractor, or alternatives duly appointed by them.

33. The applicant argued that the duty was with DoT to ensure that the dispute it had referred was adjudicated upon. On the applicant's version DoT did not bother to deal with its dispute by way of the Steering Committee neither did it ensure that a joint committee of the parties was to be formed to deal with the dispute within the requisite 14 days after the dispute was referred to it.

34. The Steering committee in terms of Schedule 11 of the agreement that deals with governance of the contract states that this committee will comprise of representatives of the parties. These representatives will be determined from time to time and they will be authorised to make decisions at the committee meetings on behalf of parties they represented. The chairperson of the Steering committee would be the State's Project Manager or in his absence a representative of the State.

35. I do not share the same sentiments of that of the applicant regarding the responsibility of ensuring the adjudication of the dispute. Clause 2.1, in my view, in no way makes it onerous upon DoT to ensure that the dispute is adjudicated. In fact both parties are urged, by way of the Steering committee, to endeavour as best they can to resolve the dispute within the requisite time mention above.

36. Clause 2.3 of the Schedule sets out that if the above fails then the dispute shall be resolved by an arbitrator or arbitrators appointed by AFSA in terms of the Rules of AFSA.

37. Of importance is clause 2.3.2 subsection 1 and 2 which states:

"2.3.2 The provisions of this clause 2-

2.3.2.1 constitutes an irrevocable consent by the parties to any proceeding in terms hereof and no party shall be entitled to withdraw therefrom or to claim at any such proceedings that is not bound by such provisions; and

2.3.2.2 are severable from the remaining provisions of this contract and shall remain in effect notwithstanding the termination of or invalidity for any reason of the contract."

38. To my mind on a reading of the two clauses above together with clause 2.3, which gives any party to the dispute, the right to seek urgent relief through a competent court, this is yet a further illustration that it is not onerous upon DoT to ensure that the dispute is careered forward and resolved. Therein also lays a duty upon the applicant to ensure that all avenues are exhausted after its referral of the dispute.

39. I am not convinced that from as far back as August 2012, when the referral of the dispute took place, the applicant has tried to enforce and comply with Schedule 13 as set out above. I say so because after correspondence was exchanged between the DoT and the applicant to set up date when the committee could meet, with no joy coming from DoT, the applicant in 2012 did not see it fit to persist with its dispute with the intent of reaching finality. To me it seems that the applicant left the dispute by the wayside and placed all its emphasis on obtain one contempt order after the next which order operated pending the finalisation of this dispute raised and left by the wayside by the applicant.

40. I hasten to add that DoT is also not an innocent party in the circumstances to finalise the dispute. However, there was a mechanism to address DoT's conduct when it dragged its feet in regarding the dispute raised by the applicant. This is found in clause 2.3 of the Schedule 13, as stated above.

41. Much was made by both DoT and RTMC that the applicant could have preceded to arbitration even in the absence of DoT, if the latter was not willing to cooperate, thus ensuring that the dispute that rose in 2012 was resolved.

42. I share the view expressed that had the applicant proceeded to arbitration, as provided for by the agreement, there would have been no need to bring all the contempt applications that it embarked upon and this application would not have been necessary.

<u>Interdictory relief sought by applicant</u>

43. In essence the applicant seeks to interdict DoT, its officials, the DG, RTMC, Mr Hlabisa, Mr Msibi from taking any steps to effect transfer of the eNaTIS system and services other than in accordance with Schedule 15 of the agreement. Associated with the aforesaid a declaratory is sought that in the absence of agreement between the parties as regarding the transfer management plan then this court should declare that the transfer period of eNatis and its services is five years and the terms of the agreement and the orders are to remain in full force and effect until for the duration of the transfer.

44. The transfer management is regulated by clause 26, while the transfer management provisions are set out in Schedule 15 of the agreement. Clause 2 of Schedule 15 deals with the *"Transfer Management Plan"*.

45. According to Schedule 15 the transfer management plan *"is necessary"* for the provision of orderly transfer of the eNaTIS and its services from the applicant to DoT or a third party (this appears in the introduction of this schedule).

46. Clause 2.1 of Schedule 15 makes provision that the applicant *"shall"* take step to transfer to the DoT or *"designated provider"*. Further, in clause 2.2 under the heading *Agreeing and carrying out of a transfer management plan* the following is stated:

> *"...Contractor **shall** upon receipt of the State's written request for a transfer management plan meeting, which request **shall** be made no later than 90 (ninety) days after the Agreement Termination Date, meet with the State and*

agree on a transfer management plan with ***agreed times scales****, which transfer management* ***shall,*** *unless otherwise agreed by the parties, be substantially similar to the Migration Plan, mutatis mutandis,* ***be completed within 30 (thirty) days of the date of the request by the State****;"* [My emphasis in bold].

47. The Concise Oxford English Dictionary the use of the word *"shall"* as a verb is noted as: *1- expresses the future; 2- express a strong assertion or intention; 3- express an instruction or command.*

48. On my analysis of the above clause 2 I am of the view that the transfer from the applicant to DoT or *designated provider* is instructive and a command. Note the provision of a designated provider. In this instance RTMC established as an independent entity in terms of The Road Traffic Management Corporation Act 20 of 1999, by virtue of its statutory mandate would fall into that category.

49. In clause 2.2, from my reading the transfer management is to be completed within 30 (thirty) days from the date of the request by DoT, this request *shall (instructive)* be within 90 (ninety) day of after the date of termination of the agreement. The time agreed times scales mention in 2.2 should be substantially similar to that in the Migration Plan, Schedule 18 of the agreement deals with this plan.

50. I am alive to the warning sound out by Wallis JA in *National Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593* at 604B-D:

> *"Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in contractual context it is to make a contract for the parties other than the one they in fact made."* [That underline is my emphasis]

51. The agreement therefor already has agreed times frames for requesting the transfer management plan and the completion of such transfer management. Thus the declaratory sought to declare the transfer period of eNatis and its services to be five years cannot be granted. The parties are bound to the terms of the agreement within which they contracted. The court has no business to impute terms or condition to an agreement contracted into by the parties. The parties are bound by the terms of the agreement entered into.

<u>Whether to allow the counter-application</u>.

52. As stated above in response to the main application DoT instituted a counter-application to declare the extension by the DG of the agreement for five years ending 30 April 2015 unlawful. DoT from the outset made that the concession that this counter- application was brought late. However DoT, submitted that its counter-application is exactly the same dispute that the applicant referred in term of Schedule 13 of the agreement, that being the validity of the extension to the agreement by the DG in 2010, which as yet has not been adjudicated.

53. DoT argued that from the Mabuse judgment it is evident that Mabuse J acknowledged that there was a material dispute between the parties as to whether the agreement was amended and extended to 30 April 2015.

54. The applicant opposed the counter-application. The applicant submitted that DoT was bringing a collateral challenge as a defence to the main application and as such it was not permitted to do so. The applicant contends that this collateral challenge amounts to nothing more than an "illegitimate appeal". The applicant further submitted that the urgency and lengthy delay in DoT bringing this counter-application, especially at this juncture, is clearly under the guise of an urgent so-called collateral review.

55. On my reading of the judgment of Mabuse J the dispute refer in terms of Schedule 13 was the *prime facia* case advanced by the applicant which afforded the applicant the interim relief granted by the Mabuse order.

56. DoT contends, that in disguise the main application seeks to enforce a decision, which amounts to an administrative act and as such DoT has the right, at this stage, not to comply with the unlawful decision and pursue its counter-application.

57. DoT makes reference to the case on *Minister of Transport v Prodiba (Pty) Ltd (20028/2014)[2015 ZASCA 38 (25 March 2015)* "***Prodiba***". It was argued that similar circumstances existed in the Prodiba case where the applicant Prodiba brought an application to declare the decision of the ADG to cancel the agreement unlawful and sought an order directing DoT to comply with its obligations terms in terms of the agreement. A counter- application was brought to declare the addendum agreement void *ab initio.* DoT contended that the SCA did not take issue with the manner of approach and likewise should this court.

58. Though the delay in bring the counter-application is one which is very lengthy (from 2012) to say the least, when considering the delay, I am mindful of Section 217 of the Constitution, Section 38(1) (a) (iii) of the Public Finance Management Act 1 of 1999 (PFMA) and the fact that *"Policy making is traditionally primarily the task of the highest ranking officials in government, namely, the Cabinet or its constituent Ministers or, at provincial level, the executive council or its individual members".* See *Probida at [26].*

59. In addition the agreement between the parties at Schedule 13 clause 2.3.3 states that nothing in clause 2 precludes any of the parties from seeking urgent relief through a court of competent jurisdiction in respect of any matter contemplated. In these circumstances DoT is not precluded from seeking the urgent relief sought in the counter-application.

60. That being said the applicant has argued that the collateral review which emerges from the counter- application can only be used in limited circumstances and especially not where the entity seeking to review its own conduct is a public body. Collateral review is available to review administrative actions but not judicial orders, as in this case DoT seeks to use this avenue against the enforcement of binding orders. The applicant further argued that DoT was using the collateral review to

circumvent the finality of the court orders and the hierarchy of appeals. The delay from 2012 to 2015 when the counter-application was launched cannot be wished away, so goes the argument of the applicant, it was up to DoT to seek a review of the decision of the DG to extend the contract and seek that it was void *ab initio*.

61. Regard should be had of the fact that the applicant filed the main application on an urgent basis. DoT filed its answering affidavit and its counter- application on an urgent basis on 26 March 2015. DoT filed what it termed as a preliminary answering affidavit on 28 March 2015 and on 13 April 2015 served a Rule 35(12) notice on DoT. Prior to the hearing of this matter DoT provides the applicant which it requested in terms of the Rule 35(12) notice. Thus this matter commenced the applicant had not filed its answering affidavit to DoT's counter-application.

62. DoT argues that the issue raised in the counter- application was not a new issue. That their answering affidavit was a response to the main application and their counter-application dealt with the dispute that was raised in 2012. Further, that DoT is the only party in these preceding's that has the knowledge of the reasons for the late institution of the review outside of the 180 day period. That special circumstances surround the delay and part thereof is the fact that the DG and his deputy were the persons responsible for ensuring that no instructions were given to initiate the proceedings as they were being investigate for their conduct of numerous agreements being extend contrary to procedures being adhered to. This was the basis upon which the criminal and departmental investigations were initiated by DoT. DoT contends that the applicant cannot rebut this information, is in possession of the document it had requested in term of Rule 35(12) and as such the counter-application could be adjudicated by this court.

63. Naturally the applicant cries fowl that it only served the preliminary answering affidavit as an indicator to this court that it had under the circumstances attempted to at least have an answering affidavit before court be it a preliminary. They have not been given an opportunity to address the issues raised in the founding affidavit of DoT in full.

64. DoT submitted that in the preliminary answering affidavit the applicants did not even attempt to address the merits of DoT's counter-application.

65. My view is that a party stands and falls by the path it chooses it litigate. In these circumstances the applicant chose to proceed on an urgent basis, having done so it dictated the course that this matter would embark on. The respondents had to file their papers under the dictated path of the applicant so to should the applicant in the counter-applicant, logic dictates this. Thus the applicant is not shielded by the fact that it chose to only file a preliminary answering affidavit it should have after receipt of the documents by way of the Rule 35(12), sought to supplement its preliminary affidavit. However the enquiry does not stop there, there is the issue of the counter- application being considered *pari passu* with the main application.

66. This is in the discretion of the court and in excising this wide discretion I take into account the fact that the basis of the counter-application is a dispute raised by the applicant already, I also consider the delay in that dispute being adjudicated, I consider that the collateral challenge raised is one that validates or invalidates the relief sought in the applicants main application, I take into account Section 217 of the Constitution and , Section 38(1) (a) (iii) of the (PFMA) and I am guided by principle enunciated in *TRUTER v DEGENAAR 1990 (1) SA 206 (T)* and the cases mentioned therein, with special reference to page 210 of the judgment where VAN DIJKHORST J stated:

> "Die Hof in *Van den Bergh and Partners Ltd v Robinson*1952 (3) SA 747 (SR) op 748E sê na aanleiding van die Engelse praktyk die volgende:
> 'In *Mersey Steamship Co v Shuttleworth & Co* 52 LJ QBD 522 it was held that the defendant has a right to resist judgment 'unless the counterclaim set up by such defendant is shown to be frivolous, unsubstantial and to be pleaded for the mere purpose of delay'. There are indications in some of these other cases that, in our practice at least, these reasons may not be exhaustive, and that judgment may be entered for the plaintiff, despite a counterclaim exceeding his claim, where other good or sufficient reason for this course appears. And this would seem to be in conformity with our Rules of Court. By Order 10, Rule 13, a discretion is conferred on the Court, which may for good cause order the separate trial of the plaintiff's claim and the claim in reconvention, and I do not think the term 'good cause' should be restrictively interpreted when the justice of the case demands such separation. But, generally speaking, and in the absence of cogent reason to the contrary, it is obviously desirable that the process of a Court should not issue until all claims and

counterclaims between the parties, not being manifestly unsubstantial, have been determined. If conflicting claims are made the subject of judicial order piecemeal, one party may suffer grave prejudice. The final event may show a large sum due to him, yet he may find it difficult or impossible to recover an amount paid under an earlier judgment.'

Die uitgangspunt sowel as konklusie is dus in ooreenstemming met ons gemene reg. Eis en teeneis behoort *pari passu* bereg te word maar die Hof het 'n onbeperkte diskresie om anders te gelas, welke diskresie uit die aard van die saak om goeie redes uitgeoefen sal word. Kyk ook *Rhodesia Omnibus Co Ltd v Modern Publicity Ltd*1956 (1) SA 103 (SR) op 104 waarin vonnis op die erkende eis verleen is maar eksekusie opgeskort is."

67. In my view to order the enforcements sought by the applicant, in the face of DoT's counter- application, the applicants referral in terms of Schedule 13 and the delay that has already taken place from 2012 together with the factors I have referred to, it would be irresponsible and not in the interest of justice if the counter-application which embodies exceptional circumstances is not considered.

RTMC opposition

68. RTMC was established as an independent entity in terms of The Road Traffic Management Corporation Act 20 of 1999. Its statutory mandate conferred by national legislation is to enhance the quality of South Africa's road traffic services and management of road traffic.

69. In the main, the applicant seeks to bind RTMC to the seven orders that it has obtained against DoT. Some of which were made prior to RTMC becoming a party to these proceedings. The applicant claims that RTMC is in breach of the agreement concluded between the applicant and DoT. This appears in the applicant's founding papers.

70. What comes to the fore is that DoT has RTMC lined up to take over from the applicant at the expiration of the agreement on 30 April 2015. In essence DoT and RTMC state that RTMC would be stepping into the shoes of its statutory mandate

and obligation on 1 May 2015. The applicant contends this cannot be as there is still a transfer period of five years that needs to be taken into account for proper hand over of the eNatis system.

71. RTMC, though not a party to the agreement between the applicant and DoT, contends that at best this agreement came to an end on 30 April 2015, taking into account the purported extension. The validity of such extension is disputed by DoT and this forms the basis of DoT's counter application. In the counter application DoT seeks an order declaring the extension null and void.

72. RTMC further contends, that the Mabuse order, upon which the applicant placed much reliance, results in the applicant not making it past the high water mark of 30 April 2015, as this order records that the contract comes to an end on 30 April 2015.

73. Be that as it may, in the applicant's heads of argument, at paragraph 25, the applicant contends that RTMC cannot raise any aspect of the termination clause as a defence as *"it is not a party to the agreement and has no legal standing to make such an assertion"*.

74. How then does the applicant propose to address the fact that they joined RTMC to the same proceedings where they sought enforcement of the agreement by DoT? In my view if the latter is the stance the applicant is taking then surely RTMC's should not be a participant in this dispute. The applicant was instrumental in joining RTMC as a party and if they now contend that RTMC has no legal standing then clearly this is a case misjoinder in respect of the dispute relating to the agreement.

75. It also stands to reason that if indeed RTMC has no legal standing, even if it's just regarding the agreement, then surely RTMC cannot be in contempt of performance in respect of such agreement, as it was not a party to the agreement.

76. In **Herbstein and Van Winsen** *The Civil Practice of the High Court of South Africa, fifth edition* at page 240 the following is said of misjoinder:

"The test to determine whether there is a misjoinder is whether or not the party has a direct and substantial interest in the subject–matter of the action, i.e. a legal interest in the subject-matter of the litigation which might be affected prejudicially by the judgment of the court... Thus, a party that has a financial or commercial interest in the relief claimed, but no legal interest, should not be joined by the plaintiff."

77. I am of the view the principle is equally applicable in the case of plaintiff and defendant. See *Agriplas (Pty) Ltd v Andrag & Sons (Pty) Ltd 1981 (4) SA 873 (C) at 890A-B:*

> "A person can only claim to be joined and indeed to intervene if he has a substantial and direct interest in the subject of the litigation. This appears to be well-established. See *Henri Viljoen Pty Ltd v Awerbuch Brothers*1953 (2) SA 151 (O) at 166 - 169; *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another*1972 (4) SA 409 (C).
> A person who is merely entitled to royalties cannot be said to have a direct and substantial interest in the reputation and goodwill of another. This is not a legal interest although it may be a strong financial or commercial interest. On the authorities this is not enough. Cf *Fulton & Co v Knox* 1917 WLD 48; *Kinemas Ltd v African Theatres Ltd* 1928 WLD 100; *Rusmarc (SA) (Pty) Ltd v Hemdon Enterprises (Pty) Ltd*1975 (4) SA 626 (W) at 632 - 635."

78. In the circumstances I find that indeed this is a case of a misjoinder as RTMC does not have a legal interest in the litigation between the applicant and DoT, in respect of the agreement as it was not a party to the agreement, thus as stated by the applicant, it has no legal standing.

79. This leaves the contempt allegation by the applicant in respect of the Fabricius order of 23 August 2013. This order, essentially paragraph 5, in my view is an extension of paragraph 3 of the Strijdom order of 26 March 2013. What comes to the fore from the Fabricius order, in relation to RTMC, is that the clauses from the Strijdom order are incorporated in the Fabricius order.

80. RTMC submits that they are not aware and neither were they a party when the facts upon which the Strijdom order was sought and granted. They were cited as a party when the Fabricius order was granted by consent.

81. The applicant states at paragraph 39 of its founding papers that the Strijdom order was an order made by consent of the parties after the DoT capitulated to the applicants contempt proceedings which was *"precipitated by, inter alia, the DoT's failure to grant authorisations and approvals in respect of PQRs, its failure timeously to pay under payment certificates, and attempts made by it unlawfully to reroute work under the agreement away from Tasima."*

82. Further, the applicant states that due to the unlawful conduct of RTMC and the abdication of DoT's duties, it sought and by consent the Fabricius order come to the fore.

83. On an examination of the Fabricius order, according to the applicant it binds RTMC to the Strijdom order and all the other orders served upon it or brought to its attention, what is notable is that these orders especially, Fabricius and Strijdom orders are in my view premised on the agreement concluded between the applicant and DoT. If I am correct, as RTMC is not a party to that agreement and does not have legal standing in respect of that agreement, is it bound by the applicant's interpretation of what constitutes unlawful conduct in terms of that agreement? My view is that RTMC is not.

84. In the circumstances the applicant cannot seek a committal due to a breach in relation to the agreement if RTMC is not a party to same. It is trite that a committal in contempt proceedings would only be granted if RTMC was in wilful default of the order or in reckless disregard of the order.

85. *Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA) at* [9], [10], [24], [40] [53] and [60], at paragraph [9] and [10] Cameron JA stated the following:

"[9] The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was 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. Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).

[10] These requirements - that the refusal to obey should be both wilful and *mala fide*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt - accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent."

Also refer to *Meadow Glen Home Owners Association and Others v Tahwane City Metropolitan Municipality and Another 2015 (2) SA 413 (SCA)* at [16], [18], [19] and [35].

86. In the circumstances I am of the view that as RTMC is not a party to the agreement any breach thereof cannot be classified as wilful, deliberate and reckless, as RTMC could genuinely believe that it was acting within in its statutory mandate, even though this believe could be premised on a mistaken.

Analysis of the applications

87. I do not propose to repeat all of the evidence above but I rather intend to deal with the analysis of the main application and the counter-application.

88. Least I not forget that there are existing orders that have been made by this court and the Mabuse order is at the heart of all these orders. From the order and judgment of Mabuse J it is evident that the main aim was for the *status qua* to remain until finalisation of the determination of the dispute raised by the applicant, which is the issue raised in DoT's the counter-application.

89. In *Zondi MEC,Traditional and Local Government Affairs and Others 2006 (3) SA1 (CC)* on page 13 at [30] NGCOBO J held:

"The rationale for holding interlocutory orders to be subject to variation seems to be their very nature. They do not dispose of any issue or any portion of the issue in the main action."

I am satisfied that the Mabuse order is in fact such an order that can be varied as the main issue was still to be determined in terms of the agreement concluded by the parties.

90. That leaves the question as to whether the collateral challenge is the correct manner to have the said order varied. This issue was considered in the cases below: In *OUDEKRAAL ESTATES (PTY) LTD v CITY OF CAPE TOWN AND OTHERS 2004 (6) SA 222 (SCA)* at pages 243 and 244, HOWIE P ET NUGENT JA said:

"[29] In our view, the apparent anomaly - which has been described as giving rise to 'terminological and conceptual problems of excruciating complexity' - is convincingly explained in a recent illuminating analysis of the problem by Christopher Forsyth. Central to that analysis is the distinction between what exists in law and what exists in fact. *Forsyth* points out that while a void administrative act is not an act in law, it is, and remains, an act in fact, and its mere factual existence may provide the foundation for the legal validity of later decisions or acts. In other words

'. . . an invalid administrative act may, notwithstanding its non-existence [in law], serve as the basis for another perfectly valid decision. Its factual existence, rather than its invalidity, is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second. 'It follows that '*(t)* here is no need to have any recourse to a concept of voidability or a presumption of effectiveness to explain what has happened [when legal effect is given to an invalid act]. The distinction between fact and law is enough.' The author concludes as follows:

'(I) t has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. *The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act.*

And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void.'(Our emphasis.)

> [30] Lord Hoffmann drew the same distinction in *R v Wicks* [1998] AC 92 (HL) ([1997] 2 All ER 801; [1997] 2 WLR 876) when he said the following at 117A - C (AC) (815*h* - *j* (All ER)): '(T) he statute may upon its true construction merely require an act which appears formally valid and has not been quashed by judicial review. In such a case, nothing but the formal validity of the act will be relevant to an issue before the justices.'
>
> [31] Thus the proper enquiry in each case - at least at first - is not whether the initial act was valid but rather whether its substantive validity was a necessary precondition for the validity of consequent acts. If the validity of consequent acts is dependent on no more than the factual existence of the initial act then the consequent act will have legal effect for so long as the initial act is not set aside by a competent court."

More simply put by HOWIE P in *V & A WATERFRONT PROPERTIES (PTY) LTD AND ANOTHER v HELICOPTER & MARINE SERVICES (PTY) LTD AND OTHERS 2006 (1) SA 252 (SCA)* at 255 held:

> "[10] The defence which the respondents sought to raise in this respect has sometimes been called 'collateral challenge'. Its applicability was examined and explained by this court in *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*. In brief, it is applicable in proceedings where a public authority seeks to coerce a subject into compliance with an unlawful administrative act. If these proceedings are not of that nature then the grounding order will have legal effect until set aside by a reviewing Court."

91. Essentially what I take away from these cases is that even if the administrative act is unlawful it is still factually an act until it's reviewed, unlawful though it might be. In addition, the validity of the initial administrative act must have been a precursor for the consequential act/s that follows. If the consequential act realise only on the fact that the initial act exists, then the initial act will stand until reviewed.

92. On my understanding the Mabuse order was sought because the applicant had been advised of the invalidly of the extension by the DG. To this end they were

even provided with correspondence. The applicants proceeded with a dispute in terms of the agreement in respect of the validity of the extension. Thereafter they came to court in 2012 to enforce the terms of the extended agreement knowing full well that the validly thereof was in dispute. The Mabuse order and various other orders were sought and obtained by the applicant with this knowledge. Even so the consequence of the Mabuse order and other orders are valid until the extension decision is reviewed and its validity is resolved.

93. Refer to *OUDEKRAAL ESTATES (PTY) LTD* at page 241-242:

> "[26] For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view, it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern State would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognised that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside."

94. The initial agreement between the parties commenced from 1 June 2002 to 31 May 2007. On 30 May 2007 the then DG Ms Mpumi Mpofu(Mpofu) rejected an attempt by the applicant to extend the agreement further and in accordance with the agreement she invoked schedule 15, the transfer management provisions. Unfortunately DoT did not provide a date for the transfer management meeting and the meeting as prescribed did not materialise. The services of the applicant proceeded on a month to month basis. On 12 May 2010 the DG Mr George Mahlalela (Mahlalela) extended the agreement for another five years. The Chief

Finantial Officer (CFO) advised the applicant on 21 May 2010 that the extension by Mahlalela was not valid. However, Mahlalela on 18 August 2010 advised the applicant that his directive of 12 May 2010 stood and they were to ignore the CFO's advice. And so the agreement was extended.

95. The then Deputy Director–General, Transport Information Services, Mr Rajesh Jock on 19 March 2012 advised the applicant that in their view the agreement between the parties had come to an end on 31May 2012 as Mpofu had advised then. On 20 March 2012 the applicant's responded and decline to meet to discuss the Mahlalela extension and on 21 March 2012, Mr Jock in a letter advised the applicant that the said extensions validity was being disputed. This is what led to the applicant referring the dispute in terms of the agreement, the Mabuse order and the other orders that followed.

96. From the aforesaid it is clear to me that Mahlalela did not adhere to section 217(1) of the Constitution in that the extension agreement was not done in a fair, transparent, equitable, and competitive and costs effective manner. With regards to the cost effective aspect it is illustrated by DoT that in the Mahlalela extension period the applicant gained R2,5 billion whilst the initial contract was for R355 million inclusive of VAT. This also went against the grain of section 38(1) (a) (iii) of the PFMA. Clearly, this extension had not been budgeted for as Mpofu had confirmed that the agreement had come to an end and had initiated the transfer management provisions.

97. In addition all attempts made by the CFO and Mr Jonk to pursue and bring the validity of the extension of the agreement to finality was averted by Mahlalela as DG. The buck stopped with him to give instructions to pursue the matter but it was not in his interest to do so.

98. Ironically in *Prodiba* similar circumstances existed involving yet again Mr Mahlalela as the DG. Likewise in this matter, as in *Prodiba* the DG did not advance any reasons for not proceeding in terms of section 217 of the Constitution and the PFMA. The SCA found that *"By not embarking on a competitive bid process, particularly given the nature and scale of the services to be provided, including the*

cost implications, Mr Mahlalela erred fundamentally...By concluding agreement and incurring a liability for which there had been no appropriation, he not only erred, but acted against mandatory statutory prescripts and against the constitutional principles of transparent and accountable governance. For all these reasons the agreement is liable to be declared void ab initio." At paragraph [40].

99. I align myself with the *dicta* in *Prodiba.* In my view in the circumstances of this matter the administrative act of the DG in extending the agreement was unlawful and as such the consequential acts that flow therefrom relied on the unlawful administrative. I therefor exercise my discretion and permit the collateral challenge of the validity of the agreement. In doing so in terms of my stance with *Prodiba* I find for the reasons I have set out above that the agreement is void *ab initio.*

The 8 May 2015 order

100. On conclusion of the parties arguments on 30 April 2015 I made an order that "By agreement the applicant will continue running the eNaTIS system subject to the right of reasonable access of the CEO of RTMC for purposes of monitoring the system; judgement was reserved to 8 May 2015. On the later date I made another order reserving my judgment.

101. The respondent's brought an urgent application to set aside my order of 8 May 2015 and the costs to be paid by the respondent's if opposed.

102. The basis upon which the order of 8 May 2015 was constructed was relayed to the parties prior to the matter being heard. The court had become aware during the construction of the judgment that the case of *Minister of Transport v Prodiba* Constitutional. On this understanding the court opted to await the outcome of the Constitutional challenge.

103. The order made of 8 May 2015 is an interlocutory order and as stated in *ZONDI* above, this type of order is subject to variation. Simple interlocutory orders may be varied, reconsidered or rescinded on good course shown.

104. At the hearing of this application the court was appraised of the developments in respect of *Prodiba* at the Constitutional Court and it became apparent that leave to appeal to the Constitutional Court was still to be considered and had not been granted.

105. The court had laboured under the belief that leave had already been granted and that a decision was eminent. When the court was advised of the correct status of *Prodiba* the court appreciated that it would be just and equitable to vary it order as the facts that the laboured under in making the order had in fact changed.

106. On the facts of this case the court saw fit that having laboured under a mistake it was entitled to bring the case to finality, promote the constitution and prevent chaos in the circumstances.

107. For the reasons set out the order of 8 May 2015 was varied and the order was that judgment was reserved.

108. As regards the issue of costs in this urgent application regarding the order, I am of the view that this is a case where the appropriate order would be that each party is to pay their own costs.

Conclusion

109. In the main the agreement sets out the process to be followed in terms of the transfer management plan in clause 2.2 of Schedule 15. Taking into account that there has to be proper transfer and taking into account that DoT had initiated this transfer management plan in 2007 but did not proceed to complete same I am of the view that in these circumstances the transfer management of the system cannot in the main be a lengthy process since the applicant has had the benefit of running the eNaTIS system on a month to month basis from 2007 to 2010 and a further five years thereafter. I do appreciate that a transfer and hand over has to take place as both parties had agreed this would be necessary in the agreement and thus there is a real need for a transfer period. In the circumstances DoT is required to request the transfer within five days of the date of this order and the transfer is to be completed within thirty day from the date of the request.

110. The costs are to follow the result.

111. In conclusion I make the following order:

111.1 The main application of the applicant against the respondents is dismissed.

111.2 The counter-application of the first, second, third, sixth and tenth respondent's succeeds.

111.3 The costs of the urgent application heard on 14 May 2015 is to be borne by the respective parties.

111.4 The decision of the then Director- General of the Department of transport, Mr George Mahlalela of 12 May 2010 to approve and extend the eNaTis Project RT1194KA Contract for a fixed period of five years effective from 1 May 2015 is reviewed and set aside.

111.5 The extended contract which took effect from 1May 2010 and expired on 30 April 2015 is declared void *ab initio*.

111.6 DoT is required to request the transfer of the eNaTIS system and related services within five days of the date of this order and the transfer is to be completed within thirty days from the date of the request.

111.7 The respondents are granted leave to supplement these papers and to approach this Honourable Court should the applicant commit any act intended to deliberately delay or frustrate the transfer in 111.6.

111.8 The applicant is ordered to pay the costs of the respondent's in the main application. In respect of the counter-application where the applicant is the respondent, the applicant/respondent is ordered to pay the costs of the respondents/applicants. Such costs are to include the costs of the employment of senior and junior counsel.

W. Hughes Judge of the High Court

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