

IN THE NORTH GAUTENG HIGH COURT, PRETORIA

REPUBLIC OF SOUTH AFRICA

CASE NO: A862/12

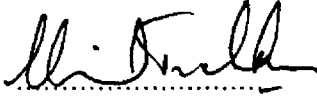
In the matter between:

26/2/2013

TASIMA (PTY) LIMITED

Applicant

and

(1)	<u>REPORTABLE:</u>	<u>YES / NO</u>
(2)	<u>OF INTEREST TO OTHER JUDGES:</u>	<u>YES / NO</u>
25/02/13		
DATE		SIGNATURE

DEPARTMENT OF TRANSPORT

First Respondent

DIRECTOR-GENERAL: DEPARTMENT OF

TRANSPORT

Second Respondent

MINISTER OF TRANSPORT

Third Respondent

JUDGMENT

Tuchten J:

- 1 This is an appeal against an order of Ledwaba J, sitting in the urgent motion court of this Division on 17 September 2012, when he dismissed the application brought by the appellant, Tasima, against the national Department of Transport ("DoT"), the Director-General of

Transport ("the DG") and the Minister of Transport (the Minister") as first, second and third respondents respectively. Although the learned judge refused leave to appeal, such leave was granted to the full court of this Division by the SCA on 9 November 2012.

- 2 The dispute arose from the provisions of an agreement, said to have been dated 3 December 2001 and concluded between Tasima and the DoT for the provision to the latter of an electronic national traffic information system, called the eNaTIS system. I shall call the agreement the eNaTIS agreement or the agreement. Arising from this dispute, Tasima launched proceedings against the present respondents for certain urgent mandatory and declaratory relief pending the determination in the normal course of its application for the same relief ("the main application").
- 3 Tasima has throughout been represented by a firm of attorneys in Johannesburg and a correspondent in Pretoria. In this judgment we shall refer to Tasima's attorney without distinguishing between the two firms. The respondents have been represented throughout by the State Attorney, Pretoria, to whom I shall refer either as such or merely as the State Attorney. Both sides were represented by both senior and junior counsel.

4 For a proper appreciation of the issues which arose before us, it is necessary to set out the procedural background to the present appeal in some detail. By notice of motion dated 27 July 2012, Tasima gave notice to the respondents of an urgent application to be heard on 7 August 2012 ("the main application"). In its notice of motion, Tasima sought both interim and final relief in the form of a declaration that the eNaTIS agreement had been extended to 30 April 2015 and directing the DoT to perform its obligations under the agreement. The respondents opposed Tasima's application. Tasima's founding papers ran to over 400 pages, so it was reasonable to anticipate that the papers in the main application, when complete, would exceed 500 pages. The significance of this figure is that when the paper in an application exceeds 500 pages, the practice in this Division is that arrangements must be made through the office of the Deputy Judge President for a special allocation of dates. Provided that cooperation from both sides is forthcoming, the date allocated for the hearing of a specially allocated application is invariably arranged by the DJP, taking into account the availability of counsel¹ who represent the parties at that stage. It is widely known amongst the legal profession that the DJP follows an open door policy and that the incumbent of the office of the DJP, at some personal cost to himself and his staff, stands ready whenever possible to facilitate the arrangement of dates

¹ By counsel I mean, in this context, the legal representatives of the parties who, it is anticipated, will actually argue the matter in due course.

for the hearing of matters which cannot justly be accommodated in the normal course. The purpose of this policy is to enhance the administration of justice by ensuring, as far as possible, that a deserving party is not kept out of court by the procedural manoeuvres of the other side.

- 5 On the same day, 27 July 2012, Tasima's attorney, no doubt anticipating the need for a special allocation because of the weight of the paper in the case,² wrote to the DJP. The DJP responded in writing. I quote this letter because of the emphasis placed on it in argument on behalf of the respondents:

Your letter dated 27 July 2012 refers.

On the premise that I accept that the matter is urgent it will be extremely difficult to allocate a special court to you for the hearing of this matter on 7 or 8 August 2012.

I suggest that all parties concerned arrange for a mutually convenient date and time to meet with me so that the future of this application can be considered and discussed.

Obviously I will try and be of assistance as far as possible.

Please send a copy of this letter to all other interested parties as well.

²

The letter of 27 July 2012 is not before us but its contents can be inferred from the reply to that letter written by the DJP.

- 6 This letter and, indeed all other communications from the DJP to Tasima's attorney and from Tasima's attorney to the DJP were promptly copied by Tasima's attorney to the State Attorney, more often than not by email.
- 7 The DJP's letter dated 30 July 2012 did not lead to the suggested meeting. The parties, represented as they were throughout by senior and junior counsel met at court on the date on which the application had been set down for hearing in the urgent court, 7 August 2012. On the day of the hearing, the parties agreed to postpone the hearing. They prepared a draft order which they put up to Teffo J, sitting in the urgent court. The draft was, without amendment, made an order of court, which I shall call the interim order.
- 8 Tasima claims that the second respondent ("the DG") as well as the first respondent have breached the terms of the interim order. The applicant brought a further urgent application which I shall call the contempt application,³ interlocutory to the main application. The outcome of the contempt application has given rise to this appeal.

³ Although Tasima sought relief in the contempt application which went beyond relief specifically in relation to contempt.

9 The interim order reads in relevant part as follows:

- 1 Pending the finalisation of this application or final settlement of the dispute between the parties, the first respondent agrees as follows:
 - 1.1 It will pay the applicant for all the services rendered or to be rendered and obligations incurred or to be incurred by the applicant in connection with the eNaTIS system, including
 - 1.1.1 The May and June Outstandings (as defined in para 17 of the founding affidavit)⁴ by no later than Friday, 10 August 2012;
 - 1.1.2 Payment for all the services rendered or obligations incurred in respect of July 2012 by no later than Monday, 27 August 2012;
 - 1.2 The first respondent will do all things and take all steps as are necessary, in accordance with the procedures previously applied by the parties, to enable the applicant to render the aforesaid services or incur the aforesaid obligations.

10 The interim order then proceeded to provide, in imperative terms, for the delivery of further affidavits and for the procedure which the parties were to follow in relation to the further conduct of the matter and for costs.

⁴

The reference must be to the founding affidavit in the main application.

- 11 The first respondent failed, to the great frustration of the applicant, to comply with any of its obligations in terms of the paragraphs of the interim order which I have quoted. What the content and nature of those obligations are must be determined in accordance with the rule laid down in *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 A at 304E-H.
- 12 The nub of Tasima's case is that it has to maintain the eNaTIS system and that without its maintenance and upkeep functions, which require it to incur travel and security expenses, the system will collapse within hours. The procedure applied by the parties in the past was that before rendering any service, Tasima would apply for an authorisation and approval to render the service and incur the expense. Routinely, and apparently without exception, a representative of the DoT would sign the necessary authorisations and provide the required approval. Tasima would then proceed to render the service and recover what was due to it from the DoT.
- 13 Tasima contended in its founding affidavit in the contempt application that the DoT was on two broad grounds in contempt of the interim order, firstly, because the DoT had not paid what was owing for May, June and July 2012 as provided for in paragraphs 1.1.1 and 1.1.2 of the interim order; and, secondly, that the DoT had been ordered to

provide Tasima with all the authorisations and approvals and had contemptuously failed to provide those which are “necessary” in connection with the system and that each of the component sums in a schedule attached to its founding affidavit in the contempt application, amounting in all to R2 002 384,34, were necessary expenditures. In its notice of motion, Tasima asked for relief declaring the DoT and the DG to be in contempt of paragraphs 1.1.2 and 1.2 of the interim order; ordering the DoT to grant the authorisations and approvals set out in a schedule attached to the founding affidavit and committing the DG to prison for contempt of court.

- 14 Although both the DoT and the DG appeared at the hearing of the contempt application through counsel, none of the respondents delivered answering affidavits. This appears to be a startling dereliction of duty on the part of the respondents who are all constitutionally obliged to justify their actions when these are called into question before a court. Section 41()(h)(ii) of the Constitution obliges all spheres of government and all organs of state within each sphere to co-operate with each other by assisting and supporting one another. The court and the first and third respondents are all organs of state within their respective spheres of government. This means, in my view, that where an organ of state can assist the court to achieve a just resolution of a case brought before it, the organ of state

concerned is in general obliged to place before the court relevant factual material within its knowledge. Whether in some cases the organ of state may be constitutionally entitled to exercise the right to remain silent in relation to the facts which a litigant which is not an organ of state enjoys need not be decided in this case. Be that as it may, the court is obliged to decide the case on the facts put before it by Tasima. I must add that we were told by senior counsel for the respondents in court when this appeal was argued that the respondents had made a considered decision, on the advice of their counsel, not to file affidavits in opposition to Tasima's factual allegations in the contempt application. This decision was exceptionally unwise.

- 15 When the contempt application came before the court *a quo*, the court was informed from the bar that the money payments which Tasima contended were due pursuant to the interim order had been paid. Tasima proceeded for the balance of the relief sought.
- 16 Ledwaba J, before whom the contempt application served, dismissed it on the grounds that the order did not constitute a *mandamus* upon the DoT, requiring it without more to authorise that which was submitted to it for that purpose by the appellant and that *mala fides* had not been demonstrated beyond a reasonable doubt. The learned

judge made no order as to costs, holding that both sides had achieved some success.

- 17 Tasima applied to Ledwaba J for leave to appeal against his order. The learned judge refused leave on 29 August 2012.
- 18 Tasima's prayer for interim relief embodied in the main application came before Mabuse J on 16 October 2012. The parties were, as before and as they have been throughout, represented by the same counsel as had previously appeared before Teffo J. In a judgment delivered the very next day, 17 October 2012, Mabuse J upheld the claim for interim relief and granted certain interim relief, expressed to operate pending the finalisation of dispute resolution proceedings directed at determining the dispute between the parties. Although the relief granted by Mabuse J was interlocutory and thus not generally appealable, the present respondents applied for leave to appeal against the order of Mabuse J. Predictably, the application for leave was refused. The respondents have petitioned the SCA and the matter is still pending in that court.
- 19 I have referred to the proceedings before Mabuse J because of the correspondence that preceded the application before Mabuse J for leave to appeal. By *emails* dated 13 November 2012, the attorney

within the office of the State Attorney, Ms Constance Lithole, who has dealt throughout with the litigation between the parties, transmitted letters of the same date to Tasima's attorney. The first was a letter addressed to Tasima's attorney. The second was a copy of a letter to Mabuse J about a date for the application for leave to appeal against the judgment of Mabuse J. The fact that these letters were transmitted to Tasima's attorney by email and the date of their transmission, 13 November 2012, is relevant to what follows.

- 20 Tasima urgently petitioned the SCA for leave to appeal against the order of Ledwaba J, leave in this regard having been previously refused by the learned judge. The SCA fixed abbreviated times for filing further affidavits in relation to the petition and then, on 9 November 2012, granted leave to appeal to the full bench of this Division. On 15 November 2012, Tasima delivered a comprehensive notice of appeal in which it disclosed to the court that circumstances had changed in that most of the approvals and authorisations which it contended were due to it when the matter was heard before the court *a quo* had by then been provided. Tasima attached to the notice of appeal a new schedule showing which approvals and authorisations were still, on its contention, outstanding. On Tasima's case those outstanding authorisations related to a total amount of R355 308,47.

21 This Division has a substantial backlog of full bench appeals. Some of the reasons for this unsatisfactory state of affairs are historical. Another, self-evident, reason is that full benches comprise three judges and pressure of other work precludes the number of full bench courts that can be empanelled. Anticipating this problem, Tasima's attorney wrote to the DJP on 15 November 2012, setting out the history of the matter and the grounds on which it contended the appeal was urgent and warranted an expedited date for its hearing. Attached to the letter to the DJP were copies of all conceivable documents relevant to the decision he was being asked to make. The letter of 15 November 2012 and its annexures were transmitted to the Ms Lithole on the same date. By letter dated 19 November 2012, the DJP wrote to Tasima's attorney asking him to obtain the comments of the State Attorney. The DJP said in the letter that he could only deal with the request after he received the comments of the State Attorney and that he would have to take the matter up with the Judge President of this Division. On 19 November 2012 Tasima's attorney transmitted to Ms Lithole by email the letter from the DJP dated 19 November 2012 as well as his letter dated 15 November 2012 which, as I have said, had already been transmitted to Ms Lithole on that same date.

- 22 There was no response from Ms Lithole or anyone else to the invitation of the DJP for comments on the request for an expedited date. The request for an expedited date came before the JP, who directed that the appeal against the order of the court *a quo* per Ledwaba J be heard on "an early date". On 12 December 2012 the DJP wrote a letter to this effect to Tasima's attorney and called for the record on appeal. A copy of this letter was transmitted by email to Ms Lithole on 13 December 2012.
- 23 On the same date, 13 December 2012, Tasima's attorney transmitted by email to Ms Lithole a letter of the same date, *inter alia* recording the decision to have the appeal heard on an early date and asking on what dates in January 2012 the respondents' counsel would be available. There was no response to this letter from Ms Lithole or anybody else.
- 24 Tasima had the record on appeal prepared, lodged it on 14 December 2012 and, in accordance with the practice of this Division, when it lodged the record applied for a date for the hearing of the appeal. It was allocated the date of 16 April 2014. On 19 December 2012, Tasima's attorney wrote to the DJP, *inter alia* recording that the respondents' attorney had not responded to his letter of 13 December 2012. On 21 December 2012 the heads of argument of Tasima's

counsel were served by hand on the State Attorney and filed in court. By letter dated 21 December 2012, the DJP wrote to Tasima's attorney, stating that after discussion with the JP the appeal would be heard on 4 February 2013.

- 25 On 8 January 2012, Tasima's attorney served by hand on the State Attorney a notice of removal of the appeal from the roll of 16 April 2014 and a notice of set down of the appeal for 4 February 2013. On 14 January 2012, the DJP wrote to Tasima's attorney, calling for heads of argument by 25 February 2012.
- 26 Two judges of this Division were diverted from their allocated work to hear the appeal. There was difficulty in allocating a third judge for this purpose. The DJP ultimately decided that he would therefore have to sit.
- 27 Finally, by letter dated 25 January 2012 to the DJP, the State Attorney, in the person of Ms Lithole, responded to the situation which had been triggered by the urgent grant of leave to appeal to the full bench of this Division by the order of the SCA dated 9 November 2012.

- 28 The letter of 25 January 2013 informs the DJP that counsel who had previously represented the respondents would not be able to prepare for the appeal because of pressure of other work and that she had discounted the possibility that alternate counsel could be briefed because of the expense involved and the amount of work required. The thrust of the letter is that this situation was precipitated by the notice of removal of the appeal from the roll for April 2014 and the enrollment of the appeal for hearing on 4 February 2013, as if none of the correspondence which I have mentioned had existed.
- 29 Tasima's attorney responded to this letter in a letter to the DJP dated 29 January 2013, opposing the suggestion that the appeal should be postponed and referring to the previous correspondence. The DJP stated in a letter dated 1 February 2013 that the appeal would be heard on 4 February 2013 at 12h00 in court 6E.
- 30 A few minutes before the appeal was called at the time stated by the DJP in his letter, each of the members of the full bench was presented with a formal application on behalf of the respondents for the postponement of the appeal and an order that Tasima pay the costs of the postponement. When the appeal itself was called, the representatives of Tasima were in attendance, as was Ms Lithole. Counsel for the respondents were not present. Ms Lithole was

directed by the bench to ensure that her counsel were present in court within ten minutes. When the court reconvened both senior and junior counsel for the respondents, those who had appeared for the respondents throughout, were present. It then emerged that the application for a postponement of the appeal had only that morning come to the knowledge of Tasima's representatives and the appeal and the application for postponement were adjourned to 8 February 2013 with directions as to the filing of further affidavits in the postponement application.

- 31 Ms Lithole deposed to the founding and replying affidavits in the application for postponement. The case made by her in the founding affidavit is that Tasima's attorney unaccountably engaged the office of the DJP to arrange an expedited date for the appeal to her complete exclusion and that the DJP equally unaccountably made arrangements in this regard with Tasima's attorney to the exclusion of Ms Lithole. She relied in her founding affidavit heavily on the letter of the DJP dated 27 July 2013, which I have quoted, to support an argument that the prosecution of the various aspects of the case should have proceeded in an atmosphere of collegial consultation between the representatives of the litigants. She alleged that it is

... more disturbing than disquieting that [Tasima's] attorneys have been communicating with the office of the [DJP] in the absence of the respondents' attorneys.

She insinuated that Tasima's attorney had misled the DJP into believing that arrangements for the expedited hearing of the appeal had taken place with the consent and cooperation of the respondents, which, she said, had not been the case. She characterised the conduct of Tasima (by implication acting through its attorney and perhaps its counsel as well) as "indefensible". She suggested that Tasima's counsel should have arranged a date with the respondent's counsel. She stated that "as at the period of 21st December 2012, she was "preparing to go on leave" and suggested that during the period of the festive season other members of the staff of the State Attorney were "preparing to go on leave", as if this period before they actually went on leave was a time during which outsiders ought to know that no work, other than that relating to certain unnamed "urgent matters" was done in the office of the State Attorney. She said that she had only been able to consult with junior counsel on 16 January 2013 and with senior and junior counsel together on 23 January 2013. And all this, I emphasise, is said to have happened because of the unilateral actions of Tasima's attorney culminating in the notices of removal and set down of the appeal delivered on 9 January 2013. There was no

explanation why the postponement application had been served so late in the day.

32 In Tasima's answering affidavit, its attorney demonstrated that the correspondence to which I have referred had indeed been exchanged. Ms Lithole then responded in a replying affidavit, the main thrust of which can only fairly be described as disgraceful. She persisted in the baseless assertion that Tasima's attorney had "unilaterally", ie to the exclusion of any participation on the part of the respondents and particularly herself, procured the expedited hearing of the appeal.

33 In a ludicrous attempt to justify her conduct, Ms Lithole discloses in her replying affidavit, to which she deposed on 7 February 2013, that the office of the State Attorney in Pretoria is, to use her own word, "dysfunctional". I again quote directly from her affidavit:

Due to challenges in the state attorney's office, I have time and again delayed in reading my emails as most of the communication from [Tasima] was by way of email.

And, she says:

I do not know why [Tasima] tarred respondents' counsel with the same brush as my dysfunctional office. Clearly I was failing to respond to the letters most of which were being communicated by email. As has become clear, I rarely look

at my emails. On this basis, I am confident that had all this communication been directed by way of letters and not emails to my office, my attention would have been drawn to them and I would certainly have responded accordingly.

She suggests that this shocking state of affairs arose because she was under pressure from running "other weighty applications" and because the office of the State Attorney is inadequately staffed. She offers a cursory apology. She asserts that the respondents' problem of lack of preparation arose because Tasima's counsel had not taken upon themselves the burden of arranging a date for the appeal directly with the respondents' counsel.

34 The replying affidavit deposed to by Ms Lithole concludes as follows:

On this basis alone [ie the failure to arrange a date for the appeal by discussion, particularly between counsel, and the "unilateral" approaches of Tasima's attorney to the DJP] the appellant [ie Tasima] is responsible for this unfortunate impasse. An appropriate costs order should be levelled against it, not excluding costs *de bonis propriis*. Clearly, the respondents' request for removal/postponement has been occasioned by the unilateral conduct of the appellant ...

35 The explanation, if it may so be described, that Ms Lithole does not read the emails addressed to her by other attorneys relative to the matters which she is handling, is most disturbing. It appears to us,

moreover, to constitute unprofessional conduct on her part. In light of the fact that Ms Lithole actually resorted to email communication in an aspect of this very litigation (her communications regarding a date for the application for leave to appeal against the order of Mabuse J to which I have made reference), her whole explanation appears to be questionable. She does not suggest that Tasima's attorney ought to have known that the office of the State Attorney was "dysfunctional" or that she told Tasima's attorney that such was her professional predicament, she was unable to read communications by email. The implication of her "explanation" is that she reads all hardcopy letters addressed for her attention. Why she should have capacity to read hardcopy letters when she does not have capacity to read emails is not explained. She does not suggest that she told Tasima's attorney that nobody in the office of the State Attorney would attend to what Tasima manifestly regarded as an urgent matter while she was preparing to go on leave, whatever that may mean, and was actually away on leave. The SCA had treated Tasima's petition as urgent. The SCA had granted leave to appeal pursuant to this urgent petition. Ms Lithole simply must have known that Tasima would seek to get its appeal heard as soon as possible. It may be that Ms Lithole's explanation for her conduct is in whole or in part untruthful. I cannot make a finding in this regard on the papers but the possibility of

untruthfulness on her part should be born in mind by any institution taking action pursuant to this judgment.

36 I deprecate strongly the conduct of Ms Lithole as disclosed in her own affidavits before us and the correspondence admittedly sent and received. Her conduct seriously prejudices the administration of justice. Even more importantly, the dysfunctionality to which she refers demonstrates that the office of the State Attorney, Pretoria, an important organ of state, is presently unable to comply with its constitutional and statutory obligations.

37 To take but one, very important, function of the State Attorney: under rule 4(9), service of court process on the State and on ministers and deputy ministers in the national government as representative of the departments which they head may legitimately take place by service on the State Attorney. If that office is dysfunctional, a court cannot be confident that the process in question has come to the attention of responsible officers within the department concerned. Indeed, the experience of each of the members of this full bench has been that frequently and most disturbingly, civil litigation against the State in this division is allowed to go by default.

38 Under s 1(1) of the State Attorney Act, 56 of 1957, the several offices of the State Attorney are under the control of the Minister of Justice. This court too is an organ of state and subject to the duties under s 41 of the Constitution. With this in mind, it is appropriate that, as foreshadowed in argument, both the Minister of Justice and the parliamentary portfolio committee for justice be provided with copies of this judgment. In my view, too, the Law Society of the Northern Provinces should be sent a copy of this judgment with the request that the Law Society investigate the conduct of Ms Lithole and the office of the State Attorney, Pretoria, as disclosed in this judgment and the papers in the postponement application. I emphasise that while I consider the conduct of Ms Lithole, as disclosed in her own affidavits, to be worthy of censure, the primary purpose in publicising this judgment in the way described is to prompt those in a position to do so to ensure that the office of the State Attorney, Pretoria, fulfils its important constitutional and statutory obligations.

39 The court cannot function as a commission of enquiry. Its duty and function is to determine the specific dispute before it on the evidence presented to it by the parties and on facts of which the court may take judicial notice. I therefore cannot and do not presume to suggest how the shocking state of affairs I have described should be put right. The ultimate responsibility in law to put matters right and ensure that the

office of the State Attorney, Pretoria, complies with its constitutional and statutory obligations rests on the Minister of Justice.

40 Counsel for the respondents initially tried to defend the conduct of Ms Lithole. But towards the end of their argument, counsel conceded that the conduct of Ms Lithole was not defensible and withdrew and apologised for the allegations of impropriety levelled in Ms Lithole's affidavits against Tasima and its representatives. Counsel disclosed that they had been responsible for the preparation and content of Ms Lithole's affidavits. Counsel also stated during argument that the respondents would not persist in the application for postponement of the appeal. The appeal then proceeded.

41 From counsels' concession it follows that I need not deal in any detail with the respondents' arguments that the appeal should be postponed. Suffice it to say, all their arguments are utterly without merit. The conduct of Ms Lithole, established from her own affidavits, entirely destroys any basis for good cause, without which no application for postponement can succeed. I hold unequivocally that there is no merit whatsoever in the assertion, persisted in by counsel for the respondents until almost the very end of their oral submissions, of impropriety on the part of Tasima's representatives.

- 42 Furthermore, in my view, it is inappropriate for counsel to engage in the formal administrative process of arranging dates for the hearing of cases and other procedural matters relative to an expedited hearing, except to inform their respective instructing attorneys of dates suitable to them for the hearing. Of course counsel may, if they choose or are asked to do so by the DJP, discuss suitable dates with their opponents and attend meetings with the DJP to facilitate the arrangements. But the route of formal communication is always open to a litigant at his election and should always be conducted through his attorney rather than his counsel. It is no part of the function of counsel to participate in such formal communication and it is never improper for a party to decide that the route of formal, rather than informal, communication is preferable.
- 43 We were asked by Tasima's counsel in argument to make special costs orders against Ms Lithole and the State Attorney. I shall accede to that request. For the reasons set out, the conduct in question demonstrates a high degree of reprehensibility. In addition, but which was not dealt with in argument, I believe that in the exercise of our inherent discretion orders should be made relative to the fees of counsel for the respondent. To eliminate any chance of unfairness, the order in relation to counsels' fees should be provisional with the

right on the part of those affected to make representations in writing as to why such orders should be withdrawn or varied.

- 44 I am now in a position to turn to a consideration of the appeal before us.
- 45 Our task on appeal has been made more difficult by the failure of the legal representatives of the respondents to provide us with written argument. I reject the suggestion that pressure of work justified this failure. In this case, the record on appeal is short (only 171 pages) and the issues are limited. Any competent middle junior could do justice to this appeal. Counsel who appeared before us represented the respondents in the court *a quo* and presented written argument to that court.
- 46 The prayer for orders compelling the first and second respondents to grant the authorisations and approvals sought by Tasima occasions no difficulty. Whatever the proper and comprehensive interpretation of paragraph 1.2 of the interim order may be, a question which need not be decided in this appeal, the order imposes a contractual obligation on the DoT to grant those authorisations and approvals which are necessary for the performance by Tasima of its obligations under the eNaTIS contract. I emphasise that it is not necessary to

decide, and I do not decide, whether paragraph 1.2 of the interim order imposes a contractual obligation on the DoT to grant authorisations and approvals and make payments other than those which are necessary for the purpose mentioned, eg those which although not necessary, are desirable. The case made by Tasima in its founding affidavit was that all the authorisations and approvals which it sought were necessary for the purpose mentioned. Because the respondents delivered no answering affidavits, the case put up by Tasima stands uncontroverted. At a contractual level, therefore, Tasima has proved its entitlement in principle to an order in terms of prayer 3 of the notice of motion, in the more restricted form in which it appears in the notice of appeal because of the approvals granted by the DoT in the period between the hearing of the contempt application before Ledwaba J and the delivery of the notice of appeal. Indeed, counsel for the respondent conceded that to that extent, the appeal should succeed.

- 47 What remains to be dealt with are the issues raised by the prayers for a declaration that the conduct of the DoT in failing to grant the approvals and authorisations sought constitute contempt and for the imprisonment of the DG.

- 48 The allegation that the DoT contracted with Tasima is not strictly correct. Although the contract is not part of the record before this court, we called for the file of the main application, to which the proceedings giving rise to this appeal are interlocutory. The contract was concluded between Tasima, then called Dataforce Trading 79 (Pty) Limited, and the Government of the Republic of South Africa ("the Government"), *acting through its National Department of Transport*. It is trite that a litigant brings a national or provincial department before court by citing its political head in a representative capacity because that is what s 2 of the State Liability Act, 20 of 1957, provides. *Jayiya v Member of the Executive Council for Welfare, Eastern Cape, and Another* 2004 2 SA 602 SCA para 5.
- 49 In the pre-constitutional era, the designation of the defendant in proceedings brought against the State was a mere matter of nomenclature. *Sibeko and Another v Minister of Police and Others* 1985 1 SA 151 W 161H. Today each department of state or administration within the national or provincial sphere of government is an organ of state. Section 239 of the Constitution; *Airconditioning Design & Development (Pty) Ltd v Minister of Public Works, Gauteng Province* 2005 4 SA 103 T para 12. However, nothing in the Constitution deals with the legal personality of the State and its several organs. In the main application, the parties treated the DoT,

rather than the Government, as the contracting party and no point in this regard was taken by the respondents.

50 The position of the Government of the Republic of South Africa, as a litigant, is less clear. It is dealt with neither in the State Liability Act nor the Constitution. It seems to me, on the material before us at present, that the intention of the parties was that the appellant was contracting with the Government and that the reference to the DoT was merely to identify the officials within government who would be administering the contract on behalf of the Government. In the private sector, a similar result might be achieved by referring to eg, "XYZ Company Limited, acting through its legal department". There is thus insufficient material before us on the strength of which to conclude that the DoT is a juristic person distinct from the Government.

51 The basic principles applicable to construing documents also apply to the construction of a court's judgment or order: the court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual, well-known rules. Thus, as in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If, on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict,

vary, qualify, or supplement it. In such a case not even the court that gave the judgment or order can be asked to state what is subjective intention was in giving it. But if any uncertainty in meaning does emerge, the extrinsic circumstances surrounding or leading up to the court's granting the judgment or order may be investigated and regarded in order to clarify it; for example, if the meaning of a judgment or order granted on an appeal is uncertain, the judgment or order of the court a quo and its reasons therefor, can be used to elucidate it. If, despite that, the uncertainty still persists, other relevant extrinsic facts or evidence are admissible to resolve it. *Firestone South Africa Ltd v Genticuro AG* 1977 4 SA 298 Ad 304D-H. In the present case, no doubt because the interim order was sought by consent, Teffo J gave no reasons for her decision.

- 52 There is a clear distinction, in my view, between the character of the provisions I have quoted and the remainder of the interim order. The quoted provisions record the terms of an agreement reached between Tasima and the DoT. The quoted provisions do not reflect any direction by the court that any of the cited respondents is to do or refrain from doing anything. The provisions of the agreement concluded between Tasima and the DoT are merely noted.

- 53 In contrast with the provisions in the interim order dealing with the agreement between Tasima and the DoT, the remainder of the order directs the respondents ("The respondents will deliver ...") and Tasima ("The applicant will deliver ...") to deliver respectively answering and replying affidavits, if any, by fixed dates and disposes of the question of costs. ("The costs ... are to be costs in the cause.")
- 54 In my view, therefore, the terms of the interim order upon which Tasima relies are clear and unambiguous in the sense that the quoted provisions do no more than record the terms of an agreement between Tasima and the DoT and do not constitute a direction by the court that the DoT must implement that agreement on pain of contempt.
- 55 If I am wrong in this conclusion and the interim order in fact constitutes a direction by the court that the DoT must do what is contained in paragraph 3.2, the following. Tasima's complaint is broadly that the DoT failed to execute certain authorisations. Some of those authorisations sought are for expenses already incurred and some for expenses which Tasima says should be incurred to enable the eNaTIS system to keep functioning. Tasima's case is that it is, or would be, at financial risk arising from the incurring of such liabilities without an equivalent authorisation from the DoT.

56 I have already mentioned that the respondent in contempt proceedings is entitled to protections, appropriate to motion proceedings, analogous to those afforded an accused person. *Fakie NO* para 42(b). During oral argument, Tasima saw its way clear, when requested to do so by a member of the court during oral argument, not to persist in its prayer for the imprisonment of the DG for contempt. But Tasima, as it was entitled to do, persisted in the prayer for a declaration that the failure to comply with paragraph 1.2 of the interim order constituted contempt. An applicant for a declarator in relation to conduct in contempt of a court order need only prove its case upon a balance of probabilities. But despite this, in our view, an application for such a declarator is akin to criminal proceedings in the sense that criminal consequences may follow if the conduct declared contemptuous or conduct found to be equivalent to that declared contemptuous takes place in the future.

57 Where criminal responsibility is created by the service upon a person of a notice requiring him or her to perform, or refrain from performing, certain acts, the notice in this regard must surely be specific. To take a hypothetical case: an inspector appointed under the Occupational Health and Safety Act, 85 of 1993 may by notice under s 30(1)(b) prohibit a person, from using plant or machinery in a certain manner or in certain circumstances. I think that it is self-evident that no

criminal liability will arise if the notice merely prohibits the use of the machinery “contrary to the provisions of the Act [or the section]” and does not specify the manner or the circumstances in which the inspector claims the plant or machinery is or will be used and wishes to proscribe.

- 58 By parity of reasoning, I do not think that an order in the general terms of paragraph 1.2 is specific enough to bring to the mind of the vitally affected reader the content of his or her obligations toward the court which the order requires him or her to perform. In my view, before a court considers the drastic step of committal for contempt, the content of the obligation to the court should have been specified in a court order. Paragraph 1.2 falls short in this regard. It does not appear from the interim order that the parties sought to impose upon the DoT obligations outside or more burdensome than those which flow from the agreement between the parties. The interim order requires the DoT to do no more than comply with those obligations. Although a declarator in the terms sought would not lead directly to loss of liberty, it is likely in the present context to be of relevance in future enquiries if in such proceedings Tasima claims that a failure to pay or to authorise is contemptuous of paragraph 1.2 of the interim order.

59 My concern is exacerbated by the alarming ineptitude with which the case for the respondents has up till now been conducted. I wish particularly to refer to the decision not to place the respondents' version by affidavit before the court in the contempt application. This indefensible and incomprehensible decision was taken, we were told in argument, by the respondents' counsel. Normally in civil proceedings, the ineptitude of counsel would not be of any relevance. But because the declarator sought could have criminal law consequences, I think the situation is different. Whether or not to issue a declarator is always in the discretion of the court. It weighs with us that the respondents may be able to place facts before the court to demonstrate that a particular failure or refusal in the future to authorise or approve a payment or to make a payment may be justifiable.

60 The question whether making an agreement an order of court is equivalent to a judgment has arisen particularly but not exclusively in the context of the settlement of matrimonial disputes. In perhaps the majority of matrimonial cases in this Division, a decree of divorce is granted with the incorporation into the order of a settlement agreement between the parties or with a further order that the settlement agreement is binding on the parties. This approach has caused controversy.

61 In *Mansell v Mansell* 1953 3 SA 716 N at 721B-F, the following was said:

For many years this Court has set its face against the making of agreements orders of Court merely on consent. We have frequently pointed out that the Court is not a registry of obligations. Where persons enter into an agreement, the obligee's remedy is to sue on it, obtain judgment and execute. If the agreement is made an order of Court, the obligee's remedy is to execute merely. The only merit in making such an agreement an order of Court is to cut out the necessity for instituting action and to enable the obligee to proceed direct to execution. When, therefore, the Court is asked to make an agreement an order of Court it must, in my opinion, look at the agreement and ask itself the question: 'Is this the sort of agreement upon which the obligee (normally the plaintiff) can proceed direct to execution?' If it is, it may well be proper for the Court to make it an order. If it is not, the Court would be stultifying itself in doing so. It is surely an elementary principle that every Court should refrain from making orders which cannot be enforced. If the plaintiff asks the Court for an order which cannot be enforced, that is a very good reason for refusing to grant his prayer. This principle appears to me to be so obvious that it is unnecessary to cite authority for it or to give examples of its operation.

And at 721H:

The enforcement of the agreement, regarded as an order of Court, teems with difficulties, and I am satisfied that if it were made an order of Court no practical or legitimate advantage

would be conferred upon either party. It is no part of the duty of this Court, on the invitation of litigants, to invest their agreement with some sort of vague aura or glamour which has no practical efficacy.

62 These *dicta* raised, but did not answer, the question what the position is when, through less than careful formulation or otherwise, an order of court records an agreement but does not make clear whether the agreement recorded is of the species that entitles the "obligee to proceed direct to execution". The position in regard to the payment of maintenance and of custody and access (now primary residence and contact) in relation to minor children is relatively straightforward. But where performance by the obligee is reciprocal to obligations of the obligor, the position is less clear.

63 In *Johannesburg Taxi Association v Bara-City Taxi Association and Others* 1989 4 SA 808 W an undertaking by the respondents 'not to assault, protest or unlawfully interfere with the applicant's members or prevent the applicant and its members from using the taxi ranks listed in annexure A to the notice of motion' and 'not to unlawfully interfere or hinder the members of the applicant in the conduct of their legitimate taxi business' was incorporated, by consent, in the order of court.

- 64 When one of the respondents allegedly continued with behaviour which was contrary to the undertaking, the applicant instituted civil contempt proceedings against it. The question before the court was whether or not non-compliance with the court order could be permissibly visited with committal for contempt of court. The applicant's counsel relied on Halsbury Laws of England 4 ed vol 9 para 75 to the effect that:

An undertaking given to the court by a person or corporation in pending proceedings, on the faith of which the court sanctions a particular course of action or inaction, has the same force as an injunction made by the court and a breach of the undertaking is misconduct amounting to contempt.

- 65 The court, however, refused to follow the English authorities and held that the 'undertaking was only effective *inter partes* and did not constitute an understanding 'to the court' having the effect of a court order. At 811E-F:

As a matter of interpretation the present order remains an order in terms of what the parties contracted, without an element of a court requiring obedience because of the administration of justice's own interest in compliance with the order.

And at 810H:

When the parties reached agreement, the Court was informed and an order was issued in the terms as requested by the parties. I still see no component of the Court regarding its order as a matter of the Court as an instance of legal authority requiring the respondents to desist. It merely orders a contract between the parties to have binding effect. It is no different from 'an order in terms of' a contract to pay.

66 In *Brandtner v Brandtner* 1999 1 SA 866 W, the court declined to enforce as an order of court a settlement agreement which had merely been declared binding. The clear implication from what appears in the judgment at 868A, however, is that if the order of court had incorporated the deed of settlement within its decree of divorce, the parties could competently have enforced the provisions of the agreement as orders of court.

67 *Tshetlo v Tshetlo* [2000] 4 All SA 375 W went the other way. In that case there was a settlement agreement in terms of which one of the parties undertook to remain liable for the bond repayments over a property. The court held, without reference to *Johannesburg Taxi Association, supra*, that because the parties had sought and been granted the incorporation of the agreement in the court order, the provision at issue in the agreement constituted an order of court.

68 In *Lebeloane v Lebeloane* 2001 1 SA 1079 W, the court declined to follow *Brandtner, supra*, on the ground that the approach was overly technical. *Lebeloane* was a case of failure to pay maintenance and reliance was placed on s 7(1) of the Divorce Act, 70 of 1979, which empowered the court in terms to make orders for the division of assets and the payment of maintenance. At paragraph 25 of the judgment, the following was said:

What I have said does not mean that a Court will always, when asked to do so, make a settlement agreement, whether in a divorce case or in another matter, an order of the Court. Agreements sometimes contain provisions which it is not appropriate to incorporate in an order of the Court.

69 In *Thutha v Thutha* 2008 3 SA 494 TkH, the court was faced by two consolidated applications to enforce, as court orders, the provisions in a matrimonial settlement agreement which settled family law questions such as maintenance and certain commercial disputes between the parties. In paragraph 53[2] of the judgment, the court noted the principle that the wording of judgments and orders should be clear and unambiguous and collected the authorities. I have drawn considerably on the researches of the court in *Thutha* in the preparation of this judgment. In the end, the result of that case went off on the facts.

- 70 In *JW v HW* 2011 6 SA 237 GSJ, the court followed the practice in the South Gauteng High Court under which divorce settlements declared binding by the court which granted the divorce were in effect incorporated in the divorce orders and as such capable of sustaining execution.
- 71 In my view, the proper approach is that the provisions of each court order which makes reference to an agreement between the parties must be examined in the light of the principle in *Firestone South Africa Ltd v Genticuro AG, supra* to determine whether the order, properly interpreted, imposes obligations *toward the court* and, if so, what the content of those obligations are. In this examination, it must be born in mind that in principle that the ultimate sanction for failure to comply with an order of court is deprivation of liberty. Regardless whether the applicant in contempt proceedings seeks an order for the deprivation of the liberty of the respondent or merely a declarator that the conduct of the respondent is contemptuous of an order of court, it is appropriate to examine the order of court relied upon to establish the contempt in much the same way as one would examine analogous documents (eg statutory measures and notices) in the context of a criminal prosecution.

- 72 On this approach too, I come to the conclusion that the interim order does not identify the obligations of the DoT with the specificity required of a court order. Had the court which made the interim order intended that the interim order visit breaches of the agreement between the parties with contempt consequences, the order would have specifically and clearly spelt out the obligations of the DoT and any reciprocal obligations of Tasima.
- 73 The appeal accordingly succeeds to the extent described. I turn to the question of the fees of the respondents' counsel. They were party to the reprehensible and misguided decisions to attack the probity of Tasima's representatives and to try to justify the conduct of Ms Lithole in ignoring, when she chose to do so, those communications from Tasima's attorney made by email. The respondents, I regret to say, contributed nothing of any substance to the adjudication of this appeal. They produced no written argument. They only appeared before us because we demanded that they do so. The application for postponement lengthened the proceedings before us from one to two days. We have an inherent power to regulate the fees claimed by officers of the court including advocates. In the exercise of this power, I intend to direct that counsel for the respondents may recover no fees from their attorneys or their clients in relation to this appeal and the

application for postponement, whether for consultations, preparation of documents or attendance at court.

74 I make the following order:

- 1 The appeal succeeds in part. The order of the court *a quo* is set aside and replaced with the following:
 - 1.1 The first and second respondents are ordered to grant the authorisations and approvals contained in the schedule attached to the notice of appeal and marked "Y" (at pp167-168 of the record on appeal);
 - 1.2 No order is made on prayers 2 and 4 of the notice of motion;
 - 1.3 The respondents, jointly and severally, are to pay the costs of the application, including the costs of both senior and junior counsel.
- 2 It is noted that the application for a postponement of the appeal was withdrawn by counsel during the hearing of that application;
- 3 The respondents in the appeal are ordered, jointly and severally, to pay the costs of the appeal, including the costs of both senior and junior counsel.

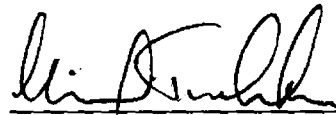
4 The respondents in the appeal, Ms Constance Lithole and the State Attorney, Pretoria are ordered, jointly and severally to pay the costs of the application for a postponement of the appeal, including the costs of both senior and junior counsel on the scale as between attorney and own client and shall include all the costs of and relating to the hearing on 4 February 2013. The liability of Ms Lithole for these costs will be *de bonis propriis*.

5 For the guidance of the taxing master, it is recorded that both the appeal and the application for postponement of the appeal were heard on 8 February 2013 and that one half of the time spent in court on that date related to the application for postponement of the appeal.

6

6.1 Counsel for the respondents on appeal may not recover either from the respondents or from the State Attorney or from any other person or organ of state any fees whatsoever, whether for consulting, advising, drawing or settling documents, appearing in court or otherwise, in relation to the appeal or the application for postponement of the appeal.

- 6.2 The order made in this paragraph will be provisional. The advocates in question may, within ten days of the date of this order, deliver to the office of the Deputy Judge President written submissions, showing why the order made in this paragraph should be set aside or varied.
- 6.3 If no such written submissions are so delivered, the order in this paragraph will cease to be provisional and will become final.
- 7 The Registrar is directed to send copies of this judgment to the Minister of Justice and Constitutional Development and the Parliamentary Portfolio Committee on Justice and Constitutional Development, with the request that such action be taken in the light of this judgment as may be considered appropriate.
- 8 The registrar is directed to send a copy of this judgment to the Law Society of the Northern Provinces with the request that the Law Society investigate the conduct of Ms Constance Lithole as appears from this judgment with a view to taking such action as the Law Society may consider appropriate.



NB Tuchtén
Judge of the High Court
25 February 2013

I agree.



WJ van der Merwe
Judge of the High Court
25 February 2013

I agree.



M Kollapen
Judge of the High Court
25 February 2013