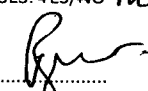




IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG, JOHANNESBURG)

15/7/2013

Case No: 44095/2012

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES/ ~~NO~~
(2)	OF INTEREST TO OTHERS JUDGES: ~~YES/NO~~ NO
(3)	REVISED
15/7/2013	
DATE	SIGNATURE

In the matter between:

TASIMA (PTY) LIMITED

Applicant

and

THE DEPARTMENT OF TRANSPORT

First Respondent

**THE DIRECTOR GENERAL: DEPARTMENT
OF TRANSPORT**

Second Respondent

THE MINISTER OF TRANSPORT

Third Respondent

WERNER EDUARD KOEKEMOER

Fourth Respondent

And

**ROAD TRAFFIC MANAGEMENT CORPORATION
(APPLICATION TO INTERVENE)**

Fifth Respondent

CORAM EBERSOHN AJ

HEARD ON

JUDGMENT HANDED DOWN ON 15 JULY 2013

JUDGMENT

EBERSOHN AJ

[1] This is the fourth contempt application which Tasima (Pty) Ltd ("**Tasima**") has brought since July 2012 in order to enforce compliance with various court orders granted in its favour by this Court against the Department of Transport and others. This court accepts that it is urgent by virtue of the fact that it is a contempt application and in addition, there are various other facts and circumstances which render this application particularly urgent. The Court deals therewith *infra*.

[2] Tasima currently operates, manages and maintains the eNaTIS system, a vehicle registration system, under the Turnkey Agreement for the provision of the eNaTIS system (Contract RT1194KA) ("**the Agreement**") between Tasima and the Department of Transport ("**the DoT**"). The eNaTIS system has been declared a national key point under the National Key Points Act, 1980, and its continued operation is a matter of national importance. The eNaTIS system allows the DoT to administer, inter alia, the licensing of all motor vehicles, driver's tests, learner licence tests, contraventions of road traffic legislation and the roadworthiness of vehicles. It also acts as the interface among the DoT, all licensing institutions and municipalities, the public and a variety of institutional users (including the South African Police, motor manufacturers and banks). It represents the realisation of the requirements under the National Road Traffic Act, 1996 to record, administer and maintain a variety of information and perform functions pertaining to road traffic in South Africa.

[3] A dispute has arisen in relation to the duration and current status of the Agreement, and in July 2012 Tasima launched an application out of this Court, against the DoT, the Director General of the DoT ("**the DG**") and the Minister of Transport, for urgent, interim interdictory and declaratory relief to compel the DoT and the DG to comply with the terms of the Agreement, pending the outcome of the dispute resolution process envisaged under the Agreement. This application is referred to as "**the Main Application**". The Main Application was heard on 17 October 2012 when the court (Mabuse J) granted an order in favour of Tasima which is attached to the

Notice of Application as “NOM 1” (“**the Mabuse Order**”). The Mabuse Order provided that, pending the finalisation of the dispute resolution proceedings instituted by Tasima in terms of the Agreement:

“[the DoT] is hereby directed:

- 1.1 To perform its obligations in terms of [the Agreement].
- 1.2 Without limiting the generality of 1.1 supra, to comply with the payment obligations as defined in paragraph 17 of [Tasima’s] founding affidavit.”

[4] Tasima has commenced arbitration proceedings and (despite challenge) the Mabuse Order has been effective from 6 December 2012 and is currently in force. An application for leave to appeal was refused by the Court and the petition for leave to appeal was also refused by the Supreme Court of Appeal.

[5] Tasima, in the light of the rather obstructive and apparently malicious conduct on the part of some of the respondents, has been compelled to launch the several contempt applications referred to above against the respondents in order to enforce its rights under the Mabuse Order and other orders that were granted by this Court. It is necessary to deal with and to set out the terms of these orders and the history of these contempt applications in order to provide context to this latest contempt application. Prior to the hearing of the Main Application Teffo J handed down an order that was granted by consent on 7 August 2012 (“**the Teffo Order**”). The Teffo Order required the DoT to do all things and take all steps as were necessary, in accordance with the procedures previously applied by Tasima and the DoT, to enable Tasima to render the services and incur the obligations required under the agreement. Under that Order, the DoT was also obliged to pay Tasima for all the services rendered or to be rendered or obligations incurred or to be incurred by Tasima in connection with the eNaTIS system. The Teffo Order operated pending the final determination of the main application.

5.1 However, the DoT and the DG failed to comply with the terms of the Teffo Order and Tasima launched a contempt application on 3 September 2012 (“**the September 2012 application**”). The September 2012 application culminated in a hearing before the Full Court of this Honourable Court. On 26 February 2013, the Full Court granted an order compelling the DoT and the DG to comply with the terms of the Teffo Order.

5.2 Over the period September 2012 to March 2013 the DoT and the DG again failed to comply with the terms of the Teffo Order and the Mabuse Order and Tasima launched a second contempt application on 7 March 2013 (“**the March 2013 Application**”). As a result of this, on 26 March 2013 Strijdom AJ handed down an order (“**the Strijdom Order**”) which was granted by consent between the parties, after a capitulation by the DoT, the DG and Werner Koekemoer (“**Koekemoer**”). The Strijdom Order is attached to the Notice of Application as “**NOM 2**” p 8-10. The relevant parts of the Strijdom Order provide as follows:

- “3. That pending the finalisation of the dispute resolution proceedings ... [the DoT, the DG and Koekemoer] are interdicted from taking any steps (including entering into any contracts with third parties, either in [the DoT’s] own name or through the eNaTIS trading entity), which have the effect of rerouting or diverting any of the Work (as defined in paragraph 15.3 of the supporting affidavit) from the applicant;
4. That [the DoT, the DG and Koekemoer] are ordered to take all steps necessary to convene, forthwith, the eNaTIS governance structures, contemplated in schedule 11 of the agreement

(as defined in the supporting affidavit), including the National Steering Committee, the eNaTIS User Group in respect of each province and meetings with provinces in respect of the eNaTIS system in the manner in which such governance structures were previously operated in [the DoT's] and [Tasima's] implementation of such agreement.”

5.3 However, the Respondents defaulted once again and on 8 April 2013, Tasima was again compelled to launch contempt proceedings for the third time (“**the April 2013 application**”) to enforce the grant of outstanding authorisations under the Agreement and the various orders granted by this Court. Again faced with a contempt application, the DoT, the DG and Koekemoer subsequently granted all the authorisations which were the subject matter of the April 2013 application and agreed to bear the costs of such application.

[6] Against this background, Tasima was once more, forced to bring urgent proceedings against the DoT, the DG and Koekemoer (“**the Respondents**”) in this, the fourth contempt application, in order to enforce its rights under the Agreement and the Mabuse and Strijdom Orders.

THE CURRENT APPLICATION AND RELIEF SOUGHT

[7] From the facts set out in this judgment *infra*, the relief sought by Tasima in the present application is designed to address various defaults by the DoT, the DG and Koekemoer. In particular, the Respondents have:

7.1 withheld payment of approximately R118 million due and payable to Tasima under the Agreement;

7.2 failed to grant various outstanding authorisations ("**the Outstanding Authorisations**") in respect of Tasima's purchase requisitions ("**PRQs**"), where such or substantively similar authorisations have always been approved in the past and are required to be approved under the Agreement and the Orders in order to keep the eNaTIS system operational (copies of all the relevant PRQs and a schedule setting out all the Outstanding Authorisations are annexed to the founding affidavit marked "FM8");

7.3 refused to appoint a, or confirm the identity of the current, Program/Project Manager under the Agreement. This issue arose because in early May 2013 the DoT gave notice to Tasima opaquely stating that Koekemoer (who has been the project manager from the outset) was not to be allowed onto the eNaTIS premises henceforth despite him being the contact person between the Applicant and the DoT;

7.4 refused to authorise the conclusion of contracts necessary for Tasima to fulfil its operational mandate under the Agreement and for the functioning of the eNaTIS system;

7.5 failed to take any steps to convene eNaTIS governance structures under the Agreement;

7.6 Sought (in breach of the Agreement and the Mabuse Order) to effect a "transfer" of the "administration" of the eNaTIS system to the Road Traffic Management Corporation ("**the RTMC**") which entity is described more fully below.

7.7 An application to intervene in this matter was even brought by RTMC who for practical purposes has been referred to as Fifth Respondent in

these proceedings. The counsel of the Fifth Respondent was allowed to address the court and judgment whether the intervention would be allowed was reserved.

THE OPPOSITION TO THIS APPLICATION

[8] Two separate answering affidavits have been filed in this matter.

[9] The one was deposed to by Koekemoer, who allegedly deposes to the affidavit on behalf of himself and the DG. No explanation was forthcoming as to why the DG himself/herself did not depose to an answering affidavit. Koekemoer fails to state that he is authorised to act on behalf of the DG and there is no proof of any such authority anywhere in the papers. The allegation of authority is remarkable given Koekemoer's sudden removal from the eNaTIS project and is disbelieved. In the answering affidavit Koekemoer attempts to explain the various defaults set out more fully below. The Court will deal with his explanations where the Court deals with the detail of the defaults below. For practical purposes this Court will deal with the contents of Koekemoer's affidavit for what it may be worth.

[10] In addition it appears from the Koekemoer answering affidavit that on 6 May 2013 the Minister directed that the eNaTIS system be managed by RTMC on behalf of the DoT. No proof of this "major occurrence" is attached and it is startling to note that the Minister himself did not see his way open to take this Court into his confidence and file an answering affidavit. The RTMC is an independent juristic entity in terms of section 3 of the Road Traffic Management Act, 1999. In light of this the Respondents allege that "*the eNaTIS system is currently being managed by the RTMC on behalf of the DoT*". For this reason RTMC seeks to be joined as a party to the present application. RTMC has also delivered an answering affidavit on its own

behalf, deposed to by its acting COO. Remarkably, the DoT has chosen to remain silent, electing not to file an answering affidavit. despite the fact that the DoT and the DG (as its accounting officer) bear the obligations of complying with the Agreement and the Orders and potentially face committals for contempt. By their silence they have not eased the burden of the Court but they will merely have to suffer the consequences of their remaining silent.

[11] Koekemoer's explanations for the defaults are, broadly speaking, as follows –

11.1 Prior to 6 May 2013, Koekemoer was the Project Manager in the DoT responsible for the management of the eNaTIS system on behalf of the DoT. However, when the management of the eNaTIS system was transferred to RTMC on 6 May 2013 he ceased to be the Project Manager and to have any responsibility on behalf of the DoT.

11.2 The management of the eNaTIS system according to him now vests in the RTMC, thus exculpating the DoT and Koekemoer of responsibility for any defaults under the Court orders, so they apparently think.

11.3 The Respondents were, at all times, acting on legal advice and their conduct cannot constitute contempt as it was not *mala fide*. This appears to be a mirror of the history of the appeal between the parties in matter A862/12 in which Tuchten J handed down the judgment on the 25th February 2013 and wherein the full Court condemned in very strong language the conduct of the same respondents. For the respondents to aver that their deliberate failure to comply with a specific and direct court order can, by merely listening to legal advice, excuse them and their failure to comply with the court order no longer constitutes contempt of court, is just not on.

[12] None of these explanations provide an adequate answer to Tasima's application. The alleged transfer of the management of the eNaTIS system to RTMC is a material breach of the Agreement and the Mabuse Order and is unlawful. Even if the DoT was entitled to transfer the management of the eNaTIS system to RTMC (which at this stage is not proven yet) and RTMC would manage it "*on behalf of the DoT*", the Agreement and the Mabuse and Strijdom Orders still bind the contracting parties and the parties referred to in the various Orders. It is not possible for the DoT and the DG to escape their obligations under the Agreement and the Orders by simply transferring their obligations to a third party without the knowledge or consent of Tasima or the sanction of the Court, and thereby "*wash their hands*" of their obligations under the Court Orders. In any event, any breach of an order by the agent of the DG or the DoT (namely RTMC) must be regarded as a breach of the order by the principal. This is borne out by the statements made by Koekemoer in his answering affidavit and by RTMC in their joinder application:

12.1 In Koekemoer's paragraph 7.2 of his answering affidavit he states that the DoT has not transferred to the RTMC any court-ordered obligations (even if it could). In a supporting affidavit to Koekemoer's answering affidavit, Me Fakira also states unequivocally that the DoT has not transferred to the RTMC any of its obligations under the Agreement;

12.2 In the RTMC joinder application RTMC states that the RTMC is the program manager, alternatively an agent of the DoT. In RTMC's answering affidavit, RTMC states that "*[RTMC] is now appointed as the Project Manager on behalf of [the DoT] with Adv Gerber as the contact person ... [RTMC] is only appointed to act as an agent of [the DoT] and nothing more*";

12.3 In either event the DoT and the DG remain liable under the Agreement and the Court orders. They cannot by their latest ruse evade such obligations.

[13] Furthermore, legal advice cannot change the facts and the contractual position and the Respondents' reliance on legal advice as a ground of opposition to the contempt application, is without merit. The terms of the Agreement are clear. The Respondents and their legal advisers have sought to rely on terms of the Agreement which are plainly inapplicable and have never been relied upon before. Tasima has pertinently pointed out to the Respondents and their legal advisers, in writing, that these provisions are inapplicable and the Respondents and their legal advisers have failed to respond to these assertions. It is submitted that if the Respondents received legal advice to the effect that they are not in default this advice was so obviously wrong that reliance thereon cannot be *bona fide*.

[14] Both Schedule 7 of the Agreement and the EPP are expressly referred to as the "payment obligations" in paragraph 1.2 of the Mabuse Order. Paragraph 1.2 of the Mabuse Order refers to "the payment obligations as defined in paragraph 17 of [Tasima's] founding affidavit." Paragraph 17 of Tasima's founding affidavit in the Main Application is "FM 14" to the Founding Affidavit (pp 180 – 181), and it makes express reference to Schedule 7 of the Agreement and the EPP.

[15] Each of the categories of defaults, which are set out in detail in the founding affidavit must now be dealt with by the Court, and the Court will then deal with the explanations for their breach proffered by Koekemoer and RTMC in their answering affidavits.

THE PRQs & OUSTANDING AUTHORISATIONS – A BREACH OF THE MABUSE ORDER

[16] The operational logistics of the eNaTIS system entail Tasima generating monthly “purchase requisitions”, also referred to as “PRQs”, which reflect expenditure to be incurred which is necessary for the ongoing maintenance and operation of the eNaTIS system, and which are then approved by the DoT. On the basis of the DoT’s approval of the underlying PRQ, Tasima then incurs the actual expenditure, invoices the DoT and presents a “payment certificate” to the DoT, in accordance with Schedule 7 of the Agreement (which is “**FM 4**” to the founding affidavit) and the Extended Period Provisions of the Agreement (which is “**FM 7**” to the founding affidavit) (“**the EPP**”). The DoT is then obliged to pay Tasima the invoiced amount within 21 days.

16.1 In particular, item 4.6 of schedule 7 to the Agreement provides as follows:

“Terms. Payment by the State will be within 21 (twenty one) days of submitting an invoice and the supporting Payment Certificate to the State”

16.2 Paragraph 2.6 of the EPP provides as follows:

“2.6 Payment terms

Payments will be claimed on a monthly basis by means of the payment certificate mechanism in accordance with Schedule 7 of [the Agreement] for work executed during the month. This includes work on a Time and Material basis, by means of formal agreements (such as maintenance), work on a recovery basis or as a result of approved proposals, quotations or work orders.

Services rendered to private or external parties (such as quotations accepted by local authorities) will be invoiced directly to the appropriate party.

Payment by the Department will be made within 21 (twenty one) days of Tasima submitting a joint invoice

and the supporting Payment Certificate to the Department.”

[17] This procedure has always been followed by the parties. Since July 2012, however, the DoT became increasingly dilatory in complying with its obligations, forcing Tasima to approach this Court and issue notice under the State Liability Act, 1957 ("**the Act**") on various occasions to obtain amounts due to it.

[18] It is plain that (as a consequence of the dispute) the DoT has adopted a strategy of hamstringing Tasima's execution of the agreement at two distinct levels – firstly, by failing to authorise necessary expenditure (such as in the case of the Outstanding Authorisations), and, secondly, by authorising such expenditure and then simply refusing to pay invoiced amounts. In particular, the Respondents have failed to –

18.1 make payment of approximately R118 million due and payable to Tasima under the Payment Certificates; and

18.2 grant the Outstanding Authorisations in respect of Tasima's PRQs, as set out in the schedule annexed to the founding affidavit marked "**FM8**" p 157 ff.

[19] These failures constitute breaches by the Respondents of their obligations under the Agreement and the Mabuse Order. The Court will deal with the facts and circumstances surrounding each of these breaches below.

NON-PAYMENT OF PAYMENT CERTIFICATES

TASIMA'S CASE:

[20] To date the DoT has failed to make payment in the amount of R118 502 705.13 due and payable under invoices and payment certificates issued by Tasima to the DoT. This amount is made up as follows, and arises from the following payment certificates:

20.1 Payment certificate 67, which was submitted on 11 January 2013 and which was due on 1 February 2013 (annexure “**FM16**” p 188 to the founding affidavit) and in respect of which the DoT has arbitrarily withheld R10 million;

20.2 Payment certificate 68, which was submitted on 8 February 2013 and which was due on 1 March 2013 (annexure “**FM19**” p 217 to the founding affidavit) and in respect of which the DoT has arbitrarily withheld R10 million;

20.3 Payment certificate 69, which was submitted on 6 March 2013 and which was due on 27 March 2013 (annexure “**FM 23**” p 252 to the founding affidavit) and in respect of which the DoT has arbitrarily withheld R10 million;

20.4 Payment certificate 70 in an amount of R47 674 144.40 (annexure “**FM30**” p 303 to the founding affidavit) which was due on 30 April 2013, and which the DoT has not paid at all; and

20.5 Payment certificate 71 in an amount of R40 829 560.73 (annexure “**FM31**” p 340 to the founding affidavit) which was due on 31 May 2013, and which the DoT has not paid at all.

[21] Importantly, underlying PRQs in respect of these payment certificates have already been approved by the DoT. This is acknowledged by the Respondents in the correspondence of the State Attorney. This is also not denied in Koekemoer’s or RTMC’s answering affidavits. All that remains is for the DoT to make payment of these amounts which they have failed to do on spurious grounds, set out below.

[22] A detailed chronology relating to the submission of these payment certificates and the exchange of correspondence between Tasima and the DoT appears in the founding affidavit at paragraphs 43 – 61 at pp 26 – 32. It is not in dispute. The essential features of this chronology are as follows:

22.1 On 21 January 2013, after Tasima submitted payment certificate 67, Tasima received a letter from “the eNaTIS Trading Entity” (which is not party to the Agreement) per Koekemoer (“**FM17**” to the founding affidavit). In this letter Koekemoer requested a “*detailed breakdown*” of various costs pertaining to certain of the items comprising payment certificate 67. Koekemoer further stated that payment would be delayed until such information was received. Those items which allegedly required a detailed breakdown related to, primarily, the 15% mark-up charged by Tasima under the Agreement and the EPP and the labour component of the invoice. Tasima’s entitlement to a 15% mark-up is dealt with fully in the FA para 39 – 40 pp 24 – 25.

22.2 On 13 February 2013, Tasima received a further letter from the eNaTIS Trading Entity" per Koekemoer ("FM18" to the founding affidavit).

In the letter Koekemoer stated that the DoT had previously requested "*confirmatory documentation pertaining to payment certificate 67 in order to perform certain compliance checks before full payment can be done*", and that, due to Tasima's failure to supply such, "*only partial payment can be approved for payment certificates 67 and 68*" (own emphasis). This resulted in the DoT arbitrarily deducting R10 million from the payments made by the DoT in respect of each of payment certificates 67 and 68 (even though no similar request for documentation had been made in respect of certificate no. 68).

22.3 Importantly, the need for additional "confirmatory documentation" and "compliance checks" constituted a novel request, foreign to the Agreement, which the DoT now required, for the first time in well over a decade, before payment would be effected, and despite the fact that the PQR's had been approved. In terms of Schedule 7 of the Agreement, payment is not contingent on the provision of any additional documentation, nor is payment reciprocal on the DoT being furnished with documentation it may decide (arbitrarily or otherwise) to request. Indeed, prior to 21 January 2013, since inception of the Agreement over 10 years ago, there has only ever been one request for any additional documentation to be provided. Such documentation (which was of very limited scope and related only to one individual) was provided without any admission of obligation to do so on the part of Tasima and, in any event, payment of the payment certificate to which the documentation related was not withheld pending the provision of any documentation. This is not in dispute.

- 22.4 On 25 March 2013 Tasima responded to the request for documentation (“**FM 20**” to the founding affidavit). Tasima denied that any documentation was required under the agreement, but Tasima nevertheless provided the DoT with all the requested documentation, and demanded full payment of payment certificates 67 and 68 by 2 April 2013. Tasima made a further demand for payment on 18 April 2013 (“**FM 22**” to the founding affidavit). Neither was met.
- 22.5 On 24 April 2013 the State Attorney sent a letter to Webber Wentzel (“**FM24**” to the founding affidavit). In this letter the State Attorney now, for the first time, and in vague and general terms, called for “timesheets”, (it is unclear for precisely which periods and items the spreadsheets were requested) in order to verify Tasima’s claims contained in items 1.1 – 1.5 of PC 67, 68 and 69 which underlay the “support and consulting services”. In justification of its request for timesheets, the State Attorney relied on Schedule 7, clause 4.5 (annexure “**FM4**”) which reads (in full) as follows:
- "Timesheets:** The Contractor shall maintain records of the hours worked by its Staff in the provision of any Service on a Time and Material Basis and of the expenses incurred for which reimbursement is due in terms of this Agreement. The State may audit such records within 12 (twelve) months of the date of the invoice in respect thereof."
- 22.6 It is clear that payment is not conditional upon the provision, approval or verification, of timesheets. Clause 4.5 simply allows the DoT to audit timesheets up to 12 months after submission of any payment certificate and invoice relating thereto, and substantially after the expiry of the 21 calendar day period for payment of every payment certificate rendered to the DoT.

- 22.7 Some further correspondence was exchanged between Webber Wentzel and the State Attorney (annexure “**FM25**”, “**FM26**”, “**FM27**” and “**FM28**”). In this correspondence Webber Wentzel addressed the allegations made by the State Attorney and repeatedly demanded payment of the outstanding amounts. In its correspondence (“**FM27**”) the State Attorney simply repeated its reliance on Schedule 7, clause 4.5 and now also raised clause 2.2.k of the EPP, (2.2.k of the EPP simply provides, “*k. The Contractor shall maintain records (time sheets) of all hours worked in the provision of the Services.*”) and stated that it was “*entitled to verify [Tasima’s] claims in respect of the hours worked by its staff in the provision of services*”. It suffices to say that this correspondence did not serve to clarify the Respondents' attitude regarding payment.
- 22.8 This correspondence culminated in Webber Wentzel making a final demand on 6 June 2013 (annexure “**FM 29**”) (“**the 6 June 2013 letter**”) for payment in full by no later than 12h00 on 12 June 2013.
- 22.9 On 7 June 2013, Tasima received a letter from the State Attorney (annexure “**FM39**” to the founding affidavit), now suddenly acting on behalf of the RTMC, not substantively addressing any of the issues raised in the 6 June 2013 letter, but rather, some two months after the submission of payment certificate 70, and some five weeks after payment thereunder became due (30 April 2013), requesting a panoply of supporting documentation to allow the respondents to “*consider*

payment" of payment certificate 70. The statement in the State Attorney's letter to the effect that payment certificates 67 to 69 have been paid allegedly is plainly untrue according to paragraph 93 of the founding affidavit.

[23] The eNaTIS system is Tasima's sole business and source of income - non-payment by the DoT, particularly of such a large amount as is currently outstanding, jeopardises Tasima's ability to continue as a going concern and remain a viable commercial enterprise.

[24] The Respondents' obstructive behaviour in calling for, and making payment conditional on the furnishing of "confirmatory documentation", and then changing tack and calling for "timesheets", where it is clear that none of the requested documents is required under the Agreement or the EPP, is a clear contrivance and a clear violation of the Agreement and the Respondents' obligations under the Mabuse Order.

[25] In the circumstances, so it appears, the Respondents are in breach of the terms of the Agreement and the Mabuse Order. Notwithstanding demand, the Respondents remain in breach, and their breach is contemptuous.

Koekemoer's & RTMC's Answer:

[26] Koekemoer asserts that the DoT was entitled to withhold R10 million in respect of PC67, PC68 and PC69, because Tasima had not supplied timesheets to verify the hours worked by its staff in the provision of "Support and consulting services" in items 1.1 – 1.5 under PC67, PC68 and PC69. Thus (he says) the DoT could not determine the amount of Tasima's claims. He then states that the withholding of this

amount (R30 million) does not involve non-compliance with the Mabuse Order because, –

26.1 the obligation to pay gives rise to a dispute under the Agreement and in terms of clause 13.4 of the Agreement and Schedule 13, clause 2 of the Agreement, this dispute is subject to a dispute resolution mechanism; and

26.2 even if the withholding of these amounts did constitute non-compliance with the Mabuse Order, such non-compliance was not wilful or mala fide because the amounts were withheld according to legal advice obtained.

[27] RTMC for its part alleges that there were “*delays in inter alia checking and processing [Tasima's] invoices*”, RTMC states that Koekemoer required a detailed breakdown of costs in relation to support and consulting services because he had received complaints that over the December 2012 Tasima was short staffed, and that Tasima had charged as if it had a full staff compliment during the December 2012 period, when in fact it did not. In the circumstances he believed that these were “excessive claims”. RTMC then promptly states that “the queries raised by [Koekemoer] are the same in respect of payment certificates 68 and 69”, even though the explanation plainly cannot apply to PC68 (or any of the others). RTMC states that it agrees with Koekemoer’s reasons for not paying the R10 million in respect of each of the payment certificates 67, 68 and 69.

[28] RTMC’s answers are clearly spurious. Firstly, there is no evidence of a valid or bona fide dispute regarding the “Support and consulting services” in items 1.1 – 1.5 under PC67, PC68 and PC69. As already indicated underlying PRQs in respect of

these certificates were already signed off by the DoT. This is not disputed in Koekemoer or RTMC's answering affidavits. It is not clear why there should therefore be delays in "checking and processing Tasima's invoices" – the PRQs were, no doubt, scrutinised when they were presented and they were subsequently approved. Indeed, RTMC itself points out that the Agreement entitles the Project Manager to request supporting documentation in order to verify the PRQs. Once the PRQs are signed off they must be processed and paid in accordance with the terms of the Agreement. Secondly, RTMC's answering affidavit is the first time that any of the Respondents have sought to explain their queries regarding the "support and consulting services" component of the relevant payment certificates. This was never explained in any of the extensive correspondence exchanged between the parties. Thirdly, if there was a query regarding Tasima's staff complement in December 2012 and this impacted on Payment Certificate 67, why request the timesheets in respect of all the subsequent Payment Certificates? This is simply not explained. Fourthly, when the State Attorney belatedly, (Importantly, the first payment certificate, PC67, was submitted on 11 January 2013 and was due on 1 February 2013. The insistence on timesheets was only made on 24 April 2013.) called for timesheets, Webber Wentzel pointed out that the Agreement does not provide that payment is conditional on the furnishing of timesheets, and that these had never before been requested. The State Attorney and Koekemoer have never meaningfully answered Webber Wentzel's assertions in this regard. Neither of them has advanced a contrary interpretation of the Agreement (which is capable of dispute resolution) nor have they explained why timesheets were never called for in the past, but are now mysteriously required. The absence of these explanations is glaring and demonstrates that this request for timesheets is a contrivance, and that there is no

actual dispute between the parties regarding payment. (See further Delfante and another v Delta Electrical Industries Ltd and another 1992 (2) SA 221 (C) which is authority for the proposition that there must be a “dispute” as a prerequisite for arbitration).

[29] Koekemoer also proffers an explanation for the non-payment of PC 70 and PC

71. He states that he and the DG were not guilty of any wilful default because –

29.1 PC 70 was payable on 30 April 2013, but that 1 May 2013 was a public holiday and from 6 May 2013 he was no longer the Project Manager responsible for the management of the eNaTIS system on behalf of the DoT; and

29.2 PC 71 is dated 9 May 2013 after he ceased to be the Project Manager in the DoT responsible for the management of the eNaTIS system on behalf of the DoT.

[30] RTMC then alleges that PC70 was only received by RTMC (specifically Adv Gerber) on 5 June 2013 and that he raised a number of queries in order to check and process the invoice, and these were communicated in the State Attorney’s letter “**FM39**” pp 447. RTMC states that it only became aware of PC71 on 6 June 2013, when receiving the letter of demand. Notwithstanding these extensive queries in FM39, RTMC now states that it will make payment of part of PC70 (which was due on 30 April 2013) and part of PC71 (which was due on 31 May 2013), but that it will withhold certain amounts. RTMC states that payment of the amounts not disputed will be effected within 7 working days calculated from Monday 24 June 2013.

[31] Again, these explanations are flimsy and clearly demonstrate the wilfulness of the DG and Koekemoer's defaults. First, PC70 was payable on 30 April 2013. This means that all steps necessary to process the payment would have had to be taken before 30 April 2013. Secondly, 1 May 2013 (the public holiday) was a Wednesday, and even if Koekemoer was reassigned on 6 May 2013, he took no action to effect payment on 2nd or 3rd of May 2013, both of which were working days. Thirdly, although Koekemoer states that he was no longer the Project manager from 6 May 2013, RTMC's answering affidavit makes it clear that as late as 8 May 2013 he had a meeting with RTMC (now ostensibly the new Project Manager) and "the purpose of this meeting was for [Koekemoer] to liaise and work with [RTMC] to ensure the smooth take-over of the Project Management duties by [RTMC]". This contact gave Koekemoer ample opportunity to ensure compliance with the terms of the Orders. Fourthly, the fact that Koekemoer was reassigned is irrelevant. The payment obligations of the DoT rest with the DG who is the "accounting officer" in terms of section 36 of the Public Finance Management Act, 1999 ("**the PFMA**"). Koekemoer's "reassignment" cannot affect the obligations of the DoT or the DG under the PFMA, the Agreement or the Court Orders. Fifthly, there is no explanation as to why RTMC only received PC70 on 5 June 2013 when it was payable on 30 April 2013 and PC71 on 6 June 2013, when it was payable on 31 May 2013. This clearly demonstrates the laxity with which the Respondents view the Agreement and the Orders of this Court.

[32] Most baffling, RTMC now states that it will recommend to the DoT to conduct a "full forensic audit of all payments made to [Tasima] in terms of this agreement for at least the past 12 months, as there are serious concerns by the respondents that all payments claimed and made were not due and payable in terms of the agreement". Interestingly, Koekemoer, who has always been the Project Manager never saw fit to call for a "full forensic audit", and it is unclear why and on what basis RTMC now seeks to do so. The only reasonable explanation is to continue to harass Tasima and

thereby make its continued operation of the eNaTIS system impossible so as to force a “divorce” between the DoT and Tasima and the Court got the clear impression that the Respondents were maliciously implementing steps to cause Tasima to financially crash so as to get rid of Tasima and then employ somebody else. The proposed full forensic audit can conveniently be conducted later but cannot be used as an interim excuse to avoid payment strictly on time. There is no merit in the excuses of the respondents and they must pay or go to prison.

THE OUTSTANDING AUTHORISATIONS

Tasima’s Case:

[33] Since May 2013 the DoT has failed to approve or even collect over 140 PRQs and provide the necessary approvals in respect of the Outstanding Authorisations. All of the Outstanding Authorisations (contained in “FM8” to the founding affidavit) are necessary for Tasima to incur expenditure under the Agreement, and are essential to the operation and maintenance of the eNaTIS system. All of the Outstanding Authorisations are substantively similar to authorisations which have always been approved in the past. As already stated, the Respondents are obliged to approve the PRQs under the Agreement and the Mabuse Order.

[34] In the past Koekemoer collected PRQs from Tasima's premises or attended at Tasima's premises to review such PRQs. From 6 May 2013, however, this practice abruptly ceased, with the DoT failing to collect, or even accept delivery of, any PRQs. When Koekemoer failed to collect the PRQs or attend at Tasima’s premises to review the PRQs, Tasima repeatedly tried to effect delivery of the PRQs to the DoT’s premises in May 2013, but the DoT refused to accept the deliveries. Specifically on 28 May 2013, Tasima's Ms N Ndebele attempted to deliver the PRQs to the DoT offices at the Forum Building, 159 Struben Street, Pretoria. However, the DoT's

officials refused to accept delivery of the PRQs, with Koekemoer informing Ms Ndebele that she was to return to Tasima with them.

[35] According to the statement this has forced Tasima into an intolerable situation. It is obliged either not to incur necessary expenditure, which jeopardises the eNaTIS system and Tasima's business, or to proceed to incur expenses on risk simply to salvage its business and maintain the sanctity of the eNaTIS system.

[36] Tasima drew the DoT's attention to this failure to accept and approve the PRQs and demanded that it be rectified, in writing on at least 2 occasions, namely –

36.1 by means of a letter dated 30 May 2013, addressed by Tasima's attorneys, Webber Wentzel, to the State Attorney, which is "FM 28" to the founding affidavit ("**the 30 May 2013 letter**"); and

36.2 by means of a letter dated 6 June 2013, addressed by Webber Wentzel to the State attorney, which is "FM29" to the founding affidavit ("**the 6 June 2013 letter**").

Koekemoer 's & RTMC's Answer:

[37] Koekemoer offers the following explanations (on his own behalf and on behalf of the DG although it is not clear where he got the authority from to speak on behalf of the DG and his own explanation is in any case irrelevant as he was a mere employee of the DoT and was apparently dismissed) for these defaults:

37.1 First, he repeats that since 6 May 2013 the eNaTIS system has not been managed by him on behalf of the DoT, but by the RTMC; and

37.2 Secondly, in relation to Ms Ndebele's visit on 28 May 2013, Koekemoer states, that when he was told by Ms Ndebele's Personal Assistant that Ms Ndebele was at the premises he told Ms Ndebele's Personal Assistant that, he was no longer the Project Manager in the DoT, and that Ms Ndebele should not deliver the PRQs pending her receiving further instructions regarding the delivery thereof. Koekemoer AA para 5.5. Koekemoer also states that on 14 May 2013 the DoT sent a letter to Tasima ("FM 33" to the founding affidavit) to no longer allow Koekemoer to enter the eNaTIS premises. (Koekemoer AA para 5.4). But clearly this explanation is an add-on. The real reason why Koekemoer no longer wanted anything to do with the Outstanding Authorisations is because he allegedly had been removed as the Project Manager on 6 May 2013.

[38] These explanations do not assist the DoT, the DG or Koekemoer. First, as already stated, the fact that Koekemoer was reassigned is irrelevant. The payment obligations of the DoT rest with the DG who is the "accounting officer" in terms of section 36 of the Public Finance Management Act, 1999 ("the PFMA"). Koekemoer's "reassignment" cannot affect the obligations of the DoT or the DG under the PFMA, the Agreement or the Court Orders. Secondly, notwithstanding Tasima's repeated requests, at no stage did the DoT, the DG or Koekemoer advise Tasima who was responsible after 6 May 2013 for signing off the Outstanding Authorisations. This strengthens the suspicion that they want Tasima to financially crash so as to get rid of Tasima so that somebody, perhaps already identified by somebody, could be appointed. The role of the Road Traffic Management Corporation, who applied for leave to intervene is most suspicious, and seems to be the tool to draw the flak away from the other Respondents and to stall the performance of the Government under the contract with Tasima.

[39] RTMC gives no answer to the failure to receive or process the Outstanding Authorisations. RTMC simply refers to the supporting documentation that accompanies the Outstanding Authorisations and states that it will need supporting documents before it can authorise the Outstanding Authorisations, and since these supporting documents are voluminous, “it is unfair to expect [RTMC] to be in a position to authorise this within 1 day” as requested in the Notice of Application. RTMC states that it will require at least 1 week to go through the supporting documents.

[40] RTMC’s explanations are again, a contrivance and miss the point. The point is that the DoT has never even attempted to collect these Outstanding Authorisations and the DoT and Koekemoer refused to take delivery of them. They cannot now complain of the lack of time. Secondly, all the supporting documentation is available for inspection. This documentation is even offered by Tsimba in FA para 16.2 record p.16. Had the DoT, the DG and Koekemoer acted in accordance with the Agreement and the Orders, as they did in the past without raising the supercilious excuses they now have, they would long since have had these Outstanding Authorisations and the supporting documentation in their possession for timeous consideration and approval.

[41] In the circumstances, the Respondents’ excuses are spurious and they are in clear breach of the terms of the Agreement and the Mabuse Order. The Court will make an appropriate order to curb future similar ploys on the part of the Respondents.

RESPONDENTS’ OTHER DEFAULTS – BREACH OF MABUSE & STRIJDOM ORDERS

[42] Paragraph 1.1 of the Mabuse Order requires Tasima “[t]o perform its obligations in terms of the agreement”. In addition paragraphs 3 and 4 of the Strijdom Order provide that –

42.1 the DoT, the DG and Koekemoer are required to convene, forthwith, the eNaTIS governance structures contemplated in schedule 11 to the Agreement, in the manner in which such governance structures were previously operated in the DoT's and Tasima's implementation of the Agreement (see paragraph 4).

42.2 pending the finalisation of the arbitration proceedings the DoT, the DG and Koekemoer are interdicted from taking any steps (including entering into any contracts with third parties, either in the DoT's own name or through the eNaTIS trading entity), which have the effect of rerouting or diverting any of "the Work" (as defined in paragraph 15.3 of the supporting affidavit in that application) from Tasima (see paragraph 3). The term "the Work" (as defined in paragraph 15.3 of the supporting affidavit in that application) refers to "services which Tasima had hitherto undertaken and performed or currently undertakes and performs under the agreement (including work in relation to provinces) (all the services which Tasima undertakes and performs or had hitherto undertaken and performed under the agreement are defined as "the Work"). See FA para 79 p 37.

[43] The Respondents –

43.1 have failed to appoint a, or confirm the identity of the current, Program/Project Manager under the Agreement, who is an essential part of the governance structures under the Agreement;

43.2 have failed to take any steps to convene the other eNaTIS governance structures under the Agreement ;

43.3 instead sought to effect a "transfer" of the "administration" of the eNaTIS system to the Road Traffic Management Corporation ("**the RTMC**") which entity is described more fully below;

43.4 refused to authorise the conclusion of contracts necessary for Tasima to fulfil its operational mandate under the Agreement and for the functioning of the eNaTIS system;

43.5 The heads of argument filed on behalf of the First, Second and Fourth Respondents states in paragraphs 6.2 and 6.3, relying as authority on paragraphs 8.1 and 8.2 of the Fifth Respondent's answering affidavit, (which paragraphs is no authority for nor do they even refer to it) argue that the provincial Departments of Transport (which counsel alleges are part of the governance structures) have refused that the governance structures set out in paragraph 4 of the Strijdom Order be convened, by way of adopting the stance that the continuation of the agreement is unlawful. No proof of such an alleged refusal is produced and it is not clear where counsel got this information from. In any case, that is the problem on the Respondents.

[44] What is stated in paragraph [43] *supra* constitute breaches by the Respondents of their obligations under the Agreement, the Mabuse Order and the Strijdom Order. The Court will deal therewith again *infra*.

FAILURE TO IDENTIFY THE PROJECT/PROGRAMME MANAGER

Tasima's Case:

[45] In terms of the Agreement, the DoT and Tasima are each obliged to appoint a "Program Manager", also referred to as the "Project Manager", who, in terms of clause 16 of the Agreement, is responsible for "Contract governance", as provided for in Schedule 11 of the Agreement. In practical terms, "contract governance", from the DoT's perspective, included approval of Tasima's PRQs, ensuring payment of eNaTIS expenditure, meeting with Tasima to discuss matters pertaining to the implementation of the Agreement, convening governance structures under the Agreement and acting as a general point of contact between Tasima and the DoT and to ensure the smooth running of the contract in the National interest.

[46] On 14 May 2013 Tasima received an email from the Director: Security Services of DoT (a copy of which is "FM33" to the founding affidavit), headed "DENIAL OF ACCESS - WERNER KOEKEMOER". The email directed Tasima to *"suspend the access of and further prevent [Mr Koekemoer] from accessing the building or any part thereof."* Thereafter, Mr Koekemoer played no further role under the Agreement, but Tasima has not received any official notice of his removal as a Project/Program Manager or revoking his authority as an authorised representative of the DoT or notice of who his replacement is.

[47] Tasima has requested the DoT and the DG to clarify who in the DoT is now responsible for the fulfilment of the obligations of the "Project Manager" in writing on at least 3 occasions, namely –

47.1 by means of a letter dated 16 May 2013, addressed by Tasima's attorneys, Webber Wentzel, to the State Attorney, which is "**FM 32**" to the founding affidavit ("**the 16 May 2013 letter**");

47.2 in the 30 May 2013 letter – "**FM 28**" to the founding affidavit; and

47.3 in the 6 June 2013 letter – "**FM29**" to the founding affidavit.

[48] To date, the DoT has ignored these demands and failed to appoint, or notify Tasima of the appointment of a Project/Program Manager to "*facilitate the smooth and effective management of the relationship*", as envisaged under clause 16 and schedule 11 of the Agreement.

Koekemoer's & RTMC's Answer:

[49] Koekemoer's only explanation of this default is that he was removed on 6 May 2013. On 6 June 2013, the State Attorney sent a letter to Webber Wentzel ("**FM34**" to the founding affidavit) in which the State Attorney advised that: (1) the administration of the eNaTIS system on behalf of the DoT has been transferred to the RTMC; (2) Adv Morne Gerber is the contact person within the RTMC; and (3) all administration matters concerning the eNaTIS system were to be referred to Advocate Gerber. Therefore, Tasima was indeed informed that the RTMC was responsible for the management of the eNaTIS system on behalf of the DoT. RTMC's answer is similar and relies on "**RRM 1**" to RTMC's answering affidavit.

[50] Tasima, as could be expected from it, fearing a collapse of the Natis system, had pertinently requested details of the programme manager, in writing on 3 occasions from 16 May 2013. It was only on 6 June 2013, that the State Attorney wrote the

letter which is “**FM 34**” (pp 370 – 371). That letter simply states that “*the administration of the eNatis has now been transferred to [the RTMC]*”. It was by no means clear, from that letter, that the DoT and the DG were intending to convey that RTMC was now the “Project Manager”. Importantly, Tasima requested clarity in “**FM 35**” which was sent immediately after “**FM 34**”. However the DoT failed to provide any clarity on this issue. If it was the DoT’s intention simply to appoint a new project manager this should have been clearly stated. Clearly, the implications of “**FM 34**” were more extensive than simply appointing a new Project Manager, and “**RRM 1**” was never been placed before Tasima. It was unclear what had been “transferred”. The confusion is explained fully in Tasima’s Replying Affidavit to Koekemoer’s answering affidavit. In the circumstances, Tasima was accordingly fully justified in seeking the relief which it seeks in this present application.

PROPOSED TRANSFER TO RTMC

Tasima’s Case:

[51] On 6 June 2013 Tasima's attorneys, Webber Wentzel, received a letter from the State Attorney, which is “**FM 34**” to the founding affidavit. In this letter the State Attorney stated that the “*administration of the eNatis has now been transferred to the Road Traffic Management Corporation and Advocate Morne Gerber is the contact person*”. The reference to “administration” of the eNaTIS system is unclear. The system has at all relevant times been operated, maintained and managed (which necessarily includes administration) by Tasima under the Agreement.

[52] The Road Traffic Management Corporation (“RTMC”) is an independent juristic entity separate from the DoT, as provided for under section 3 of the Road Traffic Management Act, 1999. As appears from the founding affidavit in the Main Application RTMC is the entity within the State which was intended eventually by the

DoT to take transfer and custody of the eNaTIS system once the Agreement had terminated.

[53] As appears from the State Attorney's letter of 6 June 2013, the DoT now seeks unlawfully to accelerate the transfer it once envisaged by rerouting the administration of the eNaTIS system to the RTMC, thus circumventing the transfer provisions of the Agreement and also ostensibly removing aspects of "the Work" from Tasima, in blatant disregard of paragraph 3 of the Strijdom Order.

[54] The DoT is bound, in terms of the Agreement and the Mabuse and Strijdom Orders, through its officials, including the DG and Koekemoer, the latter insofar as he may still directly or indirectly be involved, as is suspected, to perform its obligations under the Agreement and not to reroute any Work away from Tasima. Furthermore, the Respondents are not entitled unilaterally to transfer their court-ordered obligations to another entity which is not bound in terms of the Orders, or siphon any Work away from Tasima. The Respondents' attempts to do so constitute a clear breach of the Agreement and the Mabuse and Strijdom Orders.

Koekemoer's & RTMC's Answer:

[55] Koekemoer, whose lack of authority was attacked by the applicant at the hearing of the matter, as was already referred to in this judgment, simply states as follows: *"The management of the eNaTIS system by the RTMC on behalf of the DoT does not involve the DoT transferring its court-ordered obligations to the RTMC, or the rerouting of work under the Agreement away from the Applicant in breach of the Strijdom Order. Rather, the RTMC manages the eNaTIS system on behalf of the DoT by way of the DoT performing its obligations under the Agreement (in compliance*

with the Mabuse Order and Strijdom Order).” RTMC’s answer is similar and relies on “**RRM 1**” to RTMC’s answering affidavit.

[56] As already indicated despite Tasima’s repeated requests, it was only on 6 June 2013, that the State Attorney wrote the letter which is “FM 34”, which stated that “the administration of the eNatis has now been transferred to [the RTMC]”. It was by no means clear, from that letter that all the DoT and the DG were intending to convey was that RTMC was now the “Project Manager”. Were that the intention, this should have been clearly stated in the letter. As explained below, the implications of “**FM 34**” are apparently more extensive than simply appointing a new Project Manager. In the circumstances, Tasima was fully justified in seeking the relief which it seeks in this present application as the transferring of the administration of the eNatis to RTMC was clearly in breach of the Agreement and the Strijdom Order.

FAILURE TO CONVENE e/NaTIS GOVERNANCE STRUCTURES

Tasima’s Case:

[57] The eNaTIS governance structures, envisaged under schedule 11 to the Agreement (“**FM 5**” to the founding affidavit), which previously operated in the DoT and Tasima’s implementation of the Agreement include the National Steering Committee, of which the Project/Program Manager is the chairperson; and regular meetings with provinces and the eNaTIS User Group in respect of each province. At all material times these structures were active and important.

[58] For over one year, the DoT, the DG and Koekemoer had failed and refused, despite repeated requests from Tasima, to take all steps necessary to convene the eNaTIS governance structures. Paragraph 4 of the Strijdom Order was specifically

directed at compelling the Respondents to convene these governance structures, yet they have not done so. Instead of complying with the terms of the Strijdom Order, all the DoT has done is remove its Project/Program Manager, thus further impeding the implementation of governance structures.

[59] Tasima has insisted that the Respondents implement the various governance structures as required under the Agreement and the Strijdom Order, in writing on at least 3 occasions, namely –

59.1 in the 16 May 2013 letter – “FM 32” to the founding affidavit;

59.2 in the 30 May 2013 letter – “FM 28” to the founding affidavit;

59.3 in the 6 June 2013 letter – “FM29” to the founding affidavit.

[60] The Respondents’ failure and refusal to convene the structures is highly prejudicial to Tasima and the orderly conduct of the eNaTIS system and in clear breach of the Respondents’ obligations under the Agreement and the Mabuse and Strijdom Orders.

Koekemoer’s & RTMC’s Answer:

[61] Koekemoer refers to –

61.1 Schedule 11, Clause 1.1 of the agreement which provides that management of the eNaTIS services and the relationship between the parties shall vest in the National Steering Committee (of which the

eNaTIS User Groups in each province are sub-committees) constituted in accordance with the provisions of clause 1.3.; and

61.2 Clause 1.3.6 which provides that the National Steering Committee “shall meet on an ad hoc basis during the currency of this agreement upon the request on reasonable notice of any Party”.

[62] Koekemoer states that the Strijdom Order was granted on 26 March 2013, and that there has since, been no “request on reasonable notice” on the part of Tasima for the National Steering Committee to meet. In the circumstances Koekemoer states that he and the DG are not in contempt of paragraph 4 of the Strijdom Order alternatively, if the Strijdom Order was not complied with “stricto sensu, such non-compliance was not due to any wilful or mala fide refusal to obey the order”.

[63] Remarkably, a totally different answer is furnished by RTMC in RTMC’s answering affidavit. RTMC states as follows –

63.1 Koekemoer has informed Adv Gerber (of RTMC) that because of the dispute relating to the duration and status of the Agreement the Provincial Departments of Transport, which are party of these governance structures, “refuse to convene these structures” because they do not want to “partake in an unlawful agreement”; and

63.2 RTMC will issue a notice on or before 5 July 2013 for meetings of these structures, but convening these structures may take longer than the 20 days prayed for in prayer 6 of the Notice of Application. RTMC also states that Tasima was at fault for not joining these provincial structures.

[64] These responses are again spurious. First, paragraph 4 of the Strijdom Order is clear and unequivocal. It requires the DoT, the DG and Koekemoer “*to convene, forthwith, the eNaTIS governance structures, contemplated in schedule 11 to the agreement*” (emphasis supplied). It was not for Tasima to call for a meeting. The Court Order explicitly ordered who should convene the meeting and that the obligation to convene the governance structures immediately, clearly rested on the DoT, the DG and Koekemoer and there is self-evidently no scope for misunderstanding the terms of the Strijdom Order. Secondly, in any event, the fact that the National Steering Committee performs a pivotal role is demonstrated by Koekemoer himself in paragraph 9.2 of his answering affidavit where he states that the National Steering Committee must approve “change notes” for the various third party contracts (dealt with below). Thirdly, despite the clear terms of the Strijdom Order, which were agreed to by all parties concerned, including Koekemoer, on 26 March 2013, absolutely no attempt whatsoever was made to convene these structures. Instead RTMC will now make the first attempt on 5 July 2013, almost 4 months after the Strijdom Order. This is an obvious and blatant defiance of the Strijdom Order. Fourthly, if the provinces were unwilling to convene the structures, and it was impossible for the Respondents to comply with the Strijdom Order, it is not clear why the Respondents agree to convene the meeting in the first place? Fifthly, if the provinces refuse to cooperate on the basis that the Agreement is allegedly “unlawful” it could only be because they were advised that the Agreement was allegedly unlawful by the DoT and its agents. The DoT obviously conveniently failed to advise the provinces that they were obliged to comply with the terms of the Agreement by various Court Orders until the dispute was finalised by arbitration.

FAILURE TO AUTHORISE CONCLUSION OF CONTRACTS

Tasima's Case:

[65] In performing its role under the Agreement, and in accordance with the procedures always employed thereunder, Tasima would enter into various agreements in respect of, *inter alia*, leases and the provision of essential services to the eNaTIS system from, *inter alia*, Telkom and the South African Post Office ("SAPO"). Without such contracts, the necessary services required to operate the eNaTIS system would be undermined, and the housing of the eNaTIS system itself would be jeopardised.

[66] In order to enter into the necessary contracts, Tasima requires authorisation from the DoT; however, with no lawful explanation or reason, the DoT has, for some months, refused to grant the necessary contract authorisations.

[67] To date, the following agreements, all of which are essential for the integrity and continued operation of the eNaTIS system, remain unauthorised:

67.1 lease agreements in respect of various premises;

67.2 Telkom agreement;

67.3 SAPO agreement;

67.4 HP Hardware service agreement;

67.5 Remedy support agreement;

67.6 LAN Desk licenses.

[68] The papers show that from January 2013 Tasima has made numerous demands for the DoT to authorise the renewal of these agreements.

68.1 Between January and May 2013 Tasima's Ms Alida Hills and Mr Gustav van Vuuren have repeatedly requested Koekemoer orally to authorise the renewal of the agreements.

68.2 On 30 January 2013 Webber Wentzel addressed a letter to the State Attorney, which appears as “**FM 38**” to the founding affidavit. In this letter Webber Wentzel highlighted this issue, stating that "Mr Koekemoer also continued to refuse to renew the agreements related to the South African Post Office and Telkom services and the building lease agreements - all of which are central to [Tasima's] provision of services in respect of the eNaTIS system", and called for the agreement renewals to be attended to without further delay, but alas, with no effect.

68.3 The 6 June 2013 letter – “**FM29**” to the founding affidavit – repeated the call for contract authorisations.

[69] Such agreements have always been authorised in the past and the DoT has at no point proffered any reasons for its sudden failure to provide the relevant authorisations now.

[70] The Respondents' failure and refusal to authorise the agreements is highly prejudicial to Tasima and the orderly conduct of the eNaTIS system and in clear

breach of the Respondents' obligations under the Agreement and the Mabuse Order as well as the Strijdom Order, to the extent that it is an attempt to divert any of the Work away from Tasima and can lead to the crashing of the eNaTIS system which system is to remain operative in the National interest, at all times.

Koekemoer's & RTMC's Answer:

[71] Koekemoer states that:

71.1 Prior to renewal of a third party contract that has expired, a change note needs to be approved by the National Steering Committee; and

71.2 The standard procurement procedures in place within the DoT for the renewal of a third party contract include approval of a change note by the National Steering Committee which must thereupon be recommended by the DoT bidding committee for approval by the accounting officer, namely the DG.

[72] RTMC, mirabile, on the other hand, offers an entirely different explanation. This is remarkable given the fact that RTMC states that it has consulted with Koekemoer on the authorisations sought. RTMC states that the underlying Agreement is in dispute, and if RTMC allows Tasima to extend the said lease agreements in Tasima's name, and the Agreement is ultimately found to be void, then "[the DoT] would have authorised [Tasima] to enter into these long term lease agreements when their substratum ... have fallen away. It is for this reason that [Koekemoer] has previously refused to authorise an extension of these agreements", and RTMC will similarly not authorise an extension of these agreements. RTMC states that "the

landlords and service providers ... are ... happy to proceed on a month to month basis pending the resolution of the status of the agreement ...”.

[73] Koekemoer’s responses are a clear contrivance. Firstly the EPP (“FM7” to the founding affidavit) expressly contemplates the conclusion of third party contracts. Therefore reference to “the standard procurement procedures” is misplaced. Secondly, even if the conclusion of these contracts requires the approval of the National Steering Committee, the DoT, the DG and Koekemoer have, through their own inactivity (and through a breach of the Strijdom Order) failed to convene the National Steering Committee, as already demonstrated. Thirdly, the explanation advanced by RTMC has never been advanced or ventilated in correspondence.

[74] Clearly therefore, the DoT, the DG and Koekemoer are in breach of the Mabuse Order, and their breach is contemptuous.

THE URGENCY OF THE MATTER

[75] Our courts have held that, since it is vital to the administration of justice that those affected by court orders obey them, disregard cannot be tolerated and contempt applications are by their nature urgent. (See Civil Procedure in the Superior Court, by Harms, at para B45.4, B-316 – B-317 and the cases cited in footnote 2. In particular: Protea Holdings Ltd v Wriwt 1978 (3) SA 865 (W); Mutebwa v Mutebwa 2001 (2) SA 193 (Tk); Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng 2002 (1) SA 660 (T); Laubscher v Laubscher 2004 (4) SA 350 (T); and Victoria Park Ratepayers Association v Greyvenouw CC [2004] 3 All SA 623 (SE).) Firstly, prayer 3 of the notice of motion seeks an order (1) to make payment of approximately R118 million, which, as appears from the founding affidavit, Tasima is in desperate need of; (2) to grant various Outstanding

Authorisations, which the DoT did not even collect and even refused to take delivery of; (3) to authorise the conclusion of various long term agreements; and (4) to clarify who the Project / Programme Manager was. Quite apart from the fact that contempt applications are, by their very nature, urgent, Tasima explained, in great detail, why this relief was urgent and critical to the continued operation of the eNaTIS system. It is therefore unclear how RTMC can suggest that the relief is not urgent.

[76] The law on this issue being clear, Tasima, in any case, has made out a case as to why it is imperative in the National interest, to the operation of the eNaTIS system not being disturbed that the DoT, the DG and Koekemoer comply with their obligations under the Agreement and the Mabuse and Strijdom Orders as a matter of urgency. This is set out fully in the founding affidavit at paras 96 – 103, pp 42 – 44. It is unnecessary to repeat these reasons here. In any case in so far as the aspect of a possible overpayment to Tasima taking place this can in any case be checked and rectified later. Contracts being renewed also present no problem as they did not present problems in the past and it is only now the Respondents who are rocking the boat with a clear objective of getting Tasima out of the way. The Courts will not tolerate such devious conduct.

THE RELEVANT LEGAL PRINCIPLES

[77] Our courts draw a distinction between judgments sounding in money (ie a judgment *ad pecuniam solvendam*) which is one in which the judgment debtor is ordered to pay a specific sum of money; and judgments for the performance of certain acts (ie a judgment *ad factum praestandum*). Money judgments are not ordinarily enforced by contempt proceedings. Money judgments are enforceable by execution. (See *Jayiya v Member of the Executive Council for Welfare, Eastern Cape*, and another 2004 (2) SA 611 (SCA) at para [15]. See also *Nyathi v MEC for Department*

of Health, Gauteng and another 2008 (5) SA 94 (CC) which resulted in the amendment of the State Liability Act 20 of 1957, in order to allow for the effective execution against the state of money judgements.) On the other hand, orders for the performance of specific obligations not sounding in specified monetary amounts are enforceable by proceedings for civil contempt.

[78] This application primarily concerns the failure of the DoT and the DG to comply with certain performance obligations and, in particular, the obligations of the DoT and the DG to “*perform its obligations in terms of the agreement*” as provided for in the Mabuse Order, which are vital for the continued operation of the eNaTIS system. The same applies to Tasima’s claim for payment of R118 million so as to enable it to carry on with the running of the eNaTIS system. As appears from what is set out above, there is no valid dispute in relation to the Respondents’ obligation to make payment of this amount. Despite having approved the underlying PRQs, the Respondents seek to withhold payment of these amounts in flagrant violation of the terms of the Agreement. In the circumstances, these contempt proceedings are brought principally in respect of orders *ad factum praestandum*.

[79] Civil contempt is the wilful and *mala fide* refusal or failure to comply with an order of court. This was confirmed in *Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA). (See also *S v Sigwahla* 1967 () SA 566 (A); *S v De Bruyn* 1968 (4) SA 498 (C); *S v NguBane* 1985 (3) SA 677 (A)).

[80] In *Fakie v CCII* the court held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies. The applicant must therefore prove the requisites of contempt beyond a reasonable doubt, namely (1) the order, (2) service or notice of the order; (3) non-compliance with the terms of the order; and (4) wilfulness and mala fides in the non-compliance. However, once the applicant has proved (1), (2) and (3), the respondents bear an evidentiary burden in

relation to (4). Should the respondent fail to advance evidence that establishes a reasonable doubt as to whether his non-compliance was wilful and mala fide, the applicant would have proved contempt beyond a reasonable doubt.

[81] In the present matter Tasima has demonstrated the terms of the Court Orders. Notwithstanding the absurd contention advanced by the State Attorney in its letter dated 9 May 2013 (annexure “**FM27**”) to the effect that the Mabuse and Strijdom Orders were not “*served on the executive authority or accounting officer of the DoT*”, it is clear that the Respondents (the DoT, the DG and Koekemoer) received service and notice of the Mabuse and Strijdom Orders and –

81.1 The DoT and the DG sought leave to appeal against the Mabuse Order, which was refused; and

81.2 the Strijdom Order was made by agreement between Tasima and the DoT, the DG and Koekemoer’s legal representatives, and the DoT, the DG and Koekemoer were, at all times represented by the State Attorney and by Counsel who appeared, at the time the Strijdom Order was handed down.

There is thus no merit nor truth in the statement of the State Attorney.

[82] Furthermore, Tasima has demonstrated non-compliance with the terms of the Court Order on the part of the Respondents..

[83] No valid explanation has been forthcoming from the Respondents regarding the reasons for their failure to comply with the various terms of the Court Order. Either the Respondents have remained obdurately silent, or they have advanced spurious reasons in their correspondence and affidavits or they have a hidden agenda. The First, Second and Third Respondents in this very important matter did not file

affidavits and kept mum. As such they have shown a blatant disrespect for the Court and court procedures. Their conduct will be met with a punitive costs order.

[84] Thus, the Respondents have failed to discharge the evidentiary burden which rests upon them to show that their non-compliance was not wilful or *mala fide*. Indeed, the facts demonstrate the contrary. In the circumstances, we submit Tasima has proved contempt beyond a reasonable doubt.

[85] Where imprisonment is imposed, it is usually suspended in order to give the respondent a further opportunity to comply with the terms of the order. (See Civil Procedure in the Superior Court, by Harms, at para B45.4, B-316 – B-317) Prayers 4 and 7 of the Notice of Application comply with this imperative, and this formulation of the form of the relief sought follows closely orders granted in the reported cases in contempt proceedings, and in particular, the decisions in *Singer's Estate v Kotze* 1960 (2) SA 304 (C) and *Protea Holdings Ltd v Wriwt* 1978 (3) SA 865 (W).

CONCLUSION

[86] For the reasons set out above, it is clear that Tasima has made out a case for relief and that Tasima ought to be awarded its costs, including the costs incident upon the employment of two counsel.

[87] Costs should certainly be awarded on a punitive scale, having regard to the alarmingly contemptuous attitude adopted by the Respondents to compliance with, and the Respondents' persistent disregard of and history of non-compliance with the Court Orders and the contempt on the part of the DG for not even filing an answering affidavit and to file an affidavit by Koekemoer who apparently has been dismissed by the Department before this application was brought. As such the contents of

Koekemoer's affidavit has to be treated, in so far as the Court can pay attention to it as it apparently was not in the traditional legal methods authorised, with a measure of suspicion.

[88] The costs order will also be against RTMC who intervened in this application as the Fifth Respondent. RTMC participated fully in the opposition to the relief sought by Tasima; filed a lengthy answering affidavit; had counsel appear on its behalf at the hearing; and filed heads of argument. There is no basis upon which RTMC should not be obliged to pay the costs of the application.

[89] Tasima's counsel advised during the hearing that relief will be sought in terms of the amended prayers marked "B" to their heads of argument.

[90] The following order is accordingly made:

1. The matter is enrolled as an urgent matter and, insofar as may be necessary, dispensing with the forms prescribed by the Rules of this Honourable Court and directing that this application be heard as one of urgency under Rule 6(12) and the application by the Road Traffic Management Corporation, filed, late is also granted and it is allowed to intervene;
2. The Court declares the first, second, and fourth respondents to be in wilful contempt of:

2.1 paragraphs 1.1 and 1.2 of the Order of the above Honourable Court issued under case number 44095/2012, handed down by the

Honourable Mr. Justice Mabuse on 17 October 2012 the **Mabuse Order**);

2.2 paragraphs 3 and 4 of the order of the above Honourable Court issued under case no. 44095/2012, handed down by the Honourable Mr. Acting Justice Strijdom on 26 March 2013 (the **Strijdom Order**);

3. The Court declares that the first, second and fourth respondents are obliged to make payment to the applicant in the amount of R118 502 705,13.
4. The Court orders the first, second and fourth respondents to, within one day of the handing down of this order in open court, to make payment of the aforesaid amount of R118 502 705,13 to the applicant.
5. The Court orders the first, second and fourth respondents to, within one day of the handing down of this order in open court :
 - 5.1 to grant the authorisations and Approvals referred to and contained in the schedule annexed to the supporting affidavit of Fannie Lynen Mahlangu marked "FM8" as contained in the papers of the case ;
 - 5.2 to authorise the conclusion of the agreements set out in paragraphs 90.1 to 90.6 of the supporting affidavit of Fannie Lynen Mahlangu as it appears in the papers of this case.
6. The Court orders that:

- 6.1 The second and fourth respondents be committed to imprisonment for a period of 30 days;
 - 6.2 The order in paragraph 6.1 above will not come into operation if the first, second and fourth respondents comply fully and timeously with all their obligations imposed in paragraph 5 above;
 - 6.3 A warrant of committal is to be issued by this Honourable Court, on the same papers, duly supplemented as is necessary, if the first, second and fourth respondents do not punctually comply with the order in paragraph 5 above.
 - 6.4 In the event of warrants for the committal of the first, second and fourth respondents having been issued in terms of paragraph 6.3 above the Sheriff of this Honourable Court is authorised and directed to by his signature grant the authorisations and Approvals referred to and contained in the schedule annexed to the supporting affidavit of Fannie Lynen Mahlangu marked "FM8" as contained in the papers of the case and by his signature to authorise the conclusion of the agreements set out in paragraphs 90.1 to 90.6 of the supporting affidavit of Fannie Lynen Mahlangu as it appears in the papers of this case.
7. 7.1 Ordering the first, second and fourth respondents to convene a meeting by giving notice thereof within 3 days from the handing down of this judgment, which meeting is to take place within 20 days of the handing down of this judgment, of all of

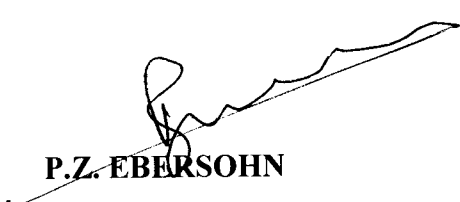
the eNaTIS governance structures, contemplated in Schedule 11 to the agreement (as set out in paragraph 4 of the **Strijdom Order**). Should they fail to do so the Sheriff is directed and authorised to immediately after the expiration of the three day period to give by his signature notice of such a meeting and to convene and if necessary to hold it.

- 7.2 Ordering the first, second and fourth respondents to in future regularly convene meetings of all of the eNaTIS governance structures, contemplated in Schedule 11 to the agreement (as set out in paragraph 4 of the **Strijdom Order**). Should they fail to do so within a period of three days after receipt of the request to call the meeting which is to take place within 20 days of the receipt of the request, the Sheriff is directed and authorised to give by his signature notice of such a meeting and to convene and if necessary to hold it.

8 It is ordered that:

- 8.1 the second, and fourth respondents be committed to imprisonment for a period of 30 days in the event of a failure on their part to convene and cause the meetings referred to in paragraph 7.1 and 7.2 above to be properly held ;
- 8.2 a warrant of committal is to be issued by this Honourable Court, on the same papers, duly supplemented as may be necessary, if the first, second and fourth respondents do not comply fully and timeously with the orders in paragraph 7.1 and 7.2 hereof.

- 9 The first, second, fourth and fifth respondents are ordered to pay the costs of the matter, jointly and severally, the one paying the other to be absolved, on the scale of attorney and own client which costs will include the costs of two counsel and including the costs of the heads of argument and supplementary heads of argument drawn by them.



P.Z. EBERSOHN

ACTING JUDGE OF THE HIGH COURT

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