

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2023-031211

- (1) REPORTABLE: NO
 (2) OF INTEREST TO OTHER JUDGES: NO
 (3) REVISED: NO

Date: 18 June 2025

MATSHELA MOSES KOKO

Intervening Applicant

and

SPECIAL INVESTIGATIVE UNIT

First Applicant

ESKOM HOLDINGS SOC LIMITED

Second Applicant

ABB SOUTH AFRICA (PTY) LTD

Third Applicant

REASONS

DE VOS AJ**Introduction**

- [1] Mr Koko sought leave to intervene in review proceedings involving the SIU, Eskom and ABB in which they obtained an order setting aside a tender. The application for leave to intervene was set down as a special motion. After considering the papers,

which exceeded twenty lever arch files and hearing submissions, the Court was not persuaded that Mr Koko had satisfied the test for leave to intervene. The Court therefore dismissed the application for leave to intervene. The parties are entitled to reasons for this decision. These are the reasons.

Review proceedings

- [2] Eskom and ABB entered into a contract for work to be done on the Kusile Power Station. The contract was preceded by a tender award. The award was tainted with irregularity. Law enforcement, local and international, investigated the award of the tender. They uncovered malfeasance perpetrated in the award of the tender. Eskom, the SIU, and ABB conducted their own investigations. They reached the same conclusion: the process preceding the award and the contract was internally flawed and contravened the procurement prescripts to which Eskom is bound.
- [3] Consequently, the contracting parties, Eskom and ABB entered into a settlement agreement. The parties agreed that ABB should repay the amount by which the contract was inflated and that it should complete the work, without making a profit. Treasury approved the settlement agreement.
- [4] The contracting parties then approached the Court, together as co-applicants, to review and set aside the tender and to make the settlement agreement an order of Court. The applicants before the Court in the review were Eskom, ABB and the SIU. They brought the case *ex parte* – as there was no dispute between them and they agreed on the relief that ought to be obtained.
- [5] To be blunt: co-contracting parties agreed that a tender was so tainted with irregularity, they jointly approached the Court to set aside the award. Part of their joint approach included an order that ABB would pay back R 1 557 107 009.00 to Eskom and in addition would complete the contract without making any profit. To use the words of Mr Leech SC who represented ABB, his client said “*mea culpa*”, has in acted in accordance with this concession and has in fact paid back the monies.
- [6] The review proceedings culminated in an order of this Court in which the Court set aside the award and the consequent agreements; made the settlement agreement an

order of court and provided for any interested party to approach the Court on notice and if granted leave to intervene, to attack the merits of the order.

[7] The relevant parts of the order read –

“4. The award and the conclusion of the Works Contract is hereby declared unlawful.

.....

8. The settlement agreement concluded between the applicants and concluded on 11 December 2020 is hereby made an order of court.

9. The First and Second Applicants are directed to publish this Order in one English National Newspaper and one Afrikaans National Newspaper circulating in the district in which the Second Applicant has its principal place of business, within 15 days of the date of grant of this Order.

10. Any interested party who has a direct and material interest in the orders set out in paragraphs 4 to 8 are called:

10.1 to apply, within 30 days of the last date of publication of this Court's Order as described above, for leave to intervene in the application and, in such application, to describe the nature of that party's interest in the relief sought and the relief which such party seeks; and

10.2 to show cause, on a date and on such terms as may be determined by the Court after receipt of any application under 10.1 above, why the aforesaid Order should be altered, varied or rescinded.”

[8] The order makes no references to Mr Koko.

[9] The Court provided reasons for the order. The reasons are quoted in full:

1. On 29 April 2015, the third applicant, ABB South Africa (Pty) Ltd (hereafter referred to as “ABB”), contracted with the second applicant Eskom Holdings SOC Limited (hereafter referred to as “Eskom”) for the provision of control and instrumentation system for the Kusile Power Station Project (hereafter referred to as “the Works Contracts”). Kusile is a coalfired power station being constructed under Eskom's nation building programme to increase Eskom's generating capacity.
2. The Works Contract was in broad terms for the provision of a control and instrumentation (hereinafter referred to as “C and I”) system at Kusile power station. The C and I system connects and controls all the operating and interfacing parts of the power station to ensure that the power station operates properly and safely.
3. The three applicants now apply to this court to set aside the works contract as a results of corruption and bribery that occurred in its reward.

4. This application is brought by the first and second applicants under the principle of legality. The third applicant bring the application in terms of the Promotion of Administrative Justice Act 3 of 2000.
5. The application is brought on an Ex parte basis. However, provision is made for interested parties to intervene after the C and I contract has been set aside and third parties may wish to be heard on the just and equitable relief.
6. Although the works contract was entered into unlawfully all three applicants agreed that the remaining and or outstanding works will be concluded by the third applicant under a new agreement between second and the third applicants.
7. The second applicant and the third applicant entered into a settlement wherein ZAABB had agreed to pay Eskom the amount of R 1 557 107 009.00 and this amount was paid in full on 22 December 2020. The applicants also seek an order from this Court to make the Settlement Agreement an order of court.
8. Furthermore this court is asked to make orders directing that certain evidence be treated confidentially. The court is also asked to admit in terms of section 3 of the Law of Evidence amendment Act 45 of 1988 some of the evidence relied upon in the founding affidavit.
9. It is submitted on behalf of the first and second applicants that the appointment of a different contractor will have costs implication for Eskom and the country as a whole and will result in delay. Load Shading will continue unabated.
10. Both counsel for the applicants agree that the order should be granted as per the notice of motion.
11. Both counsel referred the court to various decided cases in support of their views. The reasons in support of the draft order furnished by both counsel are plausible. In the premise the court is satisfied that a proper case has been made out for the relief sought. The draft order marked "X" and signed is made an order of court.

[10] The judgment contains no reference to Mr Koko.

Mr Koko's application for intervention

- [11] Mr Koko sought leave to intervene in the review application and to set aside the order. Mr Koko referred to what the parties have called "unflattering allegations" made against him in the papers filed in the review proceedings. He cites the headings that refer to him by name and the paragraphs that contain reference to his conduct. Mr Koko tells the Court that it is not only that he is mentioned by name, in unflattering circumstances, but that the order would not have been obtained had it not been for these allegations involving him. These allegations, he states further are incomplete and contain several untruths. Had he been cited he would have righted these wrongs.

As he was not cited, the principle of *audi alteram partem* has been breached. In addition, as the application was one brought *ex parte*, the applicants had an obligation of good faith to disclose all relevant facts, even those detrimental to their case, and they had failed to do so. Furthermore, Mr Koko refers to the closing of his bank account. This he says was precipitated by the settlement agreement and is proof of the reputational harm he has suffered.

- [12] At the hearing of the matter Mr Koko made a new plea. He stated that in a previous matter involving Eskom and McKinsey (*McKinsey order*),¹ he sought legal advice whether to intervene or not. In that matter the Court made an order that McKinsey had to pay monies back to Eskom. After the order, Mr Koko told the Court, he was served with a summons claiming large amounts of monies. Mr Koko fears the same procedure will be followed in this matter, particularly as the SIU has indicated in media statements that it intends to claim monies from Mr Koko. In essence, Mr Koko told the Court that not having been cited in these review proceedings, means he is limited in presenting a defence in potential future proceedings to be brought against him and he might suffer the same outcome as he did after the *McKinsey order*.

Test of direct and substantial interest in the subject matter and order

- [13] Mr Koko has to show a direct and substantial interest is the legal interest in the subject-matter of the case which could be prejudicially affected by the order of the Court.² This means that Mr Koko must show that it has a right adversely affected or likely to be affected by the order sought. The Court must identify the subject matter and order of the litigation. The subject matter is a review of a tender award. Mr Koko has to prove he has a direct and substantial interest in the review of the tender.
- [14] The test for intervention considers the impact of the order of the rights of the person seeking leave to intervene. A shareholder has a legal interest in a dispute that dissipates their shares.³ An occupier has a legal interest in a dispute that leads to

¹ Eskom Holdings SOC Limited v McKinsey and Company Africa (Pty) Ltd and Others (22877/2018) [2019] ZAGPPHC 185 (18 June 2019)

² South African Riding for the Disabled Association v Regional Land Claims Commissioner and Others 2017 (5) SA 1 (CC) ("SA Riding")

³ Morudi and Others v NC Housing Development Co Limited and Others 2019 (2) BCLR 261 (CC) at para 29

their eviction.⁴ Persons whose homes stand to be demolished pursuant to a court order have a direct and substantial interest in the underlying proceedings.⁵

[15] A third party has an interest in the relief and must be joined if they would have standing to claim relief on the same subject-matter. If a judgment cannot be sustained or implemented without necessarily prejudicing the interests of third parties who are not joined, then those third parties have a legal interest in the matter and must be joined.⁶ The judgment was sustained and implement, without Mr Koko's involvement. This indicates that Mr Koko no direct and substantial interest in the order. Furthermore, the order does not impose any obligations upon Mr Koko, nor does it deprive him of any rights, nor does it bestow any rights upon him — whether directly or indirectly. Mr Koko accepts this.

[16] The order and judgment has been quoted above. They contain no reference to Mr Koko. The Court considers that in *Zuma v NDPP*⁷ the Supreme Court of Appeal refused applications for leave to appeal brought by parties against whom adverse findings had been made in the reasoning of the Court. Even in those circumstances, references to a litigant in the reasons of the order is insufficient to ground a direct and substantial interest in the proceedings. Mr Koko's case is even weaker than the applicants in *Zuma v NDPP*, as here there is no reference to Mr Koko in either the reasons or the order. The only moment in which Mr Koko is linked in an order or reasons relating to this matter, will ironically be, as a result of his intervention application.

[17] On this basis alone, Mr Koko lacks a direct and substantial interest in the subject matter of the review proceedings. However, for fullness, the Court provides additional reasons to refuse the application for leave to intervene.

The order is one that operates *in rem*

⁴ *Snyders and Others v De Jager (Joinder)* 2017 (5) BCLR 604 (CC) para 11

⁵ *Zulu and Others v eThekweni Municipality and Others* 2014 (4) SA 590 (CC)

⁶ *Gordon v Department of Health, KwaZulu-Natal* 2008 (6) SA 522 (SCA) at para 9

⁷ *Id* para 9

[18] Orders, generally operate either *in personam*, in that it relates to a person or their rights; or *in rem*, which is binding on all. Uncited parties are bound by orders *in rem*, regardless of whether they were cited or not.⁸ Even if a party has a direct and substantial interest in the subject matter of proceedings for an order *in rem*, that does not entitle that party to intervene in the proceedings.

[19] This distinction has been drawn sharply by the Constitutional Court in *Gory v Kolver*:

“The common-law principles relating to intervention of parties applied by the courts in respect of Uniform Rule 12 deal primarily with disputes in personam, whereas an order under s 172 is an order in rem. In disputes concerning the constitutional validity of a statute, it would – so it was submitted - be impractical if 'the test of a direct and substantial interest in the subject-matter of the action is again regarded as being the decisive criterion'. This Court would not be able to function properly if every party with a direct and substantial interest in a dispute over the constitutional validity of a statute was entitled, as of right as it were, to intervene in a hearing held to determine constitutional validity. This submission is a convincing one.”⁹

[20] Thus where the order is one *in rem*, an intervening applicant must, in addition to showing a direct and substantial interest, also show that the intervention is in the interest of justice. The Constitutional Court stated considerations that would apply to this:

“This submission is a convincing one. In every case this Court must ultimately decide whether or not to allow intervention by considering whether it is in the interests of justice to grant leave to intervene. Thus, in cases involving the constitutionality of a statute, while a direct and substantial interest in the validity or invalidity of the statute in question will ordinarily be a necessary requirement to be met by an applicant for intervention, it will not always be sufficient for the granting of leave to intervene. Even if the applicant is able to show a direct and substantial interest, the Court has an overriding power to grant or to refuse intervention in the interests of justice. Other considerations that could weigh with the Court in this regard include the stage of the proceedings at which the application for leave to intervene is brought, the attitude to such application of the parties to the main proceedings, and the question whether the

⁸ *Airports Company South Africa v Big Five Duty Free (Pty) Ltd and Others* 2019 (5) SA 1 (CC) at para 2; *Marine 3 Technologies Holdings (Pty) Ltd v Afrigroup Investments (Pty) Ltd and Another* 2015 (2) SA 387 (SCA) at para 6

⁹ *Gory v Kolver NO and Others (Starke and Others Intervening)* 2007 (4) SA 97 (CC) at paras 11 to 13.

submissions which the applicant for intervention seeks to advance raise substantially new contentions that may assist the Court.”¹⁰

- [21] Therefore, even if Mr Koko had shown a direct and substantial interest in the subject matter of the proceedings, as the order operated *in rem*, he would also have to show that his intervention is in the interests of justice.
- [22] When considering the factors identified by the Constitutional Court, none of them weigh in favour of Mr Koko. The stage of the proceedings are far along – not only has an order been granted but it has been implemented. The attitude of the other parties in the main proceedings are oppositional to Mr Koko’s intervention and have provided a host of legal reasons to oppose his intervention.
- [23] In addition, the intervention does not seek to assist the Court. In fact, Mr Koko does not wish to set aside the award. Mr Koko avers that ABB had overpaid Eskom – and in this way the order ought to be interfered with after his intervention is granted. Mr Leech SC, in Court, categorically declined this offer and indicated his client was happy with the agreed amount and it had in fact already been paid. Other than this limited issue – Mr Koko does not wish to alter the award. Even if Mr Koko was granted leave to interevent, no effectively different outcome would be achieved. It unclear how it could be in the interests of justice to allow Mr Koko leave to intervene – only to let the order remain intact.
- [24] The Court concludes that it would not be in the interests of justice to permit Mr Koko leave to intervene in circumstances.

Reputational harm

- [25] Counsel for Eskom and the SIU submitted that the issue of reputational harm, as claimed by Mr Koko is a matter of settled law. The idea that a reputational interest may suffice has some superficial support in *Wynne*.¹¹ Counsel for Eskom and the SIU brought this case to the Court’s attention and submitted that there is some limited authority in *Wynne* for the proposition that where the reputational interest asserted is such that the subject-matter cannot be decided without determining the correctness

¹⁰ Id para 13

¹¹ *Wynne v Divisional Commissioner of Police and Others* 1973 (2) SA 770 (E) (“Wynne”) *Wynne* at 776A-B

of the allegations, the intervenor may well have a limited interest. As the Court observed in *Wynne*:

“One must undoubtedly sympathise with a third person who has no immediate way of rebutting apparently unnecessary and damaging allegations made against him by a litigating party. He is however not without any ultimate remedy, and sympathy for him cannot be allowed to constitute grounds for converting proceedings to which he has no right to be a party, into an action for defamation in which no pleadings have been filed, the issues have not been aired and no damages or other relief has been claimed; nor can I conceive of any sort of procedure whereby I could determine the present issue (as the intervening respondent apparently desires) by a declaration that the applicant's allegation against him are or are not true.”¹²

[26] This limited sense in which reputation may be relevant – does not arise in this matter. In addition on the facts of this case the subject-matter was decided without the Court having made express findings on the allegations regarding Mr Koko. The limited sense in which reputational harm has been weighed by a Court does not arise in these circumstances. In any event, the authority in *Wynne* is overshadowed by more recent and binding authority on point. Counsel for Eskom and the SIU relied on this authority in their written submissions wherein they summarise the legal position clearly in relation to six authorities.

[27] The first authority is *NDPP v Zuma*¹³ wherein the Supreme Court of Appeal held that the basic problem with an intervention application by Former President Mbeki and other cabinet members is that they have no interest in the order but only in the reasoning. This is insufficient. As intervening applicants, they are in the position of a witness whose evidence has been rejected or on whose demeanour an unfavourable finding has been expressed. The Court held that “such a person has no ready remedy, especially not by means of intervention.”¹⁴

[28] Whilst Former President Mbeki’s application was unsuccessful as the Supreme Court of Appeal held as it was insufficient to show an interest in the reasoning, without an interest in the order, Mr Koko cannot even show his name in the reasoning of the

¹² *Wynne* at 776G-H

¹³ *National Director of Public Prosecutions v Zuma* 2009 (2) SA 277 (SCA)

¹⁴ *Id* at para 85

Court. Mr Koko's facts are even weaker than those in *NDPP v Zuma* – which the Supreme Court of Appeal found wanting. When the reasoning of the Supreme Court of Appeal in *Zuma* is applied to that of this case, it is clear that Mr Koko does not satisfy the test for a direct and substantial interest. This authority is binding on this Court.

[29] The second authority is *B Xulu & Partners*.¹⁵ Herein Rogers J setting aside agreements concluded between the Department of Environmental Affairs and a law firm called B Xulu & Partners. The judgment by Rogers J made express findings of malfeasance against public officials in the Department. These officials applied to intervene in BXI's rescission challenge against Rogers J's judgment. The Court refused the application for leave to appeal as a direct and substantial interest in the outcome of the litigation is not established merely by the fact that judgment casts aspersions on a person's character.

[30] Third is *Central Energy Fund*,¹⁶ in which, like the present matter, it involved a review. Specifically, a legality review of the decision to sell strategic oil reserves. Mr Gamede, the former CEO of the Central Energy fund, was central to the impugned transaction was implicated in misfeasance. Mr Gamede sought leave to intervene as a party and to file an affidavit on the merits which – as Mr Koko in this matter – would correct the unflattering allegations made against him. In addition, like Mr Koko, Mr Gamede sought intervention on the basis that the judgment may adversely affect his reputation. Reputational harm, the Court held could not justify an intervention application.¹⁷ The Court suggested that a public statement may be the appropriate means by which Mr Gamede could vindicate his reputation.¹⁸

¹⁵ *B Xulu & Partners Incorporated v Department of Agriculture, Forestry and Fisheries & Another* [2020] ZAWCHC 99 (1 September 2020) at paras 56 – 57 ("B Xulu & Partners")

¹⁶ *Central Energy Fund SOC Ltd and Another Venus Rays Trade (Pty) Ltd and Others (4305/18)* [2020] ZAWCHC 164 (20 November 2020) ("Central Energy Fund")

¹⁷ *Central Energy Fund* at para [25]

¹⁸ *Central Energy Fund* at para [28] where Rogers J wrote: "To the extent that my findings reflect adversely on Gamede, they have been reached without regard to the evidence he wanted to adduce. If Gamede feels that a public statement setting out his side of the story is necessary to protect his reputation, my judgment will be no bar to his doing so."

- [31] Fourth, *Siyangena Technologies*,¹⁹ also involved a review. Herein PRASA applied to review and set aside contracts it concluded with Siyangena on grounds of legality. The review implicated PRASA executives in malfeasance and corruption, who were not cited as parties. The comparison can be drawn to the present case in which the parties to the agreement were cited, being Eskom and ABB, but not the employees or officials. The High Court halted the hearing in order to hear from the implicated executives. However, after a postponement a differently constituted Court heard the matter, disallowed the affidavits and upheld the review. On appeal, Siyangena contended that the affidavits should have been allowed.
- [32] The Supreme Court of Appeal disagreed and upheld the position that the intervening executives lacked a direct and substantial interest in the relief sought by PRASA. The Court held that there “is certainly no provision in the Uniform Rules of Court for the intervention of a witness in an application”. In addition the Court reasoned that as PRASA was not seeking relief against any of those identified as witnesses, they were not entitled to intervene. The Court weighed that the relief sought by PRASA was confined to the setting aside of the agreements, the contracts concluded with Siyangena and orders setting aside the arbitration agreements. In these circumstances the Court held that “none of those 'intervening witnesses' had any direct and substantial interest in the relief sought by PRASA.”²⁰
- [33] Mr Koko’s case falls within a similar factual scenario in which he has no interest in the relief sought and obtained by Eskom and ABB. The similarity between the cases are striking.
- [34] Fifth, is the matter of *Deputy Public Protector*²¹ in which a new Public Protector sought leave to intervene in proceedings concerning the erstwhile Public Protector’s enquiry. The High Court dismissed the application holding that as the order did not prejudicially affect the new Public Protector she had failed to establish a direct and substantial interest in the litigation.

¹⁹ *Siyangena Technologies (Pty) Ltd v Passenger Rail Agency of South Africa and Others* 2023 (2) SA 51 (SCA) (“*Siyangena Technologies*”)

²⁰ *Id* para 25

²¹ *Public Protector of South Africa v Speaker, National Assembly and Others* 2023 (4) SA 205 (WCC)

- [35] Sixth, the Constitutional Court rejected reputational interest as a basis for intervention in *Lebea*.²² The issue before the Court was whether Mr Lebea, an attorney against whom an adverse credibility finding was made a quo, could intervene to note an appeal. The Court held that Mr Lebea lacked the requisite direct and substantial interest in the order as his interest lay in the reasons for the order.
- [36] The Constitutional Court reaffirmed that test for direct and substantial interest, emphasising the interest must be in the order or the outcome, not its reasons. The Court held that “direct and substantial interest is a direct and substantial interest in the order that a court is asked to make in a matter” and that it is not enough “if a person has an interest in a finding or in certain reasons for an order”. The interest must be in the order or the outcome of the litigation. The Court held that an adverse credibility finding against Mr Lebea does not give him a direct and substantial interest.
- [37] When applied to the facts of this case – Mr Koko does not even have a damning finding against him in the reasons of the Court. Mr Koko he has failed to establish a direct and substantial interest.
- [38] Counsel for ABB referred the Court to a recent decision of this division in *Coetzer v Office of the OCJ*²³ handed down by Millar J on 13 May 2025. The facts of this case were that the applicants sought leave to intervene in an application for self-review of a tender awarded by the Office of the Chief Justice (OCJ) to Thomson Reuters (Professional) UK Ltd (TR). Pursuant to the award of the tender and signature of a contract between OCJ and TR, it emerged that the first to third applicants, former employees of the OCJ had established the fourth applicant and had then submitted and been awarded a sub-contract in terms of the main tender.
- [39] During the currency of their employ with the OCJ, the intervening applicants had in some way been involved in the adjudication and award of the tender or had knowledge of it. In the filing of its papers for the self-review certain technical grounds were raised as to why the award of the tender should be set aside. Additionally, the OCJ through

²² *Lebea v Menye and Another* 2023 (3) BCLR 257 (CC) (“Lebea”)

²³ *Coetzer and Others v Office of the Chief Justice* (043089/2023) [2025] ZAGPPHC 485 (13 May 2025)

its then Secretary General, also filed an affidavit in which certain allegations and concerns about the role of the intervening applicants.

[40] The intervening applicants did not oppose the reviewing and setting aside of the main tender. In addition, the sub-contract between the fourth applicant and TR has also since been cancelled. Save for any historical role they played in their erstwhile capacity as employees of the OCJ, they have no interest in the proceedings, save in one respect: the allegations made regarding their conduct while they were employees is false and defamatory and that the making of such allegations, without what they contend is any basis, was done purely to bring them into disrepute and to harm their reputations and future commercial prospects.

[41] Again, the factual similarities between the matter in *Coetzer* and that of Mr Koko are striking. In *Coetzer*, the Court held –

“To my mind, the main review proceedings will be decided based on the record of the proceedings which are under review. This record sets out the conduct of the applicants while they were employees of the OCJ. The court hearing the review will decide the relevance if any, of the conduct of the applicants regarding whether the review is to be granted or not and will consider the veracity and appropriateness of any adverse statements made about them in its consideration of the matter.

For the applicants, insofar as their past conduct while employed by the OCJ is concerned “*The moving finger writes: and having writ, Moves on: nor all thy Piety nor Wit shall lure it back to cancel half a Line, Nor all thy Tears wash out a Word of it.*” Their position is no different to any past employee of any institution whose conduct while employed is to be considered. The right to dignity is not in issue. Either the grounds of review premised on the conduct of the applicants have merit or they do not. The application to intervene, for the reasons I have given lacks any merit and must be refused.”²⁴

[42] These authorities halt Mr Koko’s application. They are clear, plenty, on point and categorically determinative of his application. The Court expressly raised these authorities with Mr Koko at the hearing. Mr Koko sought to distinguish them on the facts. They are not distinguishable and the fundamental principle established in these cases apply.

²⁴ Id paras 13 - 14

- [43] These authorities are also determinative of Mr Koko's reliance on the audi-principle. Mr Koko submits that the principle of audi alteram partem was breached in this case. Of course, the principle only applies if one has a right to be heard – as Mr Koko lacked a direct and substantial interest – the principle does not find application.

Mr Koko's experience after the McKinsey order

- [44] At the hearing Mr Koko implored the Court to consider the position he finds himself in. He informed the Court that after the *McKinsey order* he was met by the Sheriff at his house serving him with a particulars of claim. He informed the Court, from the bar, that prior to the order in *McKinsey* he obtained legal advice on whether he should seek leave to intervene. The advice he received was that he should not intervene premised on, amongst others, that the order would operate *in rem*. The exact advice received from his lawyers at the time was that if he were to seek leave to intervene he would be "blown [out of the water] with costs" by the Court.
- [45] Mr Koko explained that he accepted this advice and did not seek leave to intervene. Subsequent to the order, the Sheriff arrived at his door and served him with a summons claiming a significant amount of money from him. He wished not to repeat that same events in this matter, thus the application for leave to intervene in these proceedings.
- [46] The argument has some constraints. First, Mr Koko failed to plead this on the papers. The other parties are prejudiced if the Court were to consider this particular argument. On this basis alone, it is to be dismissed. Second, if the Court were to consider the argument, it engages with sophistry and events which have not yet occurred. Third, a party cannot seek leave to intervene in proceedings to stave off future hypothetical proceedings. Fourth, Mr Koko has failed to show how these proceedings have limited any defences he may be able to raise in future proceedings brought against him.
- [47] For these reasons, the Court refused Mr Koko's application for leave to intervene.
- [48] Mr Koko also launched an application for leave to adduce further evidence. As Mr Koko has failed to establish an interest in the proceedings, the application for leave to adduce further evidence is not entertained. Similarly, as Mr Koko has failed to

establish a direct and substantial interest in the proceedings, his submissions and allegations regarding the merits of the case are not entertained.

Costs

[49] Mr Koko has sought leave to intervene in circumstances where there is binding authority from all levels of our judiciary indicating that it would be inappropriate. Mr Koko was informed in the written submissions filed by the parties prior to this hearing of the principles at play. He persisted with the application. At the hearing, Mr Koko informed the Court that in similar prior proceedings he had received legal advice not to intervene as the application would be dismissed by the Court and might face a costs order. Mr Koko informed the Court of the legal principles which would lead to such a conclusion – as they had been relayed to him by his lawyers – which included the advice that the order operated *in rem*. Indeed, as can be seen from the reasons above, these include some of the reasons provided by his lawyers when advising him not to intervene.

[50] In short, Mr Koko launched an application to rescind an order in circumstances where he largely accepts the order is correct; where he is not mentioned in either the order or the judgment; for purposes of protecting his reputation – where there are two Supreme Court of Appeal judgments and one Constitutional Court judgment held this to be inappropriate – in relation to an order which operates *in rem*. In addition, Mr Koko was advised that this would result in a dismissal with costs – in similar previous proceedings.

[51] In these circumstances, a costs order is appropriate. The matter is complex in its history. The papers are voluminous reaching more than 20 lever arch files. Counsel for Eskom and the SIU consist of a team of four counsel – they sought only costs of two counsel. Costs on Scale C is appropriate in light of the complexity and sheer volume of the matter.

Order

[52] The Court ordered:

1. The application in terms paragraph 10 of the order of Makgoba J of 5 April 2024 is to be dismissed with costs including the costs of two counsel on scale C for the first

and second respondents; the third respondent on scale C for two counsel where so employed.



I de Vos
Acting Judge of the High Court

Delivered: This judgment is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be e-mailed to the parties/their legal representatives.

The intervening applicant: Self-represented
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Ms Chantel Carreira
Ms Angela Lawrence

Date of hearing: 29 May 2025

Date of order: 29 May 2025

Date of judgment: 18 June 2025