



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case no: 2025-070166

In the matter between:

PRIME AFRICAN (PTY) LTD

Applicant

And

ESKOM HOLDING SOC LTD

First Respondent

EDEN SECURITY SERVICES CC

Second Respondent

ENSEMBLE SECURITY SERVICES CC

Third Respondent

INRANITE SECURITY (PTY) LTD

Fourth Respondent

TDP ENTERPRISE (PTY) LTD

Fifth Respondent

Heard: 29 May 2025

Summary: Contempt of court - the contemnor may show good faith or substantial compliance - genuine reason for the failure to comply is a relevant consideration- When breach of a court order occurs due to circumstances beyond the control of the contemnor, and that it was, under the circumstances, impossible, to comply with the court order regardless of the degree of care exercised, this may serve as a legitimate excuse - Amendment of a court order- that introduces new wording, without the intention of correcting an error or misunderstanding, does not qualify under Rule 42 of the Uniform Rules of Court- principle of finality – Interdict - If the consequence of granting an interdict will have indirect effect of interfering with a court order, such an application to this Court must be incompetent - No court can issue an interim interdict against a court order.

ORDER

The application is dismissed with costs on punitive scale.

JUDGMENT DELIVERED ELECTRONICAL ON 25JULY 2025

Nziweni, J:

Introduction and background

- [1] This is an urgent application composed of two parts, A and B. Part A is the exclusive focus of this Court. In Part A, the applicant does not seek to enforce the order that was granted by Thulare J on 25 September 2024 ("the 2024 order"), as quoted in paragraph 7 of this judgment. However, it seeks that the first respondent ("Eskom") be declared in contempt of the 2024 order for failing to comply with paragraphs 3,4,5 and 6 thereof.
- [2] In Part B, the applicant seeks final review relief. According to the applicant, Part B may become moot if some of the relief sought in Part A is granted.
- [3] Both the first and the second respondents take issue with the application, claiming inter alia, that it is an ill-disguised attempt by the applicant, brought with an ulterior motive, to hold on to a contract, to rewrite the 2024 order, and to engage in an abuse of process. Hence, the opposition to the application.
- [4] The applicant seeks no relief against the fifth respondent, who is cited merely as an interested party; however, the fifth respondent also filed an answering affidavit together with heads of arguments. Further, the fifth respondent also seeks a relief against Eskom. An additional issue arose during the course of the parties' introductions regarding whether I could properly consider granting the relief sought by the fifth respondent.
- [5] The applicant, along with the third to fifth respondent, was awarded a tender by Eskom in June 2024, pursuant to a public procurement process, to render security services. Due to allegations of fraud against the tender awardees, the second respondent brought an application before Thulare J, to have the tender

award to be reviewed and set aside. The application that was brought by the second respondent was not opposed by the awardees and was argued only by Eskom and the second respondent. In those circumstances, the award of the tender to the applicant and the other respondents was reviewed and set aside by the 2024 order.

[6] To put the entire matter in context, it is necessary to recite at length the relief sought by the applicant in the notice of motion. In its notice of motion, the applicant seeks the following relief:

‘1. . .

2. That the First respondent is declared to be in contempt of the Court order granted by this Court on 29 September 2024 . . . to the extent that it failed to comply with paragraphs 3, 4, and 6 thereof.

3. That the first respondent’s conduct of failing to comply with the 2024 order is unconstitutional.

4. To give effect to the 2024 order and consequent upon the declaration of contempt and unconstitutionality in paragraphs 2 and 3 above, paragraph 3 of the 2024 order is amended to read as follows:

“The provisions of paragraphs 1-2 are suspended pending the conclusion of a valid and a lawful procurement process contemplated in paragraph 4 and the coming into force and effect of a contract or contracts concluded between the first respondent and the successful bidder or bidders in terms of that procurement process.”

5. The first respondent is ordered to comply with paragraphs 4 and 5 of the 2024 order and to commence a new open tender process contemplated therein within 4 months from the date on which this order is granted.

6. Pending the final determination of the review application set out in Part B . . . the first respondent is interdicted from:

6.1 Taking any further steps to implement or give effect to its decision to conduct an emergency procurement process for security services in the Helderberg and Overberg Sectors.

6.2 Terminating the applicant's contracts for the provision of security services in respect of the Helderberg and Overberg Sectors.

6.3 Appointing any new service provider(s) to render security service at the Helderberg and Overberg Sectors currently serviced by applicant . . .”

[7] The pertinent part of the 2024 order reads as follows:

“1. The decision to award Tender . . . to the second to fifth respondents is reviewed and set aside.

2. The award of the contracts concluded pursuant to the tender between the first and second to fifth is reviewed and set aside.

3. The provisions of paragraph 1-2 inclusive **will be implemented** and given effect to on or before 25 October 2024.

4. The matter of the tender is remitted to the first respondent for readvertisement for an open tender.

5. The invitation to bid for open tender will be published within a period of 4 months from the date of this order.

6. The first respondent shall, with effect from 25 October 2024, implement the outcome of an urgent procurement process for the interim rendering of the security services in the Cape Coastal Region which formed the subject of the tender.

7. The selection and appointment of any service providers, in terms of its urgent procurement process, will be made in accordance with the first respondent's procurement and supply chain management procedure . . . First respondent will commence with its urgent procurement process immediately”.

Parties' submissions

(a) Applicant's submissions

[8] First and foremost, the applicant submits that because Eskom is an organ of State, its failure to comply with a court order renders its conduct constitutionally invalid. To this end, the applicant contends that Eskom's failure to comply with the 2024 order constitutes contempt. The applicant also seeks an order declaring Eskom in contempt of the 2024 order and avers that its conduct [of Eskom] is unconstitutional.

[9] According to the applicant, section 165 of the Constitution requires two important responsibilities from Eskom, firstly, an organ of the State must assist and protect the courts to uphold their independence, impartiality, dignity, accessibility and effectiveness. And secondly, the effectiveness of the courts can only be realised if court orders are enforced and complied with.

[10] It is further argued on behalf of the applicant that the effect of paragraph 3 [of the 2024 order] is **to suspend paragraphs 1 and 2** for a limited period. The purpose of that suspension was to allow Eskom to accomplish two objectives. First, to embark on an urgent procurement process to address the immediate need, and thereafter in four months, commence a new full open tender process for all to engage in.

[11] Mr Tsatsawane SC, counsel for the applicant, argued that the suspension cannot remain in effect until Eskom completes the urgent procurement process.

[12] Mr Tsatsawane SC, conceded during his oral submissions that paragraph 3 of the 2024 order does not imply that the contracts concluded pursuant to the tender between the applicant and third to fifth respondent must continue. According to the Applicant, the date of 25 October 2025, was intended to establish a due date for Eskom to conduct an urgent procurement process, thereby allowing the suspension granted by Thulare J in paragraph 3 to be lifted.

[13] Without having followed such a course [run the urgent procurement process], so the argument ran, the suspension cannot fall away.

[14] The applicant draws this Court's attention to the papers submitted by Eskom. The applicant submits that, upon reviewing Eskom's affidavit, one may struggle to grasp two crucial points. first, what actions were taken to comply with the order, and second, what further steps are required to achieve compliance with the order?

[15] The applicant asserts that if this Court approves the amendment it is seeking, Eskom will be required to initiate a new open tender process for all parties involved. This indicates that the urgent procurement process falls away, as Eskom failed to execute it. Accordingly, Mr Tsatsawane submitted that, to remedy the failure by Eskom, it is just and equitable to simply focus on the open tender process.

[16] Mr Tsatsawane further argues that the applicant is relying on constitutional invalidity. And if this Court grants the order of constitutional invalidity, then it would be just and equitable to issue an order in terms of section 172 (1) (b) of the Constitution.

[17] Put another way, the applicant submits that this Court's authority to amend the order is rooted in section 172(1)(a) of the Constitution. This Court can amend the order in terms of section 172 (1) (b) of the Constitution.

[18] Accordingly, Mr Tsatsawane submitted that it is important for this Court to grant this order due to the lack of compliance with a court order. To support this argument, the applicant stated that the Court cannot simply remain passive and claim that the ship has sailed.

[19] It is further contended by the applicant that should this Court be inclined to grant the declaratory orders, the interdictory relief sought by the applicant in paragraph 6 of the notice of motion would no longer be necessary. However, if this Court is not inclined to grant the relief in terms of paragraph 4 [the amendment] of the notice of motion, then they contend that they are entitled to the interdictory relief.

[20] The applicant claims that their approach to the court is recent, prompted by Eskom's decision to terminate the contract that Thulare J had preserved and protected on 22 April 2025. Additionally, the applicant holds the view that the dates provided by Thulare J gave in his order are important, not only just for the progression of the but also for the conclusion of the contracts that he preserved and protected. The conclusion of those contracts is contingent upon the implementation of a new procurement process.

[21] The applicant is of the view that they were protected by the order of Thulare J, at all relevant times. Then, without warning, Eskom notified them that it has already embarked on the procurement process, excluding them from participation. He further claims that the applicant did not pursue these two reliefs [4 and 6] as alternatives.

[22] The applicant's counsel clearly articulated during his submission, that given the circumstances of this case, the fact that Eskom did not comply with the deadline, signifies the end of the matter. Notably, Thulare J, at one point, extended the deadline and granted Eskom a grace period to enforce the order.

(b) The fifth respondent's submissions

[23] The fifth respondent seeks a declaration of contempt against Eskom, along with an extension of their contracts with the [applicant and fifth respondent].

(c) Eskom and second respondent's submissions

[24] First and foremost, Eskom hold the view that there is no justification for scheduling the matter for an urgent hearing. It was further submitted on behalf of the Eskom that this Court does not have powers to interfere with a judgment that has already been granted.

[25] Eskom's counsel takes the position that the applicant is not attempting to enforce compliance through contempt but rather is trying to obstruct compliance for personal gain. As has been previously noted, that Eskom's submission further indicates that this application is a clear case of abuse of process. The second respondent submits that the applicant is before this Court merely in an attempt to extend a contract that was already set aside. According to the second respondent, the applicant and the fifth respondent, through this application, are attempting to prolong an interim contract through this application, following a notice of termination that has ended the interim contract. Mr Stelzner SC argued on behalf of the second respondent that the applicant and the fifth respondent seek to perpetuate contracts that were fraudulently obtained. So the argument continues, if this Court allows that, it will be creating a contract for the applicant and fifth respondent which no longer exist.

[26] According to Eskom's counsel, the applicant is pursuing the orders as outlined in its notice of motion; this is because it wishes the contract and the tender, which were set aside by the 2024 order, to remain in effect until the review proceedings are concluded. In those proceedings, they aim to challenge a decision [the emergency decision] that has yet to be rendered. On that premise, Mr. Oosthuizen SC contends that the applicant cannot have both

advantages simultaneously, in other words the applicant can't have its cake and eat it as well.

[27] Eskom's counsel argues that the applicant seeks to have this court stay all proceedings until a decision regarding the review of the emergency process is made. However, no such decision exists.

[28] During the course of his oral submission, counsel for Eskom's presented several arguments regarding the assertion that Eskom cannot be deemed to be in contempt of the 2024 order. In relation to the question of contempt, Mr. Oosthuizen further contends that it is peculiar for the applicant to seek a declaration of contempt against Eskom while simultaneously requesting that Eskom be prohibited from adhering to the same order.

[29] Mr Oosthuizen developed these submissions during his argument. He submitted that the urgent procurement process is now approaching completion, with only two final appointments pending. Eskom refutes the assertion of unlawful action by arguing that it remains committed to full compliance with the 2014 order.

[30] Counsel emphasises that this situation does not involve Eskom refusing to comply with the 2024 order, nor does it indicate that Eskom is unable to inform this Court about their adherence to the urgent procurement process. Thus, Eskom argues that this establishes compliance.

[31] It was submitted on Eskom's behalf that the applicant's claims are somewhat ill founded, disingenuous, self-serving and unrealistic. The assertion that

Eskom failed to provide dates and minutes of meetings, as well as to indicate the individuals who are to be appointed, is challenged, especially considering that the applicant initiated the application on a truncated timetable after delaying since October or November of the previous year to commence these proceedings.

[32] Eskom states that there is no obvious case of contempt in this matter, as the urgent procurement process was unexpectedly complicated by various requirements. Consequently, the completion of this process has been inadvertently delayed. Eskom also emphasised that the process is almost complete. According to Mr Oosthuizen, it is surprising that the applicant is proceeding in seeking the contempt of court relief, despite the fact that Eskom had informed the applicant that they are complying with the order.

[33] According to first respondent counsel, Mr Oosthuizen SC, the principle of finality of litigation would be undermined if this Court changes the order that was granted by Thulare J. In support of this argument, the applicant draws attention of the court to the decision of *Swart v Absa Bank Ltd* (2009 (5) SA 219 (C) (9 December 2008)). There is not a single authority so the argument ran, if court one has reviewed a matter and issued a remedy, another court can subsequently alter the substance of court one's remedy.

[34] It is further submitted on behalf of Eskom that section 172 of the Constitution has no application to the present case, as it does not establish a new basis for reversing a prior judgement that was not appealed.

[35] According to Mr Oosthuizen, the applicant seeks an amendment of the order due to recognising that it has a difficulty as far as the order is concerned. It is Eskom's contention that there is neither a necessity nor a justification for an amendment of the 2024 order to effectuate it.

[36] Mr Stelzner SC, counsel for the second respondent, contends that the contracts [mentioned in the 2024 order] have been terminated by the 2024 order. As a result, they ceased to exist. Mr Stelzner SC clarified that the contracts were set aside due to their unlawful acquisition. Further, counsel for the second respondent asserted that this Court cannot revive something that was unlawful in its entirety.

Analysis

(a) Urgency

[37] Though I am not satisfied that the applicant demonstrated that it could not afford to wait and have the matter heard on a normal court roll. It is however significant to note that in the circumstances of this case, it is appropriate and necessary for me to consider the issues that were raised. The merits of the matter will also reveal that there was no urgency in this matter.

(b) Contempt of court

[38] Failure to comply with a court order is unlawful. Contempt of court is inextricably intertwined with enforcement of court orders, as this connection is essential for safeguarding the rule of law and the administration of justice.

Obeying court orders also highlights public's confidence in the administration of justice. Hence, the dignity of the courts or respect of [courts'] authority is a key attribute in the preservation of due and orderly administration of justice. As such, the intersection between contempt of court and enforcement of court orders speak directly to the dignity of courts and administration of justice and depend on court orders being obeyed.

[39] The settled principle insists that a court order must be obeyed until and unless it is reversed or varied. In *Municipal Manager O.R. Tambo District Municipality and Another v Ndabeni* [2022] ZACC 3, the following was stated at paras 23-26:

[40]

“Trite, but necessary it is to emphasise this Court's repeated exhortation that constitutional rights and court orders must be respected. An appeal or review — the latter being an option in the case of an order from the Magistrates' Court — would be the proper process to contest an order. A court would not compel compliance with an order if that would be “patently at odds with the rule of law”. Notwithstanding, no one should be left with the impression that court orders — including flawed court orders — are not binding, or that they can be flouted with impunity.

This Court in *State Capture* reaffirmed that irrespective of their validity, under section 165(5) of the Constitution, court orders are binding until set aside. Similarly, *Tasima* held that wrongly issued judicial orders are not nullities. They are not void or nothingness but exist in fact with possible legal consequences. If the Judges had the authority to make the decisions at the time that they made them, then those orders would be enforceable.

Court orders are effective only when their enforcement is assured. Once court orders are disobeyed without consequence, and enforcement is compromised, the impotence of the courts and the judicial authority must surely follow. Effective enforcement to protect the Constitution earns trust and respect for the courts. This reciprocity between the courts and the public is needed to encourage compliance, and progressively, common constitutional purpose.”

Footnotes omitted.

[41] It is, of course, the case that the applicant alleges that Eskom is in wilful breach of the 2024 order. Applicant’s counsel spent considerable time addressing this [contempt issue]. It is perhaps not surprising that the applicant’s entire case is predicated on and fundamentally revolves upon the issue of contempt. Mr Oosthuizen SC argues quite sensibly that the applicant, amongst others, does not seek the enforcement of the 2024 order, but instead to restrain the enforcement of the order.

[42] In the instant case, the applicant claims that Eskom should be found in contempt of the 2024 order and it [the 2024 order] ought to be amended, failing which Eskom should be interdicted to exact a penalty for noncompliance, after the time for strict compliance has elapsed.

[43] The unusual feature of this case is that the applicant, whilst seeking a declaration of contempt against Eskom, does not seek relief of enforcement, but an amendment of the order. The applicant is solely pursuing a declaratory relief regarding the contempt aspect. One cannot help but wonder at the motive

of the applicant to formulate the relief it seeks in the fashion it did. Surely, as articulated by Mr Oosthuizen SC, the applicant cannot be heard to say in one and the same breath that Eskom is in contempt but does not seek an enforcement of the 2024 order. A mere declaration of contempt is a 'hollow relief' without enforcement. The one cannot exist without the other. Thus, the declaratory relief sought by the applicant would not yield any practical effect or result contemplated to preserve due and orderly administration of justice. Equally, a mere declarator of contempt is of no moment to Eskom, as it will not impose any binding effect upon Eskom.

[44] Clearly, the applicant does not seek a declaratory relief [with a legitimate objective] to resolve uncertainty nor a declaration of rights. Thus, the declaratory order sought by the applicant won't be binding upon Eskom. As one might have predicted, the challenge for the applicant in this case, is the fact that the amendment relief sought by the applicant is not an immediate consequence of the alleged contempt. In this matter, I am not convinced that the applicant's case satisfies the requirements for this Court to exercise its discretion to grant a declaratory order. It is pertinent to note, as was stated in *Rumbu v Mareka and Others* (239/16) [2017] ZAECHC 16 (14 November 2017), that:

"[19] A declaratory order is an order, by which a dispute over the existence of some legal right or entitlement is resolved. The right can be existing, prospective or contingent. A declaratory order need have no claim for specific relief attached to it, but it would not ordinarily be appropriate where one is dealing with events which occurred in the past. Such events, if they gave rise to a cause of action, would entitle the

litigant to an appropriate remedy. In this case there is no legal basis upon which the declaratory order in favour of the applicant can be made.”

[45] Even if I were to err regarding the declaratory aspect; I still hold the firm view that a clear case of contempt must still be made.

(c) Did Eskom commit contempt of court?

[46] In this matter, if regard is had to the terms of the 2024 order, it becomes evident that clause three (3) of the order created an emergency. There is no question as to the meaning and the terms of the 2024 order. As such, it is common cause that they are unequivocal. Hence, it is my view that this case does hinges on the construction of the 2024 order.

[47] Clearly, there was a need for an urgent procurement process that is different from the standard procurement process. Hence, the 2024 order authorised Eskom to engage in an emergency procurement to mitigate a circumstance that was likely to have had a negative impact on safety or avoiding harm on property. The emergency procurement in terms of the 2024 order was designed to be a time-limited solution. The 2024 order explicitly stated that, apart from authorising an emergency procurement process, its approval was contingent upon a time limit. It is also common cause that the deadline for Eskom to complete the emergency procurement process has indeed passed. Consequently, Eskom has failed to comply with the court ordered deadline.

[48] In the present matter, it is common ground between the parties that Eskom was bound to comply with the 2024 order as long as it remained in effect.

[49] A court order that stipulates a date for performance leaves no room for a litigant to choose whether, or when to comply with that order. The responsibility of courts is to ensure compliance with their own orders. It is the task of courts to make sure that their own orders are obeyed.

[50] Failure to comply with a court order is prima facie evidence of contempt of court and creates a presumption which may be challenged by the contemnor by demonstrating that they have a genuine reason for failing to comply with the order. Therefore, in order to rebut or to explain the prima facie appearance or evidence of contempt, the contemnor may show good faith or substantial compliance.

[51] It is trite that in contempt proceedings, the applicant needs to prove [on the part of the contemnor] a wilful disobedience of a court order. Contempt of court requires an intentional conduct in an act prohibited by a court order or intentionally refusing to do an act required by a court order. The word "intentional" denotes "wilful" or "deliberate. Thus, a failure to comply with an order of the court will not be contempt if there are genuine reasons for the non-compliance.

[52] In *Pheko and Others v Ekurhuleni Metropolitan Municipality (Socio-Economic Rights Institute of South Africa as Amicus Curiae)* [2015] ZACC 10 2015 (5) SA 600 (CC) 2015 (6) BCLR 711 (CC) (7 May 2015), at paras 32 and 36, it was stated:

"The pre-constitutional dispensation dictated that in all cases, when determining contempt in relation to a court order requiring a person or legal entity before it to do or not do something (*ad factum praestandum*), the following elements need to be established on a balance of probabilities:

(a) the must order exist;

(b) the order must have been duly served on, or brought to the notice of, the alleged contemnor;

(c) there must have been non-compliance with the order; and

(d) the non-compliance must have been wilful or *mala fide* . . . Therefore, the presumption rightly exists that when the first three elements of the test for contempt have been established, *mala fides* and wilfulness are presumed unless the contemnor is able to lead evidence sufficient to create reasonable doubt as to their existence. Should the contemnor prove unsuccessful in discharging this evidential burden, contempt will be established."

[53] The logical corollary of this is that the presence or the absence of a lawful excuse or genuine reason for the failure to comply is a relevant consideration. It is, therefore, necessary for the court to consider and give sufficient weight to the submissions of the alleged contemnor regarding the explanation offered for the non-compliance.

[54] In this matter, Eskom is providing reasons for its transgressions. Accordingly, on the one hand, Eskom insistently disputes that it wilfully breached the 2024 order but, rather, it maintains that it faced challenges associated with the procurement process. On the other hand, the applicant relies on a common

cause issue that Eskom has failed to make the deadline fixed by the 2024 order.

[55] Thus, the applicant identifies the nature of the complaint, as failing to make the deadline for finalising the procurement process as set out in the 2024 order. This begs the question whether the identification of the complainant is sufficient to prove that Eskom is in contempt of court. This is a vital question in the case.

[56] The applicant acknowledges that the emergency procurement process has commenced however, they allege that they were not invited to participate in it. In this matter, there is no evidence that Eskom intended to place itself in contempt. In this regard there is no evidence to evince that Eskom conducted itself in a manner designed to result in the breach of the 2024 court order. Accordingly, there is no evidence to show calculated deliberate acts to circumvent the judicial process.

[57] It therefore follows that Eskom has made a *bona fide* effort to comply with the 2024 court order. Accordingly, the non-compliance that makes [Eskom] susceptible to contempt, should not lead to a contempt finding merely due to a failure to literally comply with the 2024 order.

[58] The issue that aptly arises is whether or not Eskom wilfully disregarded the 2024 order. That clearly did not take place here.

[59] As mentioned above, Eskom states that it is in the process of finalising the emergency procurement process. To this end, at one point, Eskom went back to court to seek extension of the period stipulated in the 2024 order and the court granted the extension. Pursuant to this extension, the Eskom answering

affidavit, clearly demonstrates measures undertaken by it to comply with the 2024 order. The evidence before me does not suggest that [Eskom] failed to take action in an effort to prevent breaches of the 2024 order.

[60] Delays are inherent in the normal procurement process. The difficulties related to the emergency procurement process, may provide a genuine excuse of their failure to comply with the 2024 court order.

[61] When breach of a court order occurs due to circumstances beyond the control of the contemnor, and that it was, under the circumstances, impossible, to comply with the court order regardless of the degree of care exercised, this may serve as a legitimate excuse.

[62] Gleaning from Eskom's papers and Mr Oosthuizen's submissions, it becomes evident that it is the stance of Eskom that they have substantially and meaningfully complied with the 2024 order. To the extent that Eskom claims substantial compliance with the 2024 order, the papers in this matter demonstrates that the applicant has failed to adequately respond to [this] assertion made by Eskom. As such the Eskom's assertions have not been convincingly denied. There is nothing in the papers to suggests that Eskom showed bad faith or flagrant disregard of the 2024 order. At the risk of belabouring the obvious, the failure to comply with the timeline fixed in the 2024 order is not good enough to sustain a finding of contempt.

[63] Moreover, as indicated above, I remain unconvinced that the applicant succeeded in demonstrating on balance of probabilities that Eskom failed to take all reasonable steps within [its] power to comply with the 2024 court order.

As such it cannot be said that Eskom took no steps to assure that there was compliance with the 2024 order. As counsel for Eskom points out, despite the failure to timely comply with the 2024 order in a timely manner, there was a substantial compliance [with the 2024 order]. The upshot of this is that Eskom has offered proof in its papers that demonstrate facts, that indicate that compliance with the 2024 order was clearly impossible, regardless of the degree of care and diligence.

[64] Given the circumstances, I am inevitably drawn to the conclusion that it cannot be concluded that Eskom was in wilful breach of the 2024 order. There is nothing egregious about the conduct of Eskom that could justify a finding of contempt.

[65] What is apparent, however, is that as correctly noted by Eskom, in this motion for contempt, the applicant does not seek to enforce the 2024 order, but rather to amend it. Once more, this makes little sense, since the applicant strongly suggests that there had been blatant disregard of a court order. In my view, a motion for an offending party to be declared in contempt of court [contempt] that arises from an allegation of non-compliance with a court order, is inextricably tied to a relief for enforcement. Hence, in the circumstances, I find it an oddity that contempt is the relief pursued. I also find it strange that the applicant did not seek to persistently pursue issue of contempt consistently and at the time set out in the 2024 order. These questions remain unanswered.

[66] Even if I were to err regarding what constitutes contempt in this matter; I still hold the firm view that the applicant must still make out a case for an

amendment of the 2024 order. Thus, the next second major contention is the amendment of the 2024 order.

(c) Amendment of the 2024 court order

[67] The applicant in its founding affidavit states that in order to give effect to the 2024 order and consequent upon the declaration of contempt and unconstitutionality in paragraphs 2 and 3 above, paragraph 3 of the 2024 order should be amended.

[68] In *Minister of Justice v Ntuli* (CCT15/97, CCT17/95) [1997] ZACC 7; 1997 (6) BCLR 677; 1997 (3) SA 772 (5 June 1997) the following was stated:

“[29] The principle of finality in litigation, which forms the basis of the common law rules regarding the variation of judgments and orders, is clearly relevant to constitutional matters. There must be an end to litigation, and it would be intolerable and could lead to great uncertainty if courts could be approached to reconsider final orders made in judgments to declare the provisions of a particular statute to be invalid.”

Recently in *Newnet Properties (Pty) Ltd t/a Sunshine Hospital v The Road Accident Fund* (1150/2023) [2025] ZASCA 19 (14 March 2025), the following was stated at paras 17,18 and 20:

“[17] The centrality in our law of the principle of finality of court judgments has been emphasised in a long line of authorities.³ It is an incident of the rule of law and one which our courts have consistently enforced. The principle is also

reinforced by s 165 of the Constitution, which provides that an order of court binds all persons to whom it applies and organs of state to which it applies.

[18] This Court in *Firestone South Africa (Pty) Ltd v Gentiruco AG* (Firestone) said that: 'once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter, or supplement it. The reason is that it thereupon becomes *functus officio*: its jurisdiction in the case having been fully and finally exercised, its authority over the subject-matter has ceased.' The Court recognised that there are certain exceptions to the rule, such as variations in a judgment or order which are necessary to explain ambiguities, to correct errors of expression, to deal with accessory or consequential matters which were overlooked or inadvertently omitted, and to correct orders for costs made without having heard argument thereon. The list of exceptions is not exhaustive and the court has discretionary power to vary its orders in other appropriate cases. It stressed, however, that the 'assumed discretionary power is obviously one that should be very sparingly exercised, for public policy demands that the principle of finality in litigation should generally be preserved rather than eroded.' In *Molaudzi v S*, the Constitutional Court, dealing with the principle of finality in the context of the doctrine of *res judicata*, cited Firestone with approval and held that: '[W]here significant or manifest injustice would result should the order be allowed to stand, the doctrine ought to be relaxed in terms of sections 173 and 39 (2) of the Constitution in a manner that permits this Court to go beyond the strictures of rule 29 to revisit its past decisions. This requires rare and exceptional circumstances, where there is no alternative effective remedy. The Court further cautioned that the inherent power to regulate process, does, however, not apply to substantive rights but only to adjectival or procedural rights.'

[20] Having regard to the aforementioned legal principles, there can be little doubt that the high court's order offends the principle of finality of court orders. By directing the appellants to comply with pre-summons procedures despite the existence of valid court orders against the RAF, the high court has impermissibly reopened the lis between the parties."

[69] In *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) 307C-G: the following is stated:

"The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention This exception is confined to the mere correction of an error in expressing the judgment or order; it does not extend to altering its intended sense or substance. KOTZÉ, J.A., made this distinction manifestly clear in [*West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173 at 186 7], when, with reference to the old authorities, he said:

'The Court can, however, declare and interpret its own order or sentence, and likewise correct the wording of it, by substituting more accurate or intelligent language so long as the sense and substance of the sentence are in no way affected by such correction; for to interpret or correct is held not to be equivalent to altering or amending a definitive sentence once pronounced.'

[70] In *S v Wells* 1990 (1) SA 816 (A) 820C-F the court stated the following:

"The more enlightened approach, however, permits a judicial officer to change, amend or supplement his pronounced judgment, provided that the sense or substance of his judgment is not affected thereby (*tenore substantiae perseverante*). . . . According to Voet a Judge may also, on the same day, after

the pronouncement of his judgment add (supplere) to it all remaining matters which relate to the consequences of what he has already decided but which are still missing from his judgment. He may also explain (explicare) what has been obscurely stated in his judgment and thus correct (emendare) the wording of the record provided that the tenor of the judgment is preserved.”

[71] Indeed, it was in this vein that, as I have previously observed, the applicant’s argument postulates that, should this Court grant the declaratory orders, the direct sequelae arising from that is that it would be just and equitable to amend the 2024 order. The applicant seeks that paragraph 3 of the 2024 order should be amended to read as follows:

“The provisions of paragraph 1-2 are suspended pending the conclusion of a valid and lawful procurement process contemplated in paragraph 4 and the coming into force and effect of a contract or contracts concluded between the first respondent and the successful bidder or bidders in terms of that procurement process.”

[72] The original paragraph 3 reads as follows:

“The provisions of paragraph 1-2 inclusive will be implemented and given effect to on or before 25 October 2024.”

[73] As can immediately be seen; the applicant seeks to introduce something new with the amendment, that was not part of Thulare J’s consideration when he made the 2024 order. It must nevertheless be added that, the applicant’s request for an amendment [of the 2024 order] would involve significant material

changes to paragraph 3 of the 2024 order. As stated above, that the applicant holds the view that this Court derives its power to amend the 2024 order from section 172 (1) (b) of the Constitution. I emphasised this point because I am not convinced that section 172 (1) (b) of the Constitution supports such a proposition as postulated by the applicant's argument. More importantly, the applicant's argument overlooks the fact that in this matter, there is no constitutional dimension.

[74] It is Eskom's contention that there is neither necessity nor a justification for an amendment of the 2024 order to effectuate it. Eskom further argues that the manner in which the amendment is sought, directly reflects the intention of the party. In addition, Eskom objects to the requested amendment on the basis that it amounts to the applicant's attempt to enrich themselves. In the present case, it is unclear why the applicant is not explicitly pursuing enforcement of the 2024 order but, instead seeks the amendment thereof.

[75] I should also mention that I agree with Eskom and the second respondent that the applicant is trying to change the terms of the 2024 order in a way that will only be beneficial to it. The applicant's position seems to me to be compounded by the fact that if the applicant had a legitimate concern about contempt, which they may have, regarding Eskom's breach of the 2024 order, their appropriate course of action should involve seeking censure for the contempt rather than pursuing an amendment.

[76] The applicant seeks this Court to reconsider the decision by Thulare J. As previously mentioned, the applicant requires that this Court to make a significant amendment to the substance of the 2024 order.

[77] It is, of course, the case that in so far as the proceedings before Thulare J are concerned, he exercised his authority and made a determination on the application presented to him. Thulare J, through the 2024 order signified a conclusion.

[78] The 2024 order was never appealed, and the window for appeal has lapsed. Regarding the 2024 order it reached a point of *functus officio* for every judge. The decision of Thulare J was rendered, and it is final. As such, everyone including this Court is bound by its [2024 order]. This Court has a duty to respect the finality of proceedings.

[79] For a court to acquire jurisdiction to entertain the amendment sought, or to alter, or change an existing order, certain requirements must be met. Thus, there is a benchmark for modifying a court order. The above cited authorities attest that this is not a novel position.

[80] An amendment to an order that introduces new wording, without the intention of correcting an error or misunderstanding, does not qualify under Rule 42 of the Uniform Rules of Court. It is not surprising that the applicant did not seek to invoke the provisions of Rule 42. Insofar as the amendment sought by the applicant, by any stretch of imagination, it goes beyond what this Court can do. Certainly, this Court has no power to reopen issues on this matter and make

substantive decision. It seems to me that there is no rational basis for the amendment sought.

[81] It is clear that court orders of this nature cannot be amended or revisited due to change in circumstances. In other words, court orders must remain stable and not change unpredictably. Courts cannot unravel their own orders. Hence, a High Court order can only be amended in terms of Rule 42 (1) (b) where a court order or judgment contains mistakes, ambiguities, or omissions which the court must correct or clarify, or it is in the public interest to do so. It is clear therefore, that the reliance on the Constitution and contempt of court is misguided. There is absolutely no basis to revoke the jurisdiction of this Court to amend the 2024 order.

[82] Moreover, regarding the applicant's alleged non-compliance, the applicant merely seeks declaratory relief and an amendment of the 2024 order. The intended effect of the amendment relief sought by the applicant is an entire unravelling of paragraph 3 of the 2024 order. The relief requested makes no sense. It is a quantum leap. Hence, I have concluded that this remedy is not reasonable. I unhesitatingly accept and fully agree with Mr Oosthuizen SC. when he submits that, as far as the applicant's motives are concerned, there is a clear picture emerging here. It appears as though the applicant has brought this application for the purpose of self-preservation. I want to emphasise a point made by Mr Oosthuizen SC on behalf of the Eskom, that this is an endeavour by the applicant to line their pockets. This brings us to the curious matter of the interdict relief sought.

(d) Interdict relief

[83] An interdict serves as a drastic and more intense remedy. As far as this relief is concerned, I understood counsel for the applicant to argue that in the event this Court is not inclined to grant the declarators, then the applicant is seeking an interim interdict relief against Eskom, to prevent [Eskom] from:

- (1) Taking any further steps to implement, or give effect to its decision to conduct an emergency procurement process for security services at Helderberg and Overberg Sectors;
- (2) Terminating the applicant's contracts for the provision of security services in respect of the Helderberg and Overberg Sectors; and
- (3) Appointing any new service provider(s) to render security service at the Helderberg and Overberg Sectors currently serviced by applicant.

[84] As noted previously, the 2024 order gave Eskom the responsibility to conduct an emergency procurement process. The interdict relief sought by the applicant creates a distinct impression that it aims to avert the implementation of paragraph 3 of the 2024 order. The effect of granting the remedy sought by the applicant would be far reaching. Clearly, the result of granting this interdict would be to effectively hinder a court order from being effective.

[85] As such, part of the interdict relief sought by the applicant requires this Court to restrain Eskom from enforcing specific terms of a court order. At the risk of repeating, there is no question, of course, that orders of court must be obeyed unless or until set aside. Interestingly, in this matter, the applicant does not assail the court order. Yet, the applicant wants to nullify Thulare J's judgment in a court of equal standing.

[86] It is not the function of this Court to second guess or interfere with the decision of Thulare J. What the applicant is seeking would create a confusion. I view this as an effort by the applicant to circumvent the 2024 order through indirect means.

(e) Prima facie case

[87] Assuming I am mistaken about that and that the applicant is competent before this Court, the next question is whether the requirements of an interim interdict are satisfied. Turning to the issue of a prima facie right, the question which then arises is whether the applicant has established a prima facie right even if it is open to some doubt. As I understood the applicant's position, it is that they are seeking the interdict because they were not invited to the procurement process.

[88] It is common cause that there is no decision that Eskom has made as far as procurement process is concerned. This Court does not have all the facts related to the procurement processes that the applicant is referring to. Even the background that led to the 2024 order discloses no relevant basis of a prima facie right.

[89] This then begs the question, particularly in the light of the fact that the interdict will have an impact on a court order, what prima facie right does the applicant have to interdict the enforcement of an order.

[90] As has been noted earlier, the tender that was awarded was reviewed and set aside under allegations of fraud. The 2024 order appropriately mandated that

an emergency procurement process should be conducted and the contracts should be set aside. The fact that the applicant states that they were not invited to the recent procurement process, has absolutely nothing to do with the 2024 order. Why should it then affect the 2024 order.

[91] Viewed in light of the above consideration, the applicant lacks even a prima facie right, one that is subject to any uncertainty. If this Court interdicts Eskom from performing the terms of the 2024 order, the corollary to this is that this Court is asked to interdict the 2024 court order and to enjoin Eskom not to comply with the order. Surely, if the consequence of granting an interdict will have indirect effect of interfering with a court order, such an application to this Court must be incompetent. Thus, it is noteworthy, to mention that no court can issue an interim interdict against a court order. Consequently, the interdict relief sought by applicant in this matter, cannot be obtained against a court order.

(f) Injury actually committed or reasonably apprehended

[92] In reality, the interdict sought by the applicant will not interdict Eskom, but rather it will address the terms set forth in the 2024 order. This clearly demonstrates that the applicant seeks to accomplish something indirectly through an alternative route via interdict. Therefore, this specific requirement is not met.

(f) Balance of convenience

[93] As indicated before, Eskom is under obligation to comply with a court order.

On the other hand, the applicant has presented no grounds for having any title to argue for the interdict. But, more importantly, in the circumstances, to say that a balance of convenience in this matter favours the applicant would be an exaggeration.

[94] The argument in support of the applicant's contentions completely escapes this Court and, in my view, they do not merit discussion.

(g) the absence of similar protection by any other remedy

[95] If the applicant is dissatisfied with the manner in which Eskom is conducting a procurement process, they can utilise an internal process of ESKOM, to challenge the process instead of using a strong remedy like an interdict. In the circumstances, the relief for interdict should also be refused.

CONCLUSION

[96] This application was a malicious use of court process for ulterior motives. The claims by the applicant and fifth respondent were conclusory, frivolous and without merit on either the facts or the law. The conduct warrants a punitive cost order. The applicant should pay the costs of Eskom and the second respondent on a client own attorney scale, including the costs for the employment of two counsel. The fifth respondent is not entitled to any cost order. The fifth respondent is to pay its own costs.

[97] In the result, I make the following order:

ORDER

1. The application is dismissed
2. The applicant is ordered to pay the first [Eskom] and second respondents' costs on attorney and client's scale
3. The costs will include the costs of employment of two counsels, where employed.
4. Fifth respondent to pay its own costs.



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JUDGE OF THE HIGH COURT

APPEARANCES

For the applicant	:	Mr K Tsatsawane SC Mr D. Lubbe
Attorneys	:	Dirk Kotze Attorneys
For the first respondent	:	Mr AC Oosthuizen SC Ms D Mokale
Attorneys	:	Rahman Incorporated
For the second respondent	:	Mr R G Stelzner SC
Attorneys	:	Eben Klue Attorneys
For the fifth respondent	:	Mr X Hilita