

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case Number: 2025-217224

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

9 February 2026

DATE

SIGNATURE

In the matter between:

PCM MINING SUPPLY (PTY) LTD

Applicant

and

GLENCORE OPERATIONS SOUTH AFRICA (PTY) LTD

Respondent

This judgment and the order incorporated herein is handed down electronically by circulation to the parties' legal representatives by e-mail and uploading to CourtOnline.

JUDGMENT

Moultrie AJ:

[1] This matter arises from a written agreement pursuant to which the applicant was to provide mining-related services to the respondent for a period of five years until 31 January 2027. On 30 October 2025, the respondent notified the applicant in writing that the agreement would terminate 90 days later. It is common cause that

the termination notice was issued pursuant to clause 24.1 of the agreement, which states that “[the respondent] may terminate this Agreement on 90 (NINETY) days written notice to [the applicant]”. It is also common cause that no reasons were given in the notice.

[2] Contending that the termination notice was invalid, the applicant approached the court seeking interim interdictory relief restraining the respondent from giving effect thereto and ordering it to comply with the agreement pending the outcome of a dispute resolution processes (including an arbitration) to be conducted in accordance with the relevant provisions of the agreement. The applicant stated that “the core question that the arbitrator will be asked to adjudicate is whether the respondent was entitled to unilaterally terminate the agreement without furnishing the applicant with the reasons” for the termination, and further that “the arbitrator will be asked to refuse to enforce [clause 24.1] because it is against public policy when it is invoked without furnishing reasons for the termination”. The applicant, who was represented at the hearing by Mr Chabane, sought an order requiring the respondent to “pay the costs of this application on scale B”.

[3] The respondent opposed the application on a wide front, including expressly on the basis that “[u]nder clause 25.4 of the service agreement, each party expressly consents to the arbitration being conducted on an urgent basis and irrevocably authorises the other party to apply, on behalf of both parties, for such arbitration to be conducted on an urgent basis”. Counsel for the respondent (Mr Clark, who appeared together with Mr Lewis) argued that the applicant not only had an alternative remedy, but also that it had failed to establish urgency because the dispute could be determined in the arbitration proceedings. In its answering affidavit,

the respondent sought an order that the applicant be required to pay the costs of the application, including the costs of two counsel where employed on Scale C. Punitive costs were not sought.

[4] Subsequent to the hearing, the parties advised the court that the arbitration proceedings had taken place and that an award has been given, with the result that the application has been rendered moot other than in respect of the question of costs. In view of the fact that what actually transpired was precisely the scenario postulated by the argument referred to above, and given that counsel for the applicant argued at the hearing that costs (including the costs of counsel) should follow the result, it is clear that the applicant should be ordered to pay the applicant's costs. The only remaining questions are whether these costs should include the costs of one or two counsel, and whether such costs (i.e. of counsel)¹ should be awarded on scale "B" or "C".

[5] Although Uniform Rule 69(1) contemplates that the court may "authorise" "fees consequent upon the employment of more than one advocate or attorney having right of appearance in the Superior Courts and who appears", it does not expressly stipulate the factors to be considered by a court in determining the circumstances under which such authorisation should be given. As such, this is a matter governed by the common law, under which the courts are entitled to exercise a discretion on the basis of whether it considers that it was a "*wise and reasonable precaution*" to employ additional counsel in view of the particular circumstances of the case (or its consequences), having regard to factors such as the amount

¹ As was pointed out in *Mashavha v Enaex Africa (Pty) Ltd and Others* 2025 (1) SA 466 (GJ) para 5, the award of costs on scale "A", "B" or "C" only applies to the costs of counsel, in the sense of "any legal practitioner, whether a referral advocate, a trust account advocate or an attorney with higher appearance rights, who actually does the work of counsel".

involved and the nature of the issues in dispute, the length of the hearing or argument, the importance of questions of principle or of law involved, and the number of legal authorities quoted.²

[6] With regard to the scale of fees, Rule 69(2) requires that “where fees in respect of more than one advocate or attorney having right of appearance in the Superior Courts and who appears [sic] are allowed in a party and party bill of costs, the fees to be permitted in respect of any additional advocate or attorney having right of appearance in the Superior Courts and who appears, shall be on a scale in terms of subrule (7), as directed by the court”. Rule 67A(3) provides that the factors to which the court “may have regard” when determining the scale of counsel’s fees in terms of Rule 69 are (i) the complexity of the matter; and (ii) the value of the claim or importance of the relief sought.

[7] I am of the view that the application was far from “straightforward and not complicated”, as Mr Chabane was content to describe it in his heads of argument. To the contrary, just some of the difficult questions with which I found myself grappling prior to being advised of the mootness of the application included the following:

- a. Was the applicant’s pleaded case truly a purely legal contention based on the common cause fact that the respondent terminated the agreement without “*furnishing*”, “*proffering*” or “*providing*” its reasons, or did the founding papers also advance two additional (apparently alternative) contentions (both of which were factually disputed), namely that that the notice was unenforceable because: (i) there was no reason at all for the

² See Van Loggerenberg *et al* Superior Court Practice. Looseleaf, RS26 (Juta, 2025) at D1 p. 69-3 and the cases cited there.

termination; and/or (ii) there was no “substantiated” reason therefor?³

- b. Was the applicant entitled to expand its pleaded case in reply to include the legal contention that the respondent was required to observe the principle of *audi alteram partem* and afford the applicant an opportunity to answer the (disputed) complaints against it “in some form of an inquiry” before issuing the termination notice, combined with the factual allegation that this was not done?
- c. Did the attacks on the termination notice operate at the level of interpretation of the agreement,⁴ at the level of the enforceability of the agreement, or at the level of the act of termination itself?
- d. Given that it was not the applicant’s pleaded case⁵ that a provision in any private fixed-term contract allowing one of the parties to terminate it on notice without furnishing reasons (or without reasons; or without valid reasons; or without allowing *audi*) is unenforceable, what specific factual features of the case were relevant and relied upon to render its “invocation” in this particular instance unenforceable?
- e. Given the consequent centrality of the factual matrix to the pleaded case, whether the existence of a “*viable case*” is the standard to be met by an applicant seeking to establish a *prima facie* right, in view of the equal

³ In this regard, the applicant made the factual allegation that the issuing of the termination notice by one of its general managers was “a decision influenced by personal whims and nothing else” and that he “abused” the clause “to settle personal scores for whatever reason”. The applicant pre-emptively alleged that that “any reason that will be proffered at this stage is an afterthought to rationalise an otherwise sham decision taken by the general manager”

⁴ I was somewhat baffled by the contention in the founding papers that “this clause did not envisage a situation where the respondent can terminate the contract simply because it feels like doing so”.

⁵ I should note that this was Mr Chabane’s submission during argument.

‘split’ of the Constitutional Court in the recent *Eskom*⁶ case?

[8] It was precisely because there is (as Mr Chabane conceded) no established authority directly in support of the novel relief sought (i.e. other than the general statements made by the Constitutional Court in *Beadica*) that Messrs. Clark and Lewis were justified in undertaking an extensive expedition through the sometimes contradictory authorities dealing with the factors to be considered by a court before it may conclude that the common law of contract should be developed on the basis of Constitutional principles in specific factual circumstances. This task was also justified by the financial consequences that might potentially arise should the applicant have been successful: according to the respondent, the continuation of the agreement would have required it to pay approximately R450,000 per month to the applicant.

[9] Taking all of this into consideration, I am of the view that it was a wise and reasonable precaution for the respondent to have appointed two counsel to undertake the complex and important task of preparing written and oral argument in the limited time available. For the same reasons, I consider that the costs of both counsel should be payable on scale “C”.

[10] In the circumstances, the applicant is ordered to pay the respondent’s costs, including the costs of two counsel where so employed on scale “C”.

RJ MOULTRIE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG

⁶ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC).

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