



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

**DELETE WHICHEVER IS NOT
APPLICABLE**

- (1) NOT REPORTABLE.
- (2) NOT OF INTEREST TO OTHER JUDGES
- (3) NOT REVISED.

CASE NO: **2020/33700** and
2021/35990 and

In the matter between:

FRASER SOLAR GMBH

Applicant

and

TRANS-CALEDON TUNNEL AUTHORITY

First Respondent

KINGDOM OF LESOTHO

Second Respondent

**LESOTHO HIGHLANDS DEVELOPMENT
AUTHORITY**

Third Respondent

STANDARD BANK OF SOUTH AFRICA

Fourth Respondent

**THE SHERIFF OF THE COURT : JOHANNESBURG
CENTRAL**

Fifth Respondent

THE SHERIFF OF THE COURT : CENTURION EAST

Sixth Respondent

In re:

TRANS-CALEDON TUNNEL AUTHORITY

Applicant

and

FRASER SOLAR GMBH	First Respondent
KINGDOM OF LESOTHO	Second Respondent
LESOTHO HIGHLANDS DEVELOPMENT AUTHORITY	Third Respondent
STANDARD BANK OF SOUTH AFRICA	Fourth Respondent
THE SHERIFF OF THE COURT : JOHANNESBURG CENTRAL	Fifth Respondent
THE SHERIFF OF THE COURT : CENTURION EAST	Sixth Respondent

JUDGMENT

YACOOB J:

1. The applicant (“FSG”) approaches this court on an urgent basis for an order:
 - 1.1. declaring the first respondent (“TCTA”) to be in contempt of court, and
 - 1.2. that the order of Matojane J on 08 November 2021 in this matter requires funds held pursuant to writs and attachments effected by the Sheriffs of the Court: Johannesburg Central and Centurion-East at FSG’s instance to be held and not paid out and that any funds paid from accounts holding such funds by the TCTA to the second respondent (“the Kingdom”) be returned and not paid out, pending the determination of the stay application brought under case number 2020/33700.

2. The Kingdom brings a conditional counter-application for the determination of the stay application, should FSG be successful.
3. The applications under 2020/33700 and 2021/35990 have been under case management and have been consolidated. The basis of both the urgency and the substantive relief sought in both the application and the counter-application before me is, naturally, to be found in the factual history, so I will set that out before dealing with whether the application is urgent.
4. FSG obtained an arbitration award in its favour against the Kingdom, which obliged the Kingdom to pay FSG €50 million. The Kingdom disputes the validity of the contract on which the award is based, as well as the award itself. On 3 May 2021 the award was made an order of court, according to the Kingdom without proper notice to it. At this point, however, it is only the existence of the order on 3 May 2021 that is relevant.
5. FSG sought fulfilment of the order by attaching, or beginning a process to attach, the Kingdom's assets (or assets it contends are those of the Kingdom), particularly in South Africa. The assets sought to be attached include the bank account of the TCTA, which pays millions of rands to the Kingdom monthly in return for water provided to the Republic of South Africa in terms of a treaty. The account is also used to pay third respondent ("the LHDA"), for the costs incurred in delivering the water to South Africa.
6. The Kingdom then sought a stay order on an urgent basis. The applications were referred to case management and postponed, by agreement, in terms of an order

granted by Strydom J in the urgent court on 1 July 2021. The application was later consolidated with further applications which have been instituted, which I mention below in chronological order.

7. The 1 July order provided for an approach to the Deputy Judge President for a special allocation and for the filing of heads of argument. The only substantive order made was contained in paragraph 4 of the order:

The first respondent [FSG] undertakes, without accepting any responsibility to do so, to take no steps to execute the order granted by the Court in Case no 2020/33700 on 3 May 2021 and any writ of execution or notice of attachment pursuant to that order, including those referred to in the application, pending an order made at first instance in relation to the hearing in paragraph 1 above.

8. On 14 July FSG proposed to the Kingdom that the stay application be withdrawn and the funds be placed in escrow.
9. The Kingdom's response on 16 July was that the undertaking in the 1 July order (set out above) was made to allow the postponement of the stay application to a date in August, and that the parties had agreed now to seek a later date on the basis that the undertaking would endure. The basis of the urgent application and of the need for the undertaking by FSG that it would not execute on the order or on any writ, was that the Kingdom needed the money to continue to flow to it. The kingdom therefore rejected the proposal. It is clear from this letter that the Kingdom was receiving and expected to continue to receive the money the TCTA owed it.

10. FSG on 19 July responded with a letter which made clear that it considered that the funds already attached would remain attached. The Kingdom's response was simply that the interim position set out in the order would endure.
11. It is evident already at this stage that there is a difference of opinion between the Kingdom and FSG about the effect of the interim order and the status of the attachments.
12. At the end of July the TCTA instituted an application to set aside the writs, and declaring that FSG is not entitled to attach the TCTA's assets or debts the TCTA may owe to the Kingdom or the LHDA.
13. On 1 October 2021 the Kingdom instituted a rescission application, to rescind the arbitration award and the order making it an order of court.
14. The consolidated application was set down for hearing on 10, 11 and 12 November 2021. A joinder application by the (South African) Minister of Water and Sanitation and the South African Government then prompted the further postponement of the matter to 16 May 2022, for 24 days.
15. On 9 November 2021, Matojane J made an order postponing the matter to a date to be determined, and providing that the order made by agreement on 1 July 2021 would remain in force until the application was determined by this court.

16. At the case management meeting at which the order was discussed, FSG's counsel submitted to the judge that the *status quo* would endure, that is, that the funds would remain frozen. Counsel for the other parties confirmed that the *status quo* would endure. However, the submission before this court was that their understanding of the *status quo* was that only FSG had made any undertaking and that there was no question of stopping the flow of funds to Lesotho. They would never have agreed to a postponement on that basis. Somehow they did not notice the gloss placed on the 1 July order by FSG's counsel.

17. FSG's attorneys then addressed a letter to the DJP, on 10 November 2021. In it, they stated that the *status quo* which has been extended by the order of Matojane J is that the funds are frozen. The TCTA's attorneys responded on 11 November 2021, saying that it is not clear what FSG means, since the TCTA has never stopped making payments to the Kingdom and the LHDA, and has never agreed to its bank accounts being frozen.

18. As a matter of fact, it is clear that the bank accounts are not frozen, since the TCTA has continued to transact on them.

19. FSG then initiated its urgent application, first setting it down for 12 November 2021, the next day. It then removed the matter and set it down for 23 November 2021 and again for 30 November 2021.

20. The basis on which FSG founds its urgency is that the TCTA, the Kingdom and the LHDA are in contempt of the orders of Matojane J and Strydom J, and contempt is inherently urgent. FSG also suggests that the TCTA is in contempt of the writ of attachment, which, FSG suggests, has the same weight and status as an order of court. Finally, FSG suggests that clarity is urgently needed about the meaning of the orders.

21. FSG also submits that it would suffer irreparable harm if the matter were not heard urgently because the money it seeks to attach would continue to be paid to the Kingdom.

22. It is true that contempt is inherently urgent. But contempt on its own is not sufficient to entitle an applicant to jump the queue and have its application heard and determined in the urgent court. Indeed FSG is in a better position than many applicants for urgent relief because it already has a date for the hearing of the main application, which most applicants do not. In any event, FSG had an inkling of the position of the Kingdom and the TCTA regarding the funds in July, and had the matter been truly urgent that would have been the time to seek the clarity FSG now contends is urgent.

23. I am also not convinced that FSG would suffer irreparable harm if its relief is not determined urgently. This is because the treaty between the Kingdom and South Africa does not have an end date and the money that the TCTA pays to the Kingdom is not finite. It will continue to be paid every month for the foreseeable

future, since South Africa has no other comparable source from which to provide for its water needs. FSG's recovery is therefore simply delayed.

24. Finally, to the extent that it is relevant, I am not convinced that there would be any basis for a contempt order. Neither of the orders referred to make any mention of freezing bank accounts or funds, or of any undertaking by any party to the effect that money would not continue to be paid to the Kingdom. It beggars belief that, had this been intended, it would not have been included explicitly in the order.

25. As far as the writs are concerned, they are clearly not orders of court. Nor has any order been sought for their enforcement, or for the freezing of the funds on any other basis. To the extent that an order of contempt of a writ is possible, which I doubt, it cannot be more urgent than contempt of an order of court. And as I have already found, FSG has not established that it would suffer irreparable harm were the matter not found to be urgent.

26. For these reasons I make the following order:

26.1. The application is not urgent and is not enrolled.

26.2. FSG is to pay the costs of the Kingdom, the TCTA and the LHDA, including costs of two and three counsel where two and three counsel were employed.

S. YACOOB

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

Appearances

Counsel for the Applicant: J Gauntlett SC QC & A Bishop

Instructed by: Peterson Hertog and Associates

Counsel for the 1st Respondent: J Blou SC & J Mitchell

Instructed by: Werksmans Attorneys

Counsel for the 2nd Respondent: N Ferreira & I Cloete

Instructed by: Edward Nathan Sonnenbergs Inc

Counsel for the 3rd Respondent: A Bava SC

Instructed by: Molefe Dlepu Attorneys

Date of hearing: 02 December 2021

Date of judgment: 29 December 2021

