

REPUBLIC OF SOUTH AFRICA



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

Case No: A5072/2021

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

In the matter between:

AIRPORTS COMPANY OF SOUTH AFRICA SOC LIMITED	1 st Appellant
MPOFU: NOMPUMELELO	2 nd Appellant
MATSHEGO: BADISA	3 rd Appellant
MBOMVU: BONGIWE	4 th Appellant
and	
CT MED AND TRAUMA (PTY) LTD t/a CAPE MEDICS	Respondent

Heard: 19 April 2023

Delivered: 30 November 2023

Summary: Contempt of court proceedings - Wilfulness and mala fides considered in the context of an arbitration clause embodied in an agreement made an order of court – although stay of proceedings to have the disputes determined in terms of the arbitration clause not squarely requested, court should have had regard to it for purposes of assessing wilfulness and mala fides in the context of this case as contemnor relied upon such clause albeit for a different purpose i.e. that it constituted a bar per se.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Crutchfield AJ):

- (a) The appeal is upheld with each party to pay their own costs.
- (b) The order of the court *a quo* is set aside and replaced with the following:

‘The application is dismissed. Each party is to pay their own costs.’

This judgment was handed down electronically by circulation to the parties’ legal representatives by email. The date and time for hand-down is deemed to be 30 November 2023.

JUDGMENT

Ingrid Opperman J (Coppin and Dippenaar JJ concurring)

Introduction

[2] The Airports Company South Africa Soc Limited (ACSA) and its responsible executives, the second, third and fourth appellants, were held in contempt of an Order of Court issued on 10 June 2020 (*the Court Order*). The Court Order incorporated a written settlement agreement that had been entered into between

ACSA and the respondent (*Cape Medics*), which settlement agreement made provision for the settlement agreement itself to be made an order of court. The Court Order and ACSA's knowledge thereof are common cause in this appeal. The issue is whether ACSA failed to discharge the evidential burden in relation to wilfulness and *mala fides*¹.

[3] Before exploring this question I need to unpack the dispute which culminated in the conclusion of the settlement agreement.

The facts underpinning the contractual relationship between ACSA and Cape Medics

[4] In terms of the Airports Company Act 44 of 1993, ACSA is the organ of state responsible for the maintenance, management, control and operations of airports in South Africa. The three airports implicated in the present appeal are OR Tambo International Airport (*ORTIA*) in Johannesburg, Cape Town International Airport (*CTIA*) and King Shaka International Airport (*KSIA*) in Durban, (collectively '*the airports*').

[5] On 19 January 2018 and in order to procure various services to the airports, including emergency medical services, ACSA issued Request for Proposal No. COR130/2016 being a "*Request for Proposals for the Provision of Legislative Medical and Emergency Medical Services, Occupational Medicals and Low Cost Medical Aid at Airports Company of South Africa's Airports*" (*the RFP*). The RFP comprised five parts, being: Part A: Occupational Services; Part B: Supply of Emergency Medical Assistance and Emergency Medical Transportation; Part C:

¹ *Fakie N.O. v CCI Systems (Pty)Ltd*, 2006 (4) SA 326 (SCA)

Supply of Ambulances (fully converted) (small type ambulance); Part D: Supply of Medical Equipment; and Part E: Supply of Furniture.

[6] Part A of the RFP was awarded by ACSA to Novamix and Part B to Cape Medics. Pursuant thereto ACSA and Cape Medics entered into a written Service Level Agreement on 25 June 2018 (*the SLA*). Cape Medics was thus only awarded Part B.

[7] At the time of the award by ACSA of Part A to Novamix, and of Part B to Cape Medics, no award was made by ACSA in respect of Parts C, D or E of the RFP. Accordingly, as at the effective date of the SLA, no service provider had been appointed by ACSA to supply Ambulances (in terms of Part C), the medical equipment (in terms of Part D) nor the furniture (in terms of Part E) of the RFP. Without the medical equipment and the furniture which was needed to be able to render emergency medical services, such services could apparently not be rendered. To have emergency medical staff on standby, but without the necessary equipment and furniture, was, argued Cape Medics, tantamount to sending troops into combat without weapons and ammunition - they were rendered impotent and ineffectual.

[8] On 13 March 2020, ACSA sent a notice of termination to Cape Medics. In response and by virtue of ACSA's alleged breaches of the SLA to perform various of its contractual obligations in terms of the SLA, Cape Medics launched an application under case number 10223/2020 (*the SLA application*) which in turn culminated in the Settlement Agreement and Court Order. In Part A, the urgent part of the SLA application, the relief sought was to interdict the termination of the SLA whilst in Part B of the SLA application (the ordinary course part of the SLA application), Cape

Medics sought the review and setting aside of the decision by ACSA to terminate the SLA.

[9] In terms of the Settlement Agreement (which settled both Parts A and B), ACSA rescinded the purported notice of termination and it was agreed that the SLA, with its full terms and conditions save as otherwise recorded in the Settlement Agreement, would remain effective for the five year period thereof.

[10] The breach by ACSA of its obligations to provide the required ambulances featured prominently in the SLA application, but in terms of the Settlement Agreement, it was agreed that ACSA would be relieved of the obligation to provide the ambulances required for the provision of emergency medical services at the airports, and that at no extra cost, Cape Medics would utilise its own ambulances in providing these services.

[11] Non-compliance with clauses 5.1.5 and 5.1.10 of the Settlement Agreement formed the focal point of the contempt application in the court *a quo*. The breaches by ACSA of the Settlement Agreement which founded the contempt relief claimed related to nine categories of equipment which ACSA had allegedly remained in default of providing.

The SLA and the Settlement Agreement

[12] The SLA was concluded on 25 June 2018 and was for a duration of 5 years from its conclusion. The settlement agreement was concluded on 10 June 2020 and was to subsist for the term of the SLA. The Settlement Agreement incorporated by reference the terms of the SLA. It recorded that such terms remained effective save as expressly provided in the Settlement Agreement.

[13] In terms of clause 5.1.5, ACSA was to provide the equipment that was required and necessary for the operation of Parts D and E of the RFP and Clause 5.1.10 dealt with ACSA's obligations to enable Cape Medics to approach the KZN Department of Health for licensing at KSIA.

[14] A clause which took centre stage during the appeal hearing, is the dispute resolution clause 1.1.18 in the Settlement Agreement:

‘.....In an event of any dispute, such affected party shall invoke the Dispute Resolution Mechanism as set out in the SLA.’

[15] The Dispute Resolution Mechanism as set out in clause 25.1.1 of the SLA provides, in relevant parts, for arbitration as follows:

‘Any dispute of whatsoever nature which arises out of or in connection with this Agreement, including any dispute as to the validity, existence, enforceability, interpretation, application, implementation, breach, termination or cancellation of this Agreement or as to the Parties' rights and/or obligations in terms of this Agreement or in connection with any documents furnished by the Parties in terms of this Agreement, **shall be submitted to binding arbitration** before a single arbitrator in terms of this clause 25 (Dispute Resolution) and, except as otherwise provided herein, the rules for the time being as stipulated by the Arbitration Foundation of Southern Africa.’ (emphasis provided)

[16] Clause 25.2 authorises the approach to the High Court for urgent or interim relief. It stands undisputed that the breach of clauses 5.1.5 and 5.1.10 and the approach to the High Court for a finding of contempt by virtue thereof, did not occur urgently nor was the relief sought interim in nature. The exception provided for in clause 25.2 of the SLA does therefore not have application.

[17] Mr Mokhari SC, representing ACSA, argued that Cape Medics' failure to have acted in accordance with clause 25, is fatal to a finding of contempt as the steps

provided for, submitting the dispute to determination by an arbitrator in accordance with the rules for the time being as stipulated by the Arbitration Foundation of Southern Africa, and the consequential determination of that arbitration were an essential pre-requisite before any contempt proceedings could be brought by Cape Medics. I should mention that of course if Mr Mokhari is correct then the arbitrator's award would still have to be made an order of court in terms of section 31 the Arbitration Act 42 of 1965, as amended (*the Arbitration Act*) before the award could form the basis of a contempt application as an arbitrator's award must first be made an order of court before it can form the foundation of a finding of contempt, section 31 of the Arbitration Act reading:

'31(1) An award may, on the application to a court of competent jurisdiction by any party to the reference after due notice to the other party or parties, be made an order of court.

(2) The court to which application is so made, may, before making the award an order of court. correct in the award any clerical mistake or any patent error arising from any accidental slip or omission.

(3) An award which has been made an order of court may be enforced in the same manner as any judgment or order to the same effect. '

[18] Prior to the hearing in the court below, ACSA submitted a supplementary affidavit, the receipt of which by the court below was not opposed. The Group Legal Counsel for ACSA, Mr Ntsonkota, sought leave to file the affidavit arguing that the content of the affidavit was primarily a legal point but that it is intertwined with the facts and as such, could not '*solely be raised from the bar*'. It was received by the court *a quo*.

[19] Mr Ntsonkota may for purposes of this judgement be considered 'the mind' of ACSA, and, speaking to 'wilfulness and mala fides' on behalf of ACSA he says:

'15. I am advised that an Order of this nature is not capable of being breached, and even if not complied with, does not give rise to contempt of Court. The question that arises is what happens if one of the parties to this agreement breaches any of the terms of the agreement set out in clause 5.1. Does that entitle the aggrieved party to approach Court for contempt. The answer is found in paragraph 28 of the settlement agreement (SLA). Clause 28 deals with breach. It provides as follows:

"Without derogating from the provisions of clause 26 (*Termination*) above, if any Party breaches any provision or term of this Agreement and fails to remedy such breach within 10 days of receipt of written notice requiring it to do so then the aggrieved Party shall be entitled, without notice and in addition to any other remedy available to it at law or under this Agreement (including obtaining an interdict but excluding cancellation or termination of this Agreement which remedy shall only be available to the Parties in terms of clause 26 (*Termination*) above) to claim specific performance of any obligation whether or not the due date for performance has arrived, in either event without prejudice to the aggrieved Party's right to claim damages."

16. The remedy of an aggrieved party is founded in clause 28 and not in contempt proceedings. It was therefore incumbent upon the applicant to have invoked clause 28 if it believed that the respondents have breached the SLA. The settlement agreement cannot be divorced from the SLA because it has been incorporated into the SLA. The remedies provided for in the SLA are the remedies which must be resorted to by the parties to the agreement.'

[20] This, contends Mr Ntsonkota, coupled with the already quoted paragraph 25 arbitration clause, precluded Cape Medics from proceeding with contempt proceedings.

[21] Mr Mokhari was challenged by me during the hearing to explain whether the argument came down to one which ousted the jurisdiction of the court. He stated unequivocally that it did not. My understanding of the argument is this: ACSA held the view, based on *bona fide* legal advice received, that the SLA as amended by the Settlement Agreement and embodied in the Court Order, precluded an approach to

court for specific performance using contempt of court proceedings, at least until the pre-requisite steps had been taken, as outlined above. In addition, the invoking of the arbitration clause, precluded reliance on contempt of court proceedings. Both of these features, if he is correct, would negative 'wilfulness and mala fides' as they could only be present once the prior steps upon which the parties had agreed, had been taken.

[22] The court *a quo* found that although the settlement agreement, once made an order of court, retained its features as a settlement agreement, it took on new and additional features pursuant to being made an order of court which included that it could be enforced by way of contempt proceedings.

[23] Could wilfulness and mala fides be imputed at the stage at which they were, or was the gun jumped?

[24] Acting Deputy Chief Justice Khampepe (as she then was) held in *Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others*²:

'[27] Contempt of court proceedings exist to protect the rule of law and the authority of the Judiciary. As the applicant correctly avers, "the authority of courts and obedience of their orders – the very foundation of a constitutional order founded on the rule of law – depends on public trust and respect for the courts". Any disregard for this Court's order and the judicial process requires this Court to intervene.....'

And further at [87]

'.....Here, I repeat myself: court orders must be obeyed. If the impression were to be created that court orders are not binding, or can be flouted with impunity, the future of the Judiciary, and the rule of law, would indeed be bleak....'

² (CCT 52/21) [2021] ZACC 18; 2021 (9) BCLR 992 (CC); 2021 (5) SA 327 (CC) (29 June 2021)

[25] The finding by Crutchfield AJ (as she then was) is undoubtedly correct i.e. that the Court Order was enforceable by way of contempt proceedings. The question is, was it reasonable under the circumstances for ACSA and its responsible executives to expect that the provisions of the SLA would be implemented i.e. that the prior agreed upon dispute resolution clauses (including their implied terms) would be exhausted before such a drastic step could be taken? If they subjectively understood the position differently does this understanding negative wilfulness or mala fides?

[26] Where committal to prison is sought, contempt of court constitutes a criminal offence.³ In this respect, all major jurisdictions in the world are *ad idem*.⁴

[27] Given the extraordinary nature of contempt proceedings, and due to the serious consequences of incarceration, our Courts have held that committal for contempt for non-compliance with Court orders should only be engaged as a matter of last resort.⁵ This position is consistent with the position taken on the issue by Lord Omrod, in *Ansah v Ansah*:⁶

“Such a breach or breaches of an injunction in the circumstances of such a case as this do not justify the making of a committal order, suspended or otherwise. Breach of such an order is, perhaps unfortunately, called contempt of court, the conventional remedy for which is a summons for committal. But the real purpose of bringing the matter back to the court, in most cases, is not so much to punish the disobedience, as to secure compliance with the order in the future. It will often be wiser to bring the matter before the court again for further direction before applying for committal order. Committal orders are remedies of last resort.”

³ *Jayiya v MEC for Welfare, Eastern Cape Provincial Government and Another* 2004 (2) SA 611 (SCA) at para 18; *S v Beyers* 1968 (3) SA 70 (A) at 80A-B; *Butchart v Butchart* 1996 (2) SA 581 (W) at 586C; *Höltz v Douglas & Associates (OFS) CC en Andere* 1991 (2) SA 797 (O) at 802; *S v Baloyi (Minister of Justice and Another Intervening)* 2000 (2) SA 425 (CC) at para 22

⁴ See, for example, *Comet Products UK Ltd v Hawkex Plastics Ltd* [1971] 1 All ER 1141 (CA) at 1143; *Hinch and Macquarie Broadcasting Holdings Limited v Attorney-General for the State of Victoria* (1987) 164 CLR 15 at 49; and *Videotron Ltée v Industries Microlec Produits Électroniques Inc*(1992) 96 DLR (4th) 376.

⁵ *Dezius v Dezius* 2006 (6) SA 395 (T) at para 5.

⁶ *Ansah v Ansah* [1977] 2 All ER 638 (CA) at 643A-C.

[28] In *Dezius*,⁷ the Pretoria High Court held as follows:

‘An offender should not be deprived of his liberty except in accordance with the precepts of fundamental justice and in compliance with procedural safeguards. The public sanction of imprisonment for disobedience of a court order requires conclusive proof. It is, therefore, imperative that before a committal order is issued the court should scrutinise the facts with great care.’

[29] We are charged to scrutinise the facts as they feed into the wilfulness and mala fides issue, and these need to be considered.

[30] Having unpacked the SLA and settlement agreement and the dispute that flowed therefrom, I now turn to the non-compliance with the contractual obligations and the inferences drawn.

Non-compliance with the contractual obligations and the inferences drawn

[31] The court below found that:

‘Objectively considered, the respondents did not provide an exculpatory version for their non-compliance. A finding of wilfulness and mala fides against the respondents is justified. It is the only inference established by the respondents’ conduct.’⁸

[32] The Court below meticulously examined the nine alleged instances of breach and having done so concluded that ACSA had no defences in law to the contractual breaches and from this conclusion inferred wilfulness and mala fides.

[33] I take no issue with the finding by the court below that ACSA failed to comply with its obligations but do take issue with the inference drawn that such non-compliance justifies a conclusion of mala fides or wilfulness.

⁷ *Dezius v Dezius* 2006 (6) SA 395 (T) at para 5.

⁸ Paragraph [110] of the judgment

[34] Ventilators: These items were not delivered, which was common cause. ACSA contended that they were unavailable due to the prevailing Covid pandemic which version was rejected because of an inadequacy of evidence. It is common cause that Cape Medics had used its own ventilators. ACSA contended that it occurred by virtue of an agreement between the parties in terms of which ACSA would compensate Cape Medics for such use. The court rejected this agreement on the basis that it was unlikely that such agreement would have been concluded having regard to the debt owed to Cape Medics and having regard to the debt owed as recorded in clause 5.1.16 of the Settlement Agreement.

[35] That finding might be support for the conclusion that there was no compliance with the contractual obligation but in my view, weighs on the discharge of ACSA's evidentiary burden in respect of the wilfulness enquiry. ACSA might not have done enough to procure alternate ventilators and its explanation for its failure can rightly be labelled 'insufficient' but this does not make its non-compliance intentional. Had the dispute resolution clause been implemented, this inadequacy could have been explored.

[36] Defibrillators: The defibrillators provided by ACSA were not fit for purpose and the court below accordingly held there to be non-compliance with the obligations embodied in the Settlement Agreement. It does not follow from this that it was done wilfully or mala fide.

[37] Medical privacy curtains: ACSA contended that the existing curtains were functional and alleged financial constraints. Once again the court below rejected the explanation contending that it was inadequate.

[38] It is unnecessary to go through all the breaches as they all have one thing in common, being a finding that the explanation advanced was supported by inadequate supporting evidence, did not constitute a defence in law at all or did not rise to the level of factual disputes as envisaged in *Plascon-Evans*.⁹

[39] ACSA's explanations for its failure to comply coupled with the evidence of its attempts to comply substantially with the Settlement Agreement, in my view, negatives wilfulness and mala fides because, the point is, they tried. The fact that they did so poorly or inadequately does not lead to a finding that they disobeyed the Court Order wilfully or with mala fides.

[40] In my view, the court below placed undue emphasis on, as it labelled it, 'the aggressive and accusatory tone' adopted by ACSA in its correspondence exchanges and too little heed was given to the caution expressed by Cameron JA (as he then was) in *Fakie*:

"The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and mala fide'. A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe him- or herself entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith)."¹⁰

[41] It is further regrettable that the dispute resolution clause, which provided for a speedy resolution of the disputes (real or perceived), was not resorted to. I must say that I do think that it was wise to provide for arbitration in the circumstances of this agreement. The three airports mentioned are the three largest in the country, the provision of emergency medical services is no straightforward matter and the

⁹ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty)Ltd*, 1984 (3) SA 623 (AD)

¹⁰ Id at para 9.

evidence of witnesses, potentially experts in the field specific to each airport, would seem to me to be the kind of evidence which an arbitrator would be ideally suited to receive and make a determination (an award) on before the sword of Damocles that is a finding of contempt could fall on either party or their responsible executives.

[42] I find that ACSA's expectation that Cape Medics would first implement the dispute resolution clause, prior to approaching a court for 'a *remedy of last resort*,'¹¹ was reasonable. ACSA held the view, based on *bona fide* legal advice received, that the SLA as amended by the Settlement agreement and embodied in the Court Order, precluded an approach to court for specific performance using contempt of court proceedings. In the circumstances of this case, having regard to the road the parties had travelled to get to court on 10 June 2020 and although the advice was wrong ie that the court could not be approached for a finding in respect of contempt (having regard to the *Zuma dicta*), it was not unreasonable in the circumstances of this case to have laboured under this impression.

[43] The invoking of the arbitration clause did not preclude reliance on contempt of court proceedings but the court *a quo* ought to have expressly engaged with the question whether the proceedings before it ought to have been stayed. This is perhaps because a stay was not sought expressly as is required in terms of *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*¹² per Didcott J and the authorities following thereon.

[44] Ordinarily and without the existence of a court order, should a party take an arbitral dispute straight to Court and the other party does not object, the litigation

¹¹ *Ansah v Ansah* [1977] 2 All ER 638 (CA) at 643A-C.

¹² *Parekh v Shah Jehan Cinemas (Pty) Ltd and Others*, 1980 (1) SA 301 (D) at 305 G-H; *Tahilram v Trustees, Lukamber Trust and Another*, 2022 (2) SA 436 (SCA) paragraph [13]

follows its normal course. A stay of the proceedings must be sought at which point the court will exercise a discretion whether to hold the parties to the dispute resolution clause or not.

[45] The distinguishing feature in this case, and what should be remembered in this case, is that the court on 10 June 2020, when making the settlement agreement an order of court, also made the dispute resolution clause a part of that order. A party to such an arrangement could very well labour under the impression that it will only face contempt proceedings after the arbitration proceedings have been completed and if a finding adverse to them is made, after such award is made an order of court.

[46] A stay of the proceedings for purposes of implementing the dispute resolution clause was, as already pointed out, not squarely sought in this case. The court below did therefore not exercise a discretion whether to call a halt to the proceedings or not. It simply tackled the disputes and made a finding. Whilst this is admirable, the nuanced position advanced by ACSA was overlooked being that where a dispute resolution clause exists, and the court has incorporated it by reference into a court order (as is the case here) a party may labour under an impression (mistaken) that it will be enforced prior to resorting to contempt proceedings. This, in my view, negatives 'wilfulness and mala fides'.

Conclusion

[47] The evidence considered holistically, and the considerations referred to herein, in my view, establishes a reasonable doubt as to whether non-compliance with the obligations embodied in the Settlement agreement and Court Order, was wilful and

mala fide. ACSA is entitled to this doubt and I accordingly find that it discharged the evidentiary burden and the findings in the court *a quo* fall to be set aside.

[48] I need to add this though: The manner in which Cape Medics was treated by ACSA and the obstacles they had to overcome in order to do what they were contracted to do, placed them in an unenviable position. It is not unsurprising that they turned to the courts for help.

[49] Contempt is (when not exclusively coercive) about the relationship between the contemnor and the court. That being so, one would have expected affidavits from all the executives implicated (the cited respondents), giving chapter and verse of their understanding of the law, when the advice relied upon was dispensed, by whom and how it impacted upon their, and consequently ACSA's, decisions. ACSA's argued position was that it held the view, based on *bona fide* legal advice received, that the SLA as amended by the Settlement Agreement and embodied in the Court Order, precluded an approach to court for specific performance using contempt of court proceedings, at least until the arbitration route had been followed. What we have found is that this advice was wrong. It does not constitute a bar *per se* but did in the context of this case, and because the dispute resolution clause was made an order of court, the court *a quo* ought to have explored a stay of the proceedings and erred in not exercising a discretion whether to continue with the proceedings.

[50] What is lacking in this case is detail of the legal advice which should be extensive such as, the extent of the advice, the basis for the advice and the date on which ACSA received the advice.

[51] This Court is entitled (perhaps even obliged) to have regard to the source of the legal advice. In *S v Gibson*¹³ the Court rejected the contention that the accused had

¹³ 1979 (4) SA 115 (D) at 131-132.

acted recklessly after he had acted on legal advice from a firm of attorneys described in the judgment as highly experienced in the relevant field of law. The same does not hold true in this case. The source of the advice in this case is not spelled out. Although the threshold for rejecting legal advice as a defence is high, by virtue of the inadequacy of evidence presented to the court, ACSA narrowly escaped this consequence.

[52] I intend expressing my displeasure at the inadequacy of the evidence in an appropriate costs order in denying the victors, ACSA and its executives, the ordinary consequences of success.

Limited scope of the appeal

[53] The appellants applied for leave to appeal against the whole judgment and Orders of the Court *a quo* . They were granted leave to appeal to the Full Court of the Gauteng Local Division on the ground of whether or not the respondents' non-compliance with the Court Order granted on 10 June 2020 was both wilful and mala fide.

[54] Relying on *Leeuw v First National Bank Ltd*,¹⁴ where the Supreme Court of Appeal held that a Court hearing an appeal is entitled to make findings in relation to any matter dealt with in the impugned judgment provided the basis therefor has been laid in the notice of appeal and heads of argument, this Court was invited to consider the appellants' appeal on all the grounds set out in the notice of appeal.

[55] Cape Medics did not take issue with the legal principle distilled from *Leeuw* and as it turned out, this court made its finding on the issue of wilfulness and mala fides

¹⁴ 2010 (3) SA 410 (SCA) at para 5

only ie the issue on which leave to appeal was granted. It is accordingly not necessary to consider this feature further.

Costs

[56] The court below was correct in its criticisms of the inadequacy of proof presented in what was a most serious case. The failure by any of the executives (the second, third and fourth respondents) to have deposed to affidavits setting out their states of mind, the advice received, when so received and the like, is startling. Although successful, I have a discretion in awarding costs to the successful party/ies and intend exercising it against ACSA and the other appellants.

[57] I accordingly make the following order:

- (a) The appeal is upheld with each party to pay their own costs.
- (b) The order of the court *a quo* is set aside and replaced with the following:

‘The application is dismissed. Each party is to pay their own costs.’

I Opperman
Judge of the High Court
Gauteng Division, Johannesburg

Counsel for the Appellants: Adv WR Mokhare SC and Adv MD Skhosana

Instructed by: Mashiane Moodley Monama Attorneys

Counsel for the Respondent: Adv PT Rood SC

Instructed by: MMfusi & Co Attorneys

Date of hearing: 19 April 2023

Date of Judgment: 30 November 2023