CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 182/17 and CCT 240/17

CCT 182/17

In the matter between:

DEPARTMENT OF TRANSPORT	First Applicant
DIRECTOR-GENERAL: DEPARTMENT OF TRANSPORT	Second Applicant
MINISTER OF TRANSPORT	Third Applicant
WERNER EDUARD KOEKMOER	Fourth Applicant
ROAD TRAFFIC MANAGEMENT CORPORATION	Fifth Applicant
COLLINS LETSOALO	Sixth Applicant
KEVIN JOSHUA KARA-VALA	Seventh Applicant
MORNÉ GERBER	Eighth Applicant
GILBERTO MARTINS	Ninth Applicant
CHRIS HLABISA	Tenth Applicant
MAKHOSINI MSIBI	Eleventh Applicant

and

TASIMA (PTY) LIMITED	Respondent

CCT 240/17

In the matter between:

TASIMA (PTY) LIMITED	First Applicant
DENESHKUMAR NARAN	Second Applicant
FANNIE LYNEN MAHLANGU	Third Applicant
ZUKO MZIWOXOLO VABAZA	Fourth Applicant
and	
ROAD TRAFFIC MANAGEMENT CORPORATION	First Respondent
DEPARTMENT OF TRANSPORT	Second Respondent
MINISTER OF TRANSPORT	Third Respondent
MINISTER OF POLICE	Fourth Respondent
DIRECTOR-GENERAL: DEPARTMENT OF TRANSPORT	Fifth Respondent
KEVIN JOSHUA KARA-VALA	Sixth Respondent
MORNÉ GERBER	Seventh Respondent
CHRIS HLABISA	Eighth Respondent
MAKHOSINI MSIBI	Ninth Respondent

Neutral citation:	*Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others* [2018] ZACC 21
Coram:	Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J, Petse AJ and Theron J.
Judgment:	Petse AJ (unanimous)

Heard on: 8 March 2018

Decided on: 17 July 2018

Summary: Superior Courts Act 10 of 2013 — Section 18 — operation of order after final determination

Interim orders — operation of order after final determination

Mootness — interests of justice — no discrete legal issue of public importance

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ORDER

On appeal from the High Court of South Africa, Gauteng Division, Pretoria.

Under CCT 182/17 (Department of Transport and Others v Tasima (Pty) Limited):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and substituted with the following:

   "The application is dismissed with costs, including the costs of two counsel."
4. The costs orders of the Supreme Court of Appeal and the High Court in the applicants' applications for leave to appeal in those courts are set aside and replaced with an order that the costs of the applications, shall be borne by the respondent including the costs of two counsel where employed.
5. The respondent is ordered to pay the applicants' costs in this Court, including the costs of two counsel.

Under CCT 240/17 (Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others):

1. The application for leave to appeal is dismissed.
2. The applicants are ordered to pay the costs of the application jointly and severally, the one paying the others to be absolved, such costs to include the costs of two counsel.

JUDGMENT

PETSE AJ (Zondo DCJ, Dlodlo AJ, Froneman J, Goliath AJ, Jafta J, Khampepe J, Madlanga J and Theron J concurring):

Introduction

[1] This composite judgment deals with two interrelated applications for leave to appeal under cases CCT 182/17 and 240/17 that were heard together on 8 March 2018. Both have their genesis in the decision of this Court in *Tasima 1* delivered on 9 November 2018.[1]

[2] Although these applications are both dealt with in a composite judgment, it will, however, conduce to clarity if, at the appropriate stage, each application is considered and determined separately in the light of the facts peculiar to each.

[3] To say that the parties to these applications have not flinched from litigating against each other would be an understatement. This is the umpteenth time that they have, for several years, locked horns in protracted litigation, commencing in the High Court,[2] thereafter proceeding to the Supreme Court of Appeal and, ultimately, to

[1] *Department of Transport v Tasima (Pty) Limited* [2016] ZACC 39; 2017 (2) SA 622 (CC); 2017 (1) BCLR 1 (CC) (*Tasima I*).

[2] In the High Court, the parties locked horns in no less than fourteen times.

this Court. And if counsel are to be taken at their word for what they said at the hearing of these matters in this Court, the end to this sorry tale of unbridled proliferation of litigation is not yet in sight.

[4] These applications raise issues of constitutional importance that relate to the interpretation of the order of this Court in *Tasima I.* In particular, they pertinently raise the questions whether: (i) the Department of Transport has breached its constitutional obligations in terms of section 165(4) of the Constitution which, amongst others, enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness; (ii) an interim order granted pending the outcome of an appeal is immune to and can exist independently of the final decision made on appeal; and (iii) an order granted in terms of section 18(3) of the Superior Courts Act[3] is conditional upon the outcome of the matter taken on appeal.

[5] Although the parties have confined themselves to section 18(3), it is, for reasons that will become apparent later, necessary to quote section 18 in its entirety. It provides:

> "(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.
>
> (2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.
>
> (3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court

[3] 10 of 2013.

does not so order and that the other party will not suffer irreparable harm if the court so orders.

(4) If a court orders otherwise, as contemplated in subsection (1) —

(i) the court must immediately record its reasons for doing so;

(ii) the aggrieved party has an automatic right of appeal to the next highest court;

(iii) the court hearing such an appeal must deal with it as a matter of extreme urgency; and

(iv) such order will be automatically suspended, pending the outcome of such appeal.

(5) For the purposes of subsections (1) and (2), a decision becomes the subject of an application for leave to appeal or of an appeal, as soon as an application for leave to appeal or a notice of appeal is lodged with the registrar in terms of the rules."

Parties

[6] The applicants under case CCT 182/17 are the Department of Transport (DoT), its Director-General, some of its officials, the Minister of Transport, the Road Traffic Management Corporation (RTMC), and its former acting and current Chief Executive Officers (CEOs). There is an identity of interest amongst all of the applicants. For convenience, I refer to these applicants collectively as the "State parties". The respondent is Tasima (Pty) Limited (Tasima).

[7] Under case CCT 240/17, Tasima and its three directors are the applicants. And the State parties under CCT 182/17 feature as the respondents in this case. The DoT, the RTMC and Tasima are the main characters in both applications.

[8] The State parties under case CCT 182/17 seek leave to appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court). The High Court (per Potterill J) ordered the State parties, amongst others, (i) to pay a sum of R30 144 947.63 to Tasima in settlement of payment certificate 113 (presented to the applicants on 8 November 2016) which fell due for

payment on 29 November 2016; and (ii) to approve all payment requisitions which were submitted for approval before 9 November 2016.[4] The High Court subsequently dismissed the State parties' application for leave to appeal against that order. A further application for leave to appeal made to the Supreme Court of Appeal suffered a similar fate. The State parties argue that the High Court should not have granted this order when the underlying cause of action had fallen away after this Court, in *Tasima I*, upheld the High Court's declaration to the effect that the extension of the underlying contract between the parties was constitutionally invalid from 23 June 2015.

[9] Tasima opposes the application for leave to appeal. It, in essence, contends that the two court orders in issue, granted by Basson J in April and May 2016, remained operative until 9 November 2016 when this Court delivered its judgment in *Tasima I*. Accordingly, Tasima argues that the State parties were obliged to comply with these orders during the interim period for as long as they remained extant.

[10] With respect to case CCT 240/17, the applicants seek leave to appeal against the judgment and order of the High Court. The High Court (per Tuchten J) ordered the applicants to: (i) vacate the premises situated at 13 Howick Close, Waterfall Park, Bekker Road, Midrand housing the electronic National Traffic Information System (eNaTIS system); (ii) hand over the control of the eNaTIS system inclusive of its access codes, keys and source codes to the RTMC; and (iii) pay the costs occasioned by the application including the costs of two counsel.

[11] The State parties oppose Tasima's application. First, they contend that the appeal will have no practical effect because it is moot. Second, they argue that it is not in the interests of justice to hear the appeal. In addition, the State parties argue that the declaratory relief sought by Tasima is precluded by virtue of the *exceptio rei judicatae vel litis finitae* or its attenuated form commonly known as issue estoppel. The *exceptio rei judicata* or issue estoppel is a defence that can be raised by a

[4] *Tasima (Pty) Ltd v Department of Transport* [2017] ZAGPPHC 46 (Potterill J judgment) at para 23.

defendant in a later suit against a party who is demanding the same thing on the same grounds.[5] So far as the defence of issue estoppel is concerned, it is described as follows in *Boshoff*:

> "[T]he decision set up as a res judicata necessarily involves a judicial determination of some question of law or issue of fact, in the sense that the decision could not have been legitimately or rationally pronounced by the tribunal without at the same time, and in the same breath, so to speak, determining that question or issue in a particular way, such determination, though not declared on the face of the recorded decision, is deemed to constitute an integral part of it as effectively as if it had been made so in express terms."[6]

Factual background

[12] Much of what is relevant in this regard overlaps with most of the factual narrative set out in *Tasima I*. For this reason, I propose to borrow liberally from that factual narrative to the extent that those facts are relevant for the present purposes.

[13] During July 2001, the DoT awarded a tender to Tasima for the provision of services in relation to what later became known as the eNaTIS system. Through this system, the DoT was linked with the various licensing agencies throughout the country, manufacturers of motor vehicles, banks as financiers of the purchase of motor vehicles and the South African Police Service. In addition, the DoT regulated and administered the licensing of vehicles, learner driver's and driver's licences, tests for roadworthiness of vehicles and generally, the administration of the road-traffic legislation.

[14] On 3 December 2001 and pursuant to the award of the tender, the DoT and Tasima concluded a Turnkey agreement for the operation of the eNaTIS system for a five-year period commencing on 1 June 2004 and ending on 31 May 2007. The

[5] *National Sorghum Breweries (Pty) Limited t/a Vivo African Breweries v International Liquor Distributors (Pty) Limietd* [2000] ZASCA 70; 2001 (2) SA 232 (SCA) at para 2 and the authorities cited therein (per Olivier JA).

[6] *Boshoff v Union Government* 1932 TPD 345. 350-351.

agreement further provided that, upon its termination, Tasima would hand over the operation of the eNaTIS system to the DoT. To this end, the DoT was required, inter alia, to address a written request to Tasima within 90 days from the date of termination.

[15] But, upon termination of the agreement, the DoT did not invoke this contractual provision. Rather, Tasima made a written request that the agreement be extended for a further five-year period. This request was turned down by the DoT's erstwhile Director-General who also intimated that the DoT instead sought to take over the operation of the eNaTIS system. Upon its termination by effluxion of time, the agreement was kept alive on a month-to-month basis. Although this was meant to be a short-term arrangement, it nevertheless continued until April 2010. During April 2010, Tasima, once more, requested the DoT to extend the duration of the expired agreement. The then Director-General, Mr Mahlalela, addressed correspondence to the then acting CEO of the RTMC, seeking the latter's view in regard to Tasima's request. In response, the acting CEO expressed strong objection to the request, describing the interim arrangement as "bad" for the government. He advised that the controversial interim arrangement be immediately terminated.

[16] In May 2010, the agreement was extended for a further period of five years from 1 May 2010 to 30 April 2015 by the then Director-General, Mr Mahlalela, despite strong opposition by Mr Collins Letsoalo who was then acting as CEO of the RTMC which was established, inter alia, to operate the eNaTIS system. On 21 May 2010, Mr Letsoalo addressed a letter to Tasima imploring the latter not to rely on the purported approval of its request for an extension of the agreement. By letter dated 24 May 2010, Tasima informed the acting CEO that, unless it received communication from either the Director-General or the Minister to the contrary, it would plan and operate the eNaTIS system for the next five years in accordance with the extension agreement.

[17] The Auditor-General also entered the fray and queried the extension agreement, describing it as irregular for want of compliance with procurement prescripts. This prompted the Director-General to initiate negotiations with Tasima with a view to terminate the invalid extension and for the transfer of the eNaTIS system to the DoT. These negotiations came to naught following Tasima's failure to attend follow-up meetings with the DoT. All manner of attempts by the DoT to have the extension agreement terminated because it was invalidly concluded were strenuously resisted by Tasima. The DoT persisted in its stance that the extension of the agreement was in breach of section 217 of the Constitution,[7] section 38 of the Public Finance Management Act,[8] the Treasury regulations[9] and had also been

[7] Section 217, which is headed "Procurement" reads:

> "(1) When an organ of state in the national, provincial or local sphere of government, or any other institution identified in national legislation, contracts for goods or services, it must do so in accordance with a system which is fair, equitable, transparent, competitive and cost-effective.
>
> (2) Subsection (1) does not prevent the organs of state or institutions referred to in that subsection from implementing a procurement policy providing for—
>
> (a) categories of preference in the allocation of contracts; and
>
> (b) the protection or advancement of persons, or categories of persons,
>
> disadvantaged by unfair discrimination.
>
> (3) National legislation must prescribe a framework within which the policy referred to in subsection (2) must be implemented."

[8] 29 of 1999. Section 38 of the Act, which is headed "General responsibilities of accounting officers" reads:

> "(1) The accounting officer for a department, trading entity or constitutional institution—
>
> …
>
> (c) must take effective and appropriate steps to—
>
> (i) collect all money due to the department, trading entity or constitutional institution;
>
> (ii) prevent unauthorised, irregular and fruitless and wasteful expenditure and losses resulting from criminal conduct; and
>
> (iii) manage available working capital efficiently and economically;
>
> …
>
> (g) on discovery of any unauthorised, irregular or fruitless and wasteful expenditure, must immediately report, in writing, particulars of the expenditure to the relevant treasury and in the case of irregular expenditure involving the procurement of goods or services, also to the relevant tender board."

[9] Inter alia, Treasury Regulation 16A6.4 read with Treasury Instruction 8 of 2007/2008. Treasury Regulation 16A6.4 provides as follows:

disapproved of by Parliament's Standing Committee on Public Accounts[10] for the same reasons. Upon realising that the DoT was unrelenting in its resolve to terminate the extension agreement, Tasima, relying squarely on the dispute resolution provisions of the Turnkey agreement, resorted to litigation. It instituted an urgent application in the High Court in which it sought an order compelling the DoT to comply with its contractual obligations in terms of the extension agreement pending the finalisation of arbitration proceedings that Tasima had threatened to institute in order to resolve the impasse. Despite opposition by the DoT, an interim order was granted by Teffo J which was subsequently confirmed by Mabuse J in the High Court. No arbitration proceedings were instituted by Tasima and yet the order issued by Mabuse J was kept alive and consequential relief based on that order was granted in a series of court orders made in the High Court in favour of Tasima.

[18] In March 2015, Tasima instituted yet another application in which it, inter alia, sought to have the DoT and its various officials held to be in contempt of the several court orders that enforced the extension agreement. The DoT not only opposed this

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> "If in a specific case it is impractical to invite competitive bids, the accounting officer or accounting authority may procure the required goods or services by other means, provided that the reasons for deviating from inviting competitive bids must be recorded and approved by the accounting officer or accounting authority."

Treasury Instruction 8 of 2007/2008 provides as follows:

> "3.4.1 Accounting officers / authorities should invite competitive bids for all procurement above R500 000.
>
> 3.4.2 Competitive bids should be advertised in at least the Government Tender Bulletin and in other appropriate media should an accounting officer/authority deem it necessary to ensure greater exposure to potential bidders. The responsibility for advertisement costs will be that of the relevant accounting officer/authority.
>
> 3.4.3 Should it be impractical to invite competitive bids for specific procurement, e.g. in urgent or emergency cases or in case of a sole supplier, the accounting officer/authority may procure the required goods or services by other means, such as price quotations or negotiations in accordance with Treasury Regulation 16A6.4. The reasons for deviating from inviting competitive bids should be recorded and approved by the accounting officer/authority or his/her delegate. Accounting officers /authorities are required to report within ten (10) working days to the relevant treasury and the Auditor-General all cases where goods and services above the value of R1 million (VAT inclusive) were procured in terms of Treasury Regulation 16A6.4. The report must include the description of the goods or services, the name/s of the supplier/s, the amount/s involved and the reasons for dispensing with the prescribed competitive bidding process."

[10] See *Tasima I* above n 1 at paras 15-23.

application but also filed a counter-application in which it sought to have the extension agreement declared void *ab initio* (from its beginning) by virtue of its constitutional invalidity.

[19] In due course both Tasima's 2015 application and the DoT's counter-application served before Hughes J who, in the fullness of time, dismissed the main application and granted the counter-application thereby declaring the extension agreement void *ab initio* and setting it aside from 23 June 2015. However, on appeal by Tasima, the Supreme Court of Appeal set aside the order of the High Court. Instead, the Supreme Court of Appeal held that Tasima had established the charge of contempt on the part of certain officials of the DoT and the RTMC. The Supreme Court of Appeal emphasised that in a constitutional democracy founded on the rule of law, court orders must be complied with by private citizens and the State alike.[11] That the extension agreement was tainted with illegality, held the Supreme Court of Appeal, had no bearing on the relief sought by Tasima which was to compel compliance with court orders. The Supreme Court of Appeal refused to entertain the counter-application on account of what it perceived to be an inordinate delay. In addition, the Supreme Court of Appeal held that it was not open to the DoT

[11] *Tasima (Pty) Ltd v Department of Transport* [2015] ZASCA 200; [2016] JDR 1370 (SCA) at para 16 with reference to *Clipsal Australia (Pty) Ltd v GAP Distributors (Pty) Ltd* 2010 (2) SA 289 (SCA) at para 22 and *Minister of Home Affairs v Somali Association of South Africa Eastern Cape* [2015] ZASCA 35; 2015 (3) SA 545 (SCA) at paras 35-6 where the following is stated:

> "It is a most dangerous thing for a litigant, particularly a State department and senior officials in its employ, to wilfully ignore an order of court. After all there is an unqualified obligation on every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. It cannot be left to the litigants to themselves judge whether or not an order of court should be obeyed. There is a constitutional requirement for complying with court orders and judgments of the courts cannot be any clearer on that score. No democracy can survive if court orders can be shunned and trampled on as happened here.
>
> That the State must obey the law, is a principle that is fundamental to any civilised society. The logical corollary is that the State, its organs and functionaries cannot arrogate to themselves the right not to obey the law or elevate themselves to a position where they can be regarded as being above the law."

to rely on a collateral challenge to extricate itself from the obligations imposed on it in terms of the various court orders.

[20] The State parties then appealed against the judgment and orders of the Supreme Court of Appeal to this Court. They persisted in their quest to have the extension agreement reviewed and set aside and declared void *ab initio*. They also sought an order for the immediate hand-over of the eNaTIS system to the RTMC. Whilst judgment of this Court in relation to the appeal of the State parties was being awaited, Tasima again approached the High Court seeking an order holding the State parties in contempt of the various High Court orders and also an order under section 18(3) of the Superior Courts Act enforcing the order of the Supreme Court of Appeal pending the outcome of the appeal before this Court. On 11 April 2016, Basson J granted the relief sought by Tasima in terms of a court order that has come to be known as the "Basson I order".

[21] In granting relief in favour of Tasima, Basson J, inter alia, said the following:

> "It is common cause that the agreement expired on 30 April 2015. As per the provisions of Clause 26, the procedure as set out in Schedule 15 [of the Turnkey Agreement] became operative and obliged the parties from 1 May 2015 to operate in terms of the transfer management provisions.
>
> . . .
>
> In summary: In terms of the various High Court orders, the DoT and its officials were interdicted to take any steps to effect a premature transfer of the eNaTIS System contrary to the provisions of Schedule 15 . . . none of the respondents may take any steps . . . to undermine the efficacy or implementation of the various High Court orders and none of them can act contrary to any of these orders."[12]

In addition, Basson J ordered the State parties to pay an amount of R176 000 000 within two days of the order and that the management fee was to be paid into an

[12] *Tasima (Pty) Ltd v Department of Transport* [2016] ZAGPPHC at paras 22 and 26.

escrow account pending the outcome of the case then pending before this Court. In effect, the State parties were directed to comply with all their contractual obligations under the extension agreement.

[22] Aggrieved by the terms of the Basson I order, the State parties sought leave to appeal against that order. For its part, Tasima opposed the application and sought to have the order executed pending the outcome of the appeal in *Tasima I*. Motivated by practical considerations and pragmatism the parties took a second order by consent before Basson J in terms of which the parties' rights' in the appeal were preserved whilst at the same time the State parties agreed to pay Tasima's payment certificates and to process its purchase requisitions in line with the terms of the extension agreement. This order has come to be known as the "Basson II order". It bears mentioning that the Basson II order was preceded by an exchange of correspondence between the parties. Of particular relevance is a letter addressed by the State Attorney to Tasima on behalf of the State parties on 18 April 2016. Its material part read:

> "While we persist with our contention that our application for leave to appeal suspends the operation of the order made by Basson J on 11 April 2016, the government respondents nevertheless intend complying with it pending the outcome of their appeal in the Constitutional Court with full reservation of their rights, including the right to recover in full from Tasima all of the amounts now paid pending the outcome of the Constitutional Court's decision in this matter, and strictly without prejudice to their appeal before the Constitutional Court and their appeal against Basson J's decision and order of last week."

On 19 April 2016, Tasima responded to the State Attorney's letter in these terms:

> "Without in any way waiving any of its rights or contentions in the counter-application, our client is prepared to accept payment and performance by your clients, as tendered. Our client, however, reserves its right in relation to the R39 256 897 deduction ('the deducted amount') effected by your client. Also, whilst our client notes your clients' reservation of their rights, it, of course, does not acknowledge any right by your clients to reclaim amounts paid to Tasima."

[23] The terms of the Basson I order in relevant parts read thus:

"1. It is ordered that—

1.1. The first respondent pay the amount of R176 683 116.70 to the applicant within two days of this order, in satisfaction of payment certificates 96 – 101;

1.2. The management fee earned by the applicant for services rendered must be paid into an escrow account pending the final determination of the respondents' current appeal to the Constitutional Court;

1.3. The tenth respondent, or his lawful delegate, approve, alternatively process, all purchase requisition orders set out in annexure 'FM24' to the supporting affidavit which supports this application, within three days from the date of this order;

1.4. The fifth and eleventh respondents afford the applicant the full benefit of the—

1.4.1. Lease agreement entered into by the fifth respondent in respect of the premises the applicant currently occupies and operates the eNaTIS system from, and

1.4.2. LAN-Desk license until the earlier of such license expiring or the applicant fully transferring the electronic national traffic information system;

1.5. The first, second, sixth and tenth respondents, within one day of the date of this Order, afford the applicant full access, with no restriction, to the eNaTIS Data/Disaster Recovery Centre, situated at the State Information Technology Agency building, 459 Tsitsa Street, Erasmuskloof, Pretoria.

. . .

7. It is ordered in terms of section 18(3) of the Superior Courts Act, 2013—

7.1. The Supreme Court of Appeal order operate and be executed to the extent necessary until the final determination of the present appeal in respect of the Supreme Court of Appeal judgment in the Constitutional Court."

[24] The relevant parts of the Basson II order read:

"Pending the determination by the Constitutional Court of the proceedings in case CCT 5/2016, the parties agree as follows, without prejudice to their rights in those proceedings:

1. The first respondent will pay the amount of R104 225 561.04 in respect of payment certificates 102 and 106 as follows:

   1.1. That portion thereof that constitutes the 10 – 15% management fee reflected in each of the purchase requisitions which make up the total amount, will be paid into the escrow account established in terms of paragraph 1.2 of the order of the Honourable Madam Justice Basson, dated 11 April 2016 under this case number;

   1.2. The balance thereof shall be paid to the applicant by 10:00, Wednesday, 25 May 2016;

. . .

3. The applicant shall deliver to the project / programme manager, as appointed by the first respondent in terms of the Turnkey Agreement for the provision of the eNaTIS system (Contract RT1194KA) between the applicant and the first respondent, dated 3 December 2001, as subsequently amended and extended ('the agreement'), in his official capacity, (currently, the tenth respondent), and simultaneously copy to Mr Kevin Kara-Vala, purchase requisition orders ('PRQs') from time to time;

4. the project/programme manager or his lawfully appointed delegee must deliver to the applicant processed PRQs within 5 working days of receipt of such PRQs;

5. PRQs must be processed by the project/ programme manager or his lawfully appointed delegee, currently Mr Kevin Kara-Vala;

6. payment of payment certificates 107 and further will take place within 21 days of presentation thereof to the first respondent, in the same manner as provided for in 1 above."

[25] It is necessary to emphasise that the introductory part of the Basson II order which reads: "Pending the determination by the Constitutional Court of the proceedings in case CCT 5/2016, the parties agree as follows, without prejudice to their rights in those proceedings" is of critical significance to the fate of the application under case CCT 182/17. I shall return to this aspect later.

[26] As already stated above, this Court delivered its judgment in *Tasima I* on 9 November 2016 in terms of which the order of the High Court declaring the extension agreement invalid with effect from 23 June 2015, previously set aside by the Supreme Court of Appeal on appeal to it, was reinstated. Tasima was then ordered to hand over the eNaTIS system to the RTMC within 30 days of the order in *Tasima I*. This Court further directed that the handover was to be "conducted in terms of the Migration Plan set out in schedule 18 of the Turnkey Agreement" unless "an alternative transfer management plan is agreed to by the parties within 10 days of [its] order".[13]

[27] It is convenient from this point onwards to deal with the two applications separately. I shall commence with case CCT 182/17, which is the application of the State parties against Tasima.

Department of Transpot and Others v Tasima (Pty) Limited

Pre-litigation history

[28] On 8 November 2016, Tasima presented payment certificate 113 in the sum of R30 144 947.53 to the DoT in line with various court orders culminating in the Basson I and II orders. Payment of this certificate was, in accordance with the provisions of the extension agreement, only due and payable on 29 November 2016, that is 21 days after the presentation of the certificate. The State parties refused to pay payment certificate 113 and to process requisition requests received after 9 November 2016 despite demand by Tasima.

Litigation history

High Court

[29] On 27 December 2016, and relying squarely on the Basson I and II orders, Tasima instituted an urgent application in the High Court seeking an order compelling

[13] *Tasima I* above n 1 at para 208.

the State parties to pay payment certificate 113 and to approve certain payment requisitions submitted by Tasima. Tasima's application, opposed by the State parties, was partially successful.

[30] In granting an order for the relief foreshadowed in the preceding paragraph, the High Court said the following:

> "The crux of this matter is whether the Constitutional Court order has set aside the Basson 1 and Basson 2 orders; consequently can the DoT refuse payment for work done by Tasima between the Supreme Court of Appeal judgment and the date of the order of the Constitutional Court? The question is also whether any order given herein pre-judges the pending application before the Constitutional Court.
>
> The determination of this application depends upon a proper interpretation of the order of the Constitutional Court to ascertain the manifest purpose of the order. The court's intention is to be ascertained from the language of the order, which is to be interpreted on its terms and the court's reasons given as a whole.
>
> In para 7 of the Basson 1 order it was inter alia ordered that the Supreme Court of Appeal order operated and was to be executed to the extent necessary until the final determination of the appeal of the Supreme Court of Appeal judgment in the Constitutional Court. In Basson 2 it was inter alia ordered that pending the determination by the Constitutional Court the project/programme manager or his lawfully appointed delegee must deliver to Tasima processed PRQs within 5 working days of receipt of such PRQs. The PRQs must be processed by the project/programme manager or his lawfully appointed delegee. It was further ordered that payment of payment certificates 107 and further will take place '[w]ithin 21 days of presentation thereof to the DoT.'
>
> Tasima is in terms of the Basson 1 and 2 orders requesting that the DoT make payment of payment certificate 113. It is common cause that payment certificate 113 was submitted on 8 November 2016, a day before the Constitutional Court judgment was handed down. It is never denied by the DoT that all the work relating to certificate 113 was done before 8 November 2016 and that all the underlying PRQs were approved prior to 8 November 2016. What is denied is Tasima's entitled to payment because of the order of the Constitutional Court."[14] (Footnotes omitted.)

[14] Potterill J judgment above n 4 at paras 8-11.

[31] The High Court declined to grant relief in relation to payment requisitions in respect of services rendered after the date of the judgment of this Court in *Tasima I* describing the judgment date as "the guillotine date for the previous court orders" and that the Basson I and II orders so far as they related to work done before 9 November 2016 fell outside the ambit of *Tasima I*.[15]

Applications for leave to appeal in the High Court and the Supreme Court of Appeal.

[32] The High Court dismissed the State parties' application for leave to appeal with costs. A further application to the Supreme Court of Appeal suffered a similar fate, the latter Court concluded that there were no reasonable prospects of success and no other compelling reason why an appeal should be heard.

Preliminary issues

Jurisdiction

[33] It is trite that the question whether the jurisdiction of this Court is engaged in any given case must be determined with reference to section 167(3)(b) of the Constitution.[16]

[34] The State parties advance two bases in support of their quest for leave to appeal in this Court which they assert engage its jurisdiction. First, they argue that this application is founded on constitutional issues. Second, they submit that the application raises an arguable point of law of general public importance which

[15] Id at para 18.

[16] The section provides:

> "(3) The Constitutional Court—
>
> . . .
>
> (b) may decide—
>
> (i) constitutional matters; and
>
> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court"

deserves to be considered by this Court. I hasten to deal with these contentions in turn.

[35] The State parties, in essence, advance four issues of a constitutional nature and/or arguable points of law of general public importance. First, that the current dispute between the parties concerns the proper interpretation of this Court's order in *Tasima I.* In particular, whether the declaration of invalidity of the extension agreement took effect from 23 June 2015 in terms of the now reinstated High Court order or 9 November 2016 being the date of *Tasima I.* This necessarily entails that this Court must determine the effect of the operative date on the court orders granted after the date of the declaration of constitutional invalidity of the extension agreement.

[36] Second, this application raises the question whether the refusal by the State parties to comply with the Basson orders granted after 23 June 2015, but before the date of judgment in *Tasima I,* constitutes a violation of their constitutional obligation under section 165(4) of the Constitution to assist and protect the courts to ensure their independence, impartiality, dignity, accountability and effectiveness. Third, whether a consensual order granted pending an appeal is immune to the appellate court's determination of the underlying cause of action or the final outcome of the appeal. Fourth, whether an order granted under section 18(3) of the Superior Courts Act is conditional upon the final determination of the dispute between the parties on appeal or whether its legal force remains operative and unaffected by such final determination.

[37] In my judgement this matter engages this Court's jurisdiction on at least three bases. First, as already indicated in paragraph 1 above, it has its origin in *Tasima I,* a matter which implicated section 217 of the Constitution. In particular, in the context of this application it raises the question whether the extension agreement which was declared constitutionally invalid on 23 June 2015 should be allowed to subsist until 9 November 2016 – being the date of the this Court's judgment in *Tasima I* – despite

this Court exercising its just and equitable discretion under section 172(1)(b)(i)[17] against limiting the retrospective effect of the declaration of invalidity.

[38] Secondly, this case implicates section 165(4) of the Constitution as explained in paragraph 4 above. Both these issues fall squarely within the scope of constitutional matters contemplated in section 167(3)(b)(i) of the Constitution. In addition, this Court also enjoys jurisdiction by virtue of section 167(3)(b)(ii) which enjoins this Court to consider "any other matter that raises an arguable point of law of general public importance".[18]

[39] Furthermore, the State parties argue that at its core this application concerns the nature and powers of the courts. In *Bannatyne*, this Court said that any issue relating to the nature and ambit of the powers of the High Court necessarily raises a constitutional question.[19] Understandably, Tasima does not contest the fact that this matter raises constitutional issues.

Leave to Appeal

[40] As already determined above, this application raises constitutional issues of importance. However, the fact that an application for leave to appeal raises a constitutional issue is not decisive of the question whether leave should be granted. It is still necessary to demonstrate that it is in the interests of justice that leave to appeal

[17] Section 172(1)(b) of the Constitution provides:

> "(1) When deciding a constitutional matter within its power, a court —
>
> …
>
> (b) may make any order that is just and equitable, including—
>
> (i) an order limiting the retrospective effect of the declaration of invalidity; and
>
> (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[18] As to what this requirement entails see *DE v RH* [2015] ZACC 18; 2015 (5) SA 83 (CC); 2015 (4) BCLR 1003 (CC) at paras 8-10 and *Paulsen and Another v Slip Knot Investments 777 (Pty) Limited* [2015] ZACC 5; 2015 (3) SA 479 (CC); 2015 (5) BCLR 509 (CC) (*Slip Knot Investments*) at para 16.

[19] *Bannatyne v Bannatyne* [2002] ZACC 31; 2003 (2) SA 363 (CC); 2003 (2) BCLR 111 (CC) at para 17.

should be granted, and for this Court to hear the appeal. In order for this Court to determine whether leave to appeal should be granted, it must also have regard to the prospects of success[20] and decide whether the interests of justice dictate that this Court ought to hear the appeal. When all is said and done, the question that arises ultimately in this case is whether the High Court was correct in enforcing the Basson orders – regard being had to their sole purpose – some three months after the delivery of this Court's judgment in *Tasima I*. The State parties argue that it is in the interests of justice for this Court to hear the appeal because the effect of the High Court judgment is that the extension agreement that was declared invalid from 23 June 2015 has effectively been kept alive beyond the date of invalidity.

[41] Once again, Tasima does not contest that it is in the interests of justice for this Court to hear the appeal. On the prospects of success, the State parties assert that such prospects are good as this Court's exercise of its discretionary powers under section 172(1)(b) of the Constitution was undermined in a most fundamental way by the High Court's interpretation of the order in *Tasima I*. True, the questions that arise for determination in this application are of critical importance to the parties. And the prospects of success in relation to those questions are good. Accordingly, it is in the interests of justice to grant leave to appeal in case CCT 182/17 as the order of the High Court has the effect of extending the life of the extension agreement beyond the cut-off date confirmed by this Court in *Tasima I*, namely: 23 June 2015.

Discussion

[42] As already alluded to above, the fate of this case hinges, in large measure, on the interpretation of the judgment and order of this Court in *Tasima I*. As to the proper approach in this regard, this Court in *Parsons* said the following:

> "The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court's intention is to be ascertained primarily from the

[20] *National Education, Health and Allied Workers Union v University of Cape Town* [2002] ZACC 27; 2003 (3) SA 1 (CC); 2003 (2) BCLR 154 (CC) at para 25.

> language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention."[21] (Footnotes omitted.)

[43] In *Firestone*, the Appellate Division (now known as the Supreme Court of Appeal) said that the basic principles applicable to the construction of documents also apply to the construction of a court's judgment or order.[22] The court's intention is to be ascertained primarily from the language of the judgment or order as construed according to the usual well-known rules. As in the case of any document, the judgment or order and the court's reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary or qualify, or supplement it.[23]

[44] In *Tasima I*, this Court reinstated the order of the High Court declaring the extension agreement invalid from 23 June 2015. It further reiterated that from 23 June 2015 "the extension no longer had legal effect, and the interim interdicts issued by the High Court fell away".[24] As to the legal effect of the interim orders directing the State parties to comply with the terms of the extended agreement, this Court said:

> "The interim orders requiring compliance with the contract extended by the decision of Mr Mahlalela are of legal effect for the period before the counter-application succeeded. Moreover, the various findings of contempt and suspended committal made prior to the High Court judgment are enforceable. By contrast, the finding of contempt and committal made by the [Supreme Court of Appeal] and challenged in this Court stands to be set aside. This is because once the High Court orders lapsed

[21] *Eke v Parsons* [2015] ZACC 30; 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 (CC) *(Parsons*) at para 29. See also generally *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Ltd* [2012] ZASCA 49; 2013 (2) SA 204 (SCA) (*Finishing Touch*) at para 13; and *Administrator, Cape v Ntshwaqela* 1990 (1) SA 705 (A) (*Ntshwaqela*) at 715F-H.

[22] *Firestone South Africa (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) (*Firestone*) at 304D-H.

[23] See *Parsons* above n 22; *Finishing Touch* and *Ntshwaqela* id .

[24] *Tasima I* above n 1 at para 200.

> as a result of the Department's successful reactive challenge of the extension, the interim interdicts could no longer be enforced. This deduction does not, however, affect the period before the reactive challenge was successfully brought."[25] (Footnotes omitted.)

[45] Having noted that the interim interdicts fell away from 23 June 2015, this Court went on to craft a just and equitable remedy in the light of the declaration of invalidity. It remarked that the extension agreement had long expired. And upon a consideration of the relevant factors, it concluded that a handover of the eNaTIS system to the RTMC had to take place "as expeditiously as possible".[26] Hence a period of 30 days was allowed for this to happen.

[46] It is necessary to emphasise that before 23 June 2015 the contractual relationship between the parties was regulated by the terms of the Turnkey Agreement. For the initial period the contract was lawful. When the initial agreement was unlawfully extended on 1 May 2010 for a five-year period the parties fulfilled their respective obligations in terms of the unlawful contract until it was declared invalid and set aside on 23 June 2015. After 23 June 2015, but before November 2016, the relationship between the parties had no contractual underpinning but was perpetuated by a series of court orders granted by the High Court. After 9 November 2016, the parties' relationship had no contractual substratum save for the migration plan whose sole purpose was to regulate the handover of the eNaTIS system to the DoT. As is apparent from paragraph four of the order in *Tasima I*, the handover of the system could be implemented in one of two ways: either in terms of a handover plan agreed to between the parties within 10 days or if no agreement was reached within 10 days, in terms of the migration plan under schedule 18 of the Turnkey Agreement. Whichever way was adopted, the handover had to be completed within 30 days from the date of the order of *Tasima I*.

[25] Id at para 176.

[26] Id at para 206.

[47] The State parties accepted that they were under a constitutional obligation to comply with all the court orders predicated on the order of Mabuse J until their counter- application succeeded. That counter-application succeeded on 23 June 2015. Accordingly, the State parties contend that the legal basis for all of the transactions that took place between 23 June 2015 and 9 November 2016 fell away. Therefore, they are under no obligation to pay payment certificate 113.

[48] In this Court the case for Tasima was argued along the following confines. First, that there is, rightly, no express or implied reference to the Basson orders in *Tasima I*, because the Basson orders were made long after 23 June 2015 but before 9 November 2016. Second, that the Basson orders were not premised on the extension agreement but on: (i) the judgment of the Supreme Court of Appeal handed down on 2 December 2015; (ii) section 18 of the Superior Courts Act; and (iii) the agreement reached between the State parties and Tasima culminating in a "practical regime to govern the period [from the date of the orders] up to the date of the" judgment of this Court in *Tasima I.* Third, the sole purpose of the Basson orders was to regulate the parties' relationship related to the period from the termination of the extension agreement that is: from 1 May 2015 to 9 November 2016 when, on the latter date, judgment in *Tasima I* was handed down. In elaboration, Tasima contended that it would be illogical to suggest, as the State parties sought to do, that the Basson orders were set aside on 23 June 2015 even before they were granted.

[49] It is now apposite to revert to a consideration of the import of section 18(3) of the Superior Courts Act. In *Ntlemeza*, the Supreme Court of Appeal said that:

> "Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of section 18(1) is required 'in addition', to prove on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders."[27]

[27] *Ntlemeza v Helen Suzman Foundation* [2017] ZASCA 93; 2017 (5) SA 402 (SCA) at para 35.

But what this Court is called upon to determine in the context of this case is the import of section 18(3). In particular, this aspect of the case raises the question whether an order made under section 18(3) retains its legal force beyond the date of the decision of the appeal that finally determines the dispute between the protagonists. To answer this question it is necessary to emphasise the point that all the subsections of section 18 are interlinked and must therefore be read contextually.

[50] The importance of context in the process of statutory interpretation was underscored by this Court in *Bato Star* in these terms:

> "Certainly no less important than the oft repeated statement that the words and, expressions used in a statute must be interpreted according to their ordinary meaning is the statement that they must be interpreted in the light of their context. But it may be useful to stress two points in relation to the application of this principle. The first is that 'the context', as here used, is not limited to the language of the rest of the statute regarded as throwing light of a dictionary kind on the part to be interpreted. Often of more importance is the matter of the statute, its apparent scope and purpose, and, within limits, its background." [28]

[51] Subsection (1), which is subject to subsections (2) and (3), provides that the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal is suspended pending the decision of the application for leave to appeal or the appeal, unless a court under exceptional circumstances orders otherwise. In turn, subsection (2) is made subject to subsection (3). It provides that, unless a court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the final effect of a final judgment, which is the subject of an application for leave to appeal or an appeal, is not suspended pending the decision on the application for leave to appeal or an appeal.

[28] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) (*Bato Star*) Id, at para 89.

[52] Crucially, subsection (3) requires an applicant for an execution order to prove "on a balance of probabilities that he or she will suffer irreparable harm if the order is not granted and that the other party will not suffer irreparable harm if the court so orders". As explained in *Ntlemeza*, section 18(1) reiterates the common law position to the effect that the operation or execution of a judgment is suspended when there is an application for leave to appeal or an appeal.[29] What ultimately happens to the suspended operation or execution of a judgment subject to an appeal process would be determined by the outcome of the appeal. If the appeal is unsuccessful the suspension would cease, unless, of course, as noted in *Ntlemeza*, "a further application for leave to appeal"[30] is made.

[53] If a court grants an order for the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, and its judgment is subsequently set aside on appeal and judgment is granted in favour of the appellant as it happened in *Tasima I*, the order made under section 18(3) would then fall away. This is so once no further application for leave to appeal is made or all appeal avenues have been exhausted. This, in my view, accords with the intention and the tenor of section 18.

[54] Accordingly, the sole purpose of the Basson I order relative to section 18(3) was to regulate the interim position between the litigants from the time when that order was made until the final determination of the underlying dispute between the parties by this Court.

[55] At the hearing of this case, counsel for Tasima conceded that the Basson I order had its origin in the various High Court orders going back to the order of Mabuse J. Moreover, this order was, in part, granted in terms of section 18(3) of the Superior Courts Act which meant that it could only subsist for so long as the judgment of this Court in *Tasima I* was still pending.

[29] *Ntlemeza* above n 28 at paras 25 and 28.

[30] Id at para 28.

[56] Thus, an order made under section 18(3), as already indicated above, serves to regulate the interim position between the litigants from the time when such an order is made until the final judgment on appeal is handed down.

[57] It therefore goes without saying that the order made by Basson J on 11 April 2016 in terms of which Tasima was permitted to execute the judgment of the Supreme Court of Appeal – which was on appeal before this Court – fell away when, on 9 November 2016, the order of the Supreme Court of Appeal was set aside in *Tasima I* and that of the High Court was reinstated. With respect to the Basson II order, counsel contended that it stood on a different footing because it was granted by agreement between the parties. For this reason, it was argued that it fell outside the ambit of *Tasima I*. This contention is plainly unsustainable for at least two reasons. First, the Basson II order came about pursuant to negotiations aimed at resolving a dispute between the parties relating to the Basson I order. Second, the terms of the order are, as already mentioned, prefaced with the words: "Pending the determination by the Constitutional Court of the proceedings in case CCT 5/16, the parties agree as follows, without prejudice to their rights in those proceedings". These introductory words to the Basson II order make plain that the terms of this order were to remain of legal force and effect until a decision was made in case CCT 5/16. This is also put beyond doubt by the contents of the letter addressed to Tasima on behalf of the State parties referred to in paragraph 22 above.

[58] It therefore follows that if all of the orders that were the legal source of the Basson orders fell away upon the confirmation of the High Court's declaration of invalidity of the extension agreement by this Court on 9 November 2016 retrospective to 23 June 2015, it is difficult to understand on what basis then can it be contended that the Basson orders were immune to the outcome of the appeal in *Tasima I*. The fact that the Basson orders were not under the spotlight in *Tasima I* is of no moment. What matters is that they too were granted pursuant to the order of Mabuse J which had in fact spawned a series of court orders that enforced compliance with the order of

Mabuse J. In sum, the Basson orders had legal force and effect from the time they were made and for so long as the declaration of invalidity – effective from 23 June 2015 – had not been made.

[59] Although the declaration of invalidity made by the High Court was confirmed by this Court in *Tasima I* on 9 November 2016, this confirmation, as indicated earlier, had retrospective effect from 23 June 2015. This is borne out by what this Court said in paragraph 176 of *Tasima I* to which reference has already been made in paragraph 44 above.

[60] Thus, once the extension agreement was declared invalid with effect from 23 June 2015, the order granted by Mabuse J – whose sole purpose was to preserve the status quo pending the conclusion of the dispute resolution proceedings – fell away as did all the subsequent orders made to enforce the Mabuse J interim order.

[61] Accordingly, Tasima had no legal basis to enforce the Basson orders in the face of the judgment of this Court in *Tasima I*. The High Court erroneously considered that the operative date beyond which Tasima could not enforce its rights deriving from the Basson orders was 9 November 2016 and consequently lost sight of the date of the declaration of constitutional invalidity of the extension agreement, namely 23 June 2015. It, therefore, follows from this, that it entirely misconceived the import of this Court's judgment and order in *Tasima I*. It ought to have dismissed Tasima's application in its entirety. This conclusion also disposes of the question whether the State parties had breached their constitutional obligations under section 165(4) of the Constitution by failing to comply with the Basson orders which, in light of the aforegoing, falls to be answered in the negative.

Costs

[62] Before concluding, there is one final issue that requires to be addressed. And that issue relates to the costs orders of both the Supreme Court of Appeal and the High Court occasioned by the dismissal of the applications for leave to appeal made to

those courts by the State parties. In light of the conclusion to which I have come, those costs orders fall to be set aside and substituted with an order directing Tasima to bear those costs in both courts.

[63] I now proceed to deal with the second application under case CCT 240/17.

Tasima (Pty) Limited v Road Traffic Management Corporation

Pre-litigation history

[64] As already stated above, this Court, having confirmed the High Court's declaration of invalidity of the extension agreement with effect from 23 June 2015, ordered Tasima to hand over the eNaTIS system and related services to the RTMC within 30 days of its order.[31] It further ordered that unless an alternative transfer-management plan was agreed to by the parties within 10 days of its order, the handover was to be conducted in terms of the migration plan set out in schedule 18 of the Turnkey Agreement.[32]

[65] Soon after the grant of this Court's order in *Tasima I*, the parties entered into negotiations with a view to agree on a handover plan for a transfer of the eNaTIS system to the RTMC. But these negotiations reached an impasse because Tasima had instead proposed that the handover be implemented over a period of 44 weeks. Tasima then turned to this Court and sought an order granting it direct access and for this Court to clarify or vary its order of 9 November 2016 such that the handover of the eNaTIS system would not have to be implemented within 30 days. The application for direct access was dismissed with costs for lack of prospects of success. Thereafter, further negotiations still failed to break the logjam.

[31] Id at para 208.

[32] Id.

Litigation history

High Court

[66] On 16 March 2017, some three months after the expiry of the 30-day period, the State parties instituted legal proceedings against Tasima seeking an order evicting Tasima from the premises housing the eNaTIS system and for the handover of the system to the RTMC. In April 2017, the High Court (per Tuchten J) granted the order sought, noting that the transfer had to take place expeditiously as it had been delayed for some four months. The High Court observed that "there is nothing in the handover order [in *Tasima I*] or [its own] order to prevent the parties from continuing after the handover to cooperate in ensuring that the transfer is achieved as swiftly and in an orderly fashion as possible."[33] Tasima's application for leave to appeal against the judgment and order of the High Court failed, both in the High Court and the Supreme Court of Appeal. During August 2017 the President of the Supreme Court of Appeal dismissed Tasima's further application in terms of section 17(2)(f) of the Superior Courts Act for reconsideration or variation of the Supreme Court of Appeal's earlier decision refusing Tasima's application for leave to appeal.

In this Court

[67] In this Court Tasima seeks leave to appeal against the judgment and order of the High Court evicting it from the eNaTIS premises and compelling it to hand over the system and its accessories to the RTMC. But Tasima does not seek restoration of its occupation to the premises. Nor does it seek that control of the eNaTIS system be restored to it. Rather it seeks a declaratory order that: (i) as the parties failed to agree to an alternative transfer-management plan, the handover of the eNaTIS system must be conducted in accordance with the migration plan provided for in schedule 18 of the Turnkey Agreement; (ii) that, in essence, this Court's order did not contemplate a handover of the eNaTIS system that must occur forthwith; (iii) although the migration

[33] *Road Traffic Management Corporation v Tasima (Proprietary) Limited* [2017] ZAGPPHC 94 at para 24.

plan pursuant to which the eNaTIS system would be transferred to the RTMC had to be agreed to within 10 days, the handover of the system was, however, not required to take place within 30 days of this Court's order; and (iv) Tasima was entitled to payment for services rendered during the period of the implementation of the handover until the date on which the transfer is completed.

Jurisdiction

[68] With respect to jurisdiction, Tasima submitted that this application raises constitutional issues and that, in addition, the High Court order raises an arguable point of law of general public importance which ought to be considered by this Court.[34] As to what constitutes an "arguable point of law" this Court in *Slip Knot Investments* , said that such a point must axiomatically, "not be one of fact" and that "[t]he notion that a point of law is arguable entails some degree of merit in the argument [sought to be advanced]".[35] At its core, this application concerns the interpretation of this Court's order in *Tasima I* by the High Court.

Leave to appeal

[69] But, the fact that the matter engages this Court's jurisdiction does not mean that leave must, as a matter of course, be granted. Leave to appeal may still be refused if this Court finds that it is not in the interests of justice to hear the appeal. For reasons that will become apparent later in this judgment, this application does not enjoy reasonable prospects of success. Accordingly, leave to appeal should not be granted.

[70] In its written heads of argument, Tasima submitted that the High Court, in authorising a "precipitous" handover of the eNaTIS system to the RTMC, lost sight of the fact that: (i) in crafting its order, this Court took cognisance of the complexity and critical importance of the eNaTIS system as a national key point hence the requirement that the handover had to be conducted in terms of the migration plan set

[34] Section 167(3)(b)(ii) of the Constitution.

[35] *Slip Knot Investments above* n 20 at paras 20-21.

out in schedule 18 of the Turnkey Agreement absent an alternative transfer plan agreed to by the parties; (ii) it was not feasible to transfer the system on less than 24 hours' notice; and (iii) that it was critical that the State parties and Tasima should agree on which party, between them, would be liable for the costs incurred by third-party service providers responsible for operating the eNaTIS system and that the absence of an agreement on this issue has a potential to precipitate a crisis. It bears repeating that whilst Tasima submits that it is in the interests of justice that this Court should hear the appeal, it nevertheless does not seek to be restored as the operator of the eNaTIS system. Instead, it requires this Court to determine what it calls the "final legal framework which all affected parties can look to and rely upon to govern their affairs consequent upon the transfer of the eNaTIS system".

[71] For their part, the State parties argue that it is not in the interests of justice for this Court to grant leave because the case is moot as the declaratory relief sought by Tasima will have no practical legal effect. In elaboration, they contend that: (i) Tasima does not seek to reverse the transfer of the eNaTIS system; (ii) the migration plan provided for in Schedule 18 merely provides broad principles according to which such plan should be formulated and no more which is still open to the parties to do; (iii) the judgment of the High Court acknowledged that there was nothing that precluded the parties from resolving any outstanding issues between them even after Tasima's eviction from the premises; and (iv) in any event the relief now sought by Tasima in its application in this Court is *res judicata*, having been previously determined by this Court when, on 8 February 2017, it dismissed Tasima's application made under case CCT 305/2016 for direct access on the ground that it bore no prospects of success. Thus, the State parties assert that Tasima is precluded from seeking the same relief again from this Court.

[72] The relevant part of schedule 18 of the Turnkey Agreement is clause 2.2 which provides:

> "*Agreeing on detailed migration plan*. In order to facilitate the migration of the Existing System and Services as contemplated in clause 2.1, Contractor shall as soon as is reasonably possible after the Effective Date, meet with the State and agree on a detailed migration plan with agreed time scales, unless otherwise agreed by the parties, be completed within 46 (forty six) days of the Effective Date."

[73] As is apparent from the preceding paragraph, Schedule 18 does not itself spell out a plan on how the eNaTIS system must be transferred to the DoT. All it provides for is that the parties must, within 46 days of the effective date, agree on a comprehensive plan on how the migration of the system should be implemented. The effective date referred to in clause 2.2 of schedule 18 is, in terms of clause 1.2.23, 1 February 2002.

Is the matter moot?

[74] In determining this question it is as well to remind oneself of the import of the order sought to be appealed by Tasima. As already mentioned, the order of the High Court, in essence, directed Tasima forthwith to vacate the eNaTIS system premises and to hand over the system to the RTMC. Tasima takes no issue with the fact that the system is now firmly under the control of the RTMC. Indeed the relief sought by Tasima in this application is not aimed at reversing the execution of the order or interfering with its operation in any way. To the contrary, the change brought about by the execution of the eviction order will remain intact. Thus, the RTMC will remain in occupation of the premises and continue to operate the eNaTIS system as it has been doing so since April 2017.

[75] As to mootness, in *National Coalition for Gay and Lesbian Equality* this Court said the following:

> "A case is moot and therefore not justiciable, if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law."[36]

[76] Nonetheless, this Court has in the past decided appeals even when the case is moot, if it is in the interests of justice to do so.[37] Some of the relevant considerations in this regard are whether the order that the court may make will have any practical effect either as between the parties or others; whether it is in the interests of justice to nevertheless hear the matter; and whether the decision will be of benefit to the public at large.[38] In *Pillay* this Court said that in determining whether it is in the interests of justice to hear a case that is moot, a court should have regard to the following factors: (i) the nature and extent of the practical effect any order it might make would have; (ii) the complexity and importance of the issue; and (iii) whether deciding the matter would have the effect of resolving discordant court decisions.[39]

[77] Counsel for Tasima argued that the matter is not moot because at its roots the application seeks a "definitive pronouncement by this Court [that] will settle the dispute and inform the parties of what its order contemplated and thereby eliminate or reduce any potential future litigation". In my view, this submission is, in truth, an invitation to this Court to give advice to the parties on their differing contentions. That is no function of this Court. And, as Innes CJ aptly put it in *Geldenhuys* almost a century ago:

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[36] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at fn 18.

[37] See, for example *Van Wyk v Unitas Hospital (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC); 2008 (4) BCLR 442 (CC) at para 29; *AAA Investments (Pty) Limited v Micro Finance Regulatory Council* [2006] ZACC 9; 2007 (1) SA 343 (CC); 2006 (11) BCLR 1255 (CC) at para 27 *and Radio Pretoria v Chairperson of Independent Authority of South Africa* [2004] ZACC 24; 2005 (4) SA 319 (CC); 2005 (3) BCLR 231 (CC) at para 22.

[38] Id, *Van Wyk* at para 29.

[39] *MEC for Education: Kwazulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (*Pillay*) at para 32.

> "[C]ourts of law exist for the settlement of concrete controversies and actual infringements of rights, not to pronounce upon abstract questions, or to advise upon differing contentions, however, important."[40]

[78] It was further submitted that if the order of the High Court were set aside it would then follow that Tasima should not have been evicted thereby vindicating its rights under the order of this Court in *Tasima I*. In my view this contention is unavailing. This Court's order in *Tasima I* is unequivocal. It decrees that the eNaTIS system must be handed over to the RTMC within 30 days of the date of the order. In order to achieve that outcome, the parties were directed to agree to a transfer plan within 10 days. Failing that, the transfer was to be conducted in accordance with the migration plan in terms of Schedule 18. And, as the High Court correctly observed, the fact that Tasima has been evicted otherwise than in terms of a mutual agreement between the parties, which eviction Tasima does not seek to reverse, does not preclude the parties, even at this late stage, from negotiating and agreeing on any outstanding issues in order to give final effect to the hand-over.

Practical effect

[79] In the alternative, Tasima contended that any order that this Court may make will have a practical effect on the parties themselves or on others who are awarded tenders by organs of state that are subsequently declared constitutionally invalid. I fail to see how this argument can avail Tasima in the context of this case when Tasima itself accepts the status quo brought about by the execution of the order of the High Court.

[80] Moreover, the argument advanced by Tasima loses sight of the fact that an appeal lies against the order and not the reasons for the order.[41] As already mentioned, Tasima has no desire to be reinstated in the premises. Nor does it seek to

[40] *Geldenhuys and Neethling v Beuthin* 1918 AD 426 at 441.

[41] *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2010 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC) at para 71.

regain control of the eNaTIS system. Accordingly, any declaratory order that Tasima should never have been evicted would still leave Tasima in the same position. The RTMC would also remain in occupation of the premises and continue to operate the system as it has been doing since regaining effective control thereof on 6 April 2017. As explained in paragraph 74 above, the eviction of Tasima from the premises and the handover of the eNaTIS system to the RTMC, which is what the order sought to be appealed is all about, would remain unaffected even if this Court were to uphold the appeal. The question that arises is: to what end then should an appeal be entertained? Doing so would be an academic exercise yielding no practical consequences.

[81] It is as well to remember that the principal purpose of the migration plan was to place the eNaTIS system under the control of the RTMC in a manner that would cause the least disruption to the functionality of the system given its strategic importance to the government. I therefore fail to see how granting leave in this case would advance the interests of justice as contended for by Tasima.

Res judicata

[82] It remains to briefly say something in passing about why, even under the rubric of *res judicata*, leave to appeal ought not to be granted in this case. As already indicated, the State parties also resist Tasima's application on the grounds that the relief sought by Tasima is *res judicata*.[42] It is not in dispute that on 8 December 2016, Tasima applied to this Court in terms of rule 18 of this Court's Rules by way of direct access under CCT 305/16 for an order:

a. clarifying this Court's order in *Tasima I* to the effect that the eNaTIS system must be handed over in terms of the migration plan;
b. that failure to agree to an alternative migration plan within 10 days of *Tasima I*, meant that the transfer of the eNaTIS system could take place only in terms of schedule 18 of the Turnkey Agreement;

[42] The philosophical rationale for the *res judicata* principle is to avoid conflicting decisions on the same issue and to bring finality to litigation.

c. that the duration of the migration plan, which did not have to provide for the transfer of the system within 30 days, must be agreed between the parties, failing which the time frames under the project management plan would apply;

d. that the State parties would pay all costs incidental to the transfer of the system and also pay Tasima its standard rates for services rendered during the transfer process.

[83] On 8 February 2017, this Court dismissed Tasima's application for direct access in its entirety for lack of prospects of success. Implicit in the reason for dismissal of Tasima's application is the fact that this Court had regard to the merits of Tasima's application.[43] The principal, if not the sole objective, of Tasima's application for direct access was to seek clarification, and indeed interpretation, of this Court's order in *Tasima I*. For its part, Tasima argued that its application for direct access was dismissed "in the interests of justice."[44] But this contention is belied by

[43] See in this regard the discussion in the minority judgment of van der Westhuizen J in *Mpofu v Minister of Justice and Constitutional Development* [2013] ZACC 15; 2013 (2) SACR 407 (CC); 2013 (9) BCLR 1072 (CC) at paras 14–6 where the following was stated:

> "[14] … Once an application for leave to appeal is dismissed, this is a judicial decision, which is final and determinative, involving the same parties, cause of action and relief sought. The fact that an application for leave to appeal or an appeal is without merit, or 'ill-advised', cannot easily make it a nullity and open the way for further appeals, every time on a different ground.
>
> [15] However, one has to look a little deeper into the history and reason behind the principle of res judicata before concluding that it is an absolute bar to the granting of leave. . . . Historically, its use was mainly to prevent the difficulties that might arise from discordant or contradictory decisions in the same suit. In the context of civil matters it operates in tandem with the so-called 'once and for all' rule that a plaintiff may generally only claim for damages arising out of the same cause of action once….
>
> [16] Furthermore – and closer to the facts of this case – the present application does not necessarily call for a decision on the merits which may contradict the previous decisions of this Court. Both the 2008 and 2009 applications were dismissed on the basis that this Court did not regard it as 'in the interests of justice' to hear the matter. The merits of the applicant's specific claim in the present application . . . were not decided by this Court. No finding was made on the prospects of success of the applicant's case, as this Court often does…." (Footnotes omitted.)

As already mentioned, Tasima's 2016 application was dismissed pursuant to a finding that it had no prospects of success. Thus, the fundamental reason for the *res judicata* principle, which is to avoid conflicting decisions on the same issue and to bring about finality in litigation, is undoubtedly apposite.

[44] See *Lekolwane v Minister of Justice* [2006] ZACC 19; 2006 JDR 0897; 2007 (3) BCLR 280 (CC) at para 1 where this Court had occasioned to explain the import of an order dismissing an application for direct access "in

this Court's order from which it is manifest that the application was dismissed for "lack of prospects". To all intents and purposes the relief claimed by Tasima in its current application is, in substance, the same as that sought in its application for direct access. In both applications the cause of action and the parties are the same.

[84] As I see it, in seeking a declaratory order in the terms for which Tasima now contends, Tasima is in truth attempting to have "a second bite at the cherry" in the guise of an application for leave to appeal against the order of the High Court. But even on an acceptance that there is no commonality of a cause of action and relief, the attenuated form of *res judicata* known as "issue estoppel" would apply. And in the context of this case, there is no reason to think that Tasima would suffer great hardship or even positive injustice if the State parties' reliance on *res judicata* were upheld. That said, I find it unnecessary to determine the issue relating to *res judicata* definitively in this case. That question must therefore be left open to be dealt with on another day when it is appropriately raised and after thoughtful consideration.

[85] For all the reasons stated above, there is no basis upon which this Court should exercise its discretion to hear the appeal notwithstanding the mootness of the crux of the issue as between the parties. There is clearly no discrete legal issue of public importance arising from the eviction order granted by the High Court against which Tasima seeks to appeal that would affect matters in the future on which the adjudication of this Court is required.

Costs

[86] As Tasima is, in this application, advancing its commercial interests I can conceive of no exceptional circumstances that would justify a departure from the ordinary rule that costs follow the result.[45] In their written heads of argument, counsel

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the interests of justice". It said that this meant that it is generally undesirable for it to be both a court of first and last instance.

[45] Compare: *Biowatch Trust v Registrar, Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 25.

for the State parties argued that as Tasima's application is vexatious this would be a proper case to award costs on an attorney and client scale including the costs of three counsel. However, this submission was not pressed at the hearing before us. Accordingly nothing more need be said on this score, save to say that neither costs on a punitive scale[46] nor costs of three counsel are warranted.[47]

Order

[87] The following orders are made:

Under CCT 182/17 (Department of Transport and Others v Tasima (Pty) Limited):

1. Leave to appeal is granted.
2. The appeal is upheld.
3. The order of the High Court is set aside and substituted with the following:

   "The application is dismissed with costs, including the costs of two counsel."
4. The costs orders of the Supreme Court of Appeal and the High Court in the applicants' applications for leave to appeal in those courts are set aside and replaced with an order that the costs of the applications, shall be borne by the respondent including the costs of two counsel where employed.
5. The respondent is ordered to pay the applicants' costs in this Court, including the costs of two counsel.

Under case CCT 240/17 (Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others), the following order is made:

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[46] Compare: *Nel v Davis SC N.O.* [2016] ZAGPPHC 596; [2016] JDR 1339 (GP) at paras 25-6; *Plastic Converters Association of South Africa obo Members v National Union of Metalworkers Union of South Africa* [2016] JOL 36301 (LAC) at para 46; and *Van Dyk v Conradie* 1963 (2) SA 413 (C) at 418.

[47] See, for example *Motsepe v Commissioner for Inland Revenue* [1997] ZACC 3; 1997 (2) SA 898 (CC); 1997 (6) BCLR 692 (CC) at para 32.

1. The application for leave to appeal is dismissed.
2. The applicants must pay the costs of the application jointly and severally, the one paying the others to be absolved, such costs to include the costs of two counsel.

For the Applicants (in CCT 182/17):	G Marcus SC, N Maenetje SC, M Stubbs, M Musandiwa and A Armstrong instructed by the State Attorney and Selepe Attorneys.
For the Respondents (in CCT 182/17):	A E Franklin SC and A W T Rowan instructed by Webber Wentzel.
For the Applicants (in CCT 240/17):	A E Franklin SC and A W T Rowan instructed by Webber Wentzel.
For the Respondents (in CCT 240/17):	G Marcus SC, N Maenetje SC, M Stubbs, M Musandiwa and A Armstrong instructed by the State Attorney and Selepe Attorneys.