REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
29 APRIL 2010
DATE SIGNATURE

CASE NO: 00589/10

In the matter between:

MAROGA, PHIRWA JACOB Applicant

and

ESKOM HOLDINGS LIMITED First Respondent

MINISTER OF PUBLIC ENTERPRISES Second Respondent

J U D G M E N T

TSOKA, J:

[1] The applicant Phirwa Jacob Maroga (Mr Maroga) seeks, on a semi-urgent basis, an interim interdict against the first respondent ("*Eskom*") and the third respondent ("*the Minister*"). In terms of the interdict, the applicant

seeks to prevent Eskom and the Minister from proceeding with the appointment of a new Chief Executive Officer ("*CEO*") of Eskom.

[2] The application is premised on Mr Maroga's contentions that he was unlawfully dismissed by Eskom and that he is entitled to be reinstated as the CEO of Eskom. Based on these contentions, Mr Maroga instituted an application, the main application, under Case No. 00589/2010 ("*the main application*") against Eskom, Mpho Makwana (Mr Makwana) the acting CEO of Eskom, as the second respondent and the Minister (as the third respondent) seeking an order for reinstatement, alternatively damages. The main application, which is pending, is defended by both Eskom and the Minister.

[3] This application is also opposed by both Eskom and the Minister. Eskom contends that on 28 October 2009 Mr Maroga resigned from his position as CEO alternatively that due to Mr Maroga's poor performance, the Board of Directors of Eskom ("*the board*"), on 30 October 2009, terminated Mr Maroga's employment contract with immediate effect. Consequently, so contends Eskom, Mr Maroga is not entitled to an order for specific performance, namely, reinstatement. The Minister's contention is that Mr Maroga was lawfully dismissed but even if it is found that he was unlawfully dismissed, which dispute is mainly between Mr Maroga and Eskom, Mr Maroga has not made out a case for reinstatement in the main application. Furthermore, so contends the Minister, Mr Maroga has failed to satisfy the requirements for interim relief. In the main, the Minister's contention is that the

prospects of success of the main application are minimal. She agrees with Eskom's grounds of challenging the main application that the balance of convenience is against the granting of the interim relief.

[4] The facts that gave rise to the application are as follows. Mr Maroga was employed as CEO of Eskom in terms of an employment contract signed on 22 November 2007. The contract was for a minimum term of five years from 1 May 2007 to 30 April 2012 and thereafter subject to six months' notice of termination.

[5] The version of Eskom as to what transpired at Eskom board meeting on 28 October 2009 is as follows. That day, the simmering differences between Mr Maroga and the former chairman of the board, Mr Godsell came to a head. Mr Maroga informed the board that he could no longer work with Mr Godsell. Mr Maroga and Mr Godsell offered to resign. Both Mr Maroga and Mr Godsell were excused from the meeting to enable the board to deliberate on the issue of resignation. After the deliberations, the board accepted Mr Maroga's offer of resignation but refused to accept Mr Godsell's offer of resignation. Both Mr Maroga and Mr Godsell were informed, on the evening of 28 October 2009, of the board's decision. The board's decision was accepted by Mr Maroga and Mr Godsell without demur.

[6] The following morning Mr Maroga reneged on the agreement. He denied that he had offered to resign. The other directors were taken by surprise by Mr Maroga's denial that he had offered to resign and that his

resignation was accepted and conveyed to him on the previous evening. This unexpected turn of events resulted in the board deliberating and unanimously resolving to terminate Mr Maroga's contract of employment with immediate effect. In a letter dated 30 October 2009 Mr Maroga was notified of the termination of the contract. The letter was received by Mr Maroga on 2 November 2009. Nothing turns on this date.

[7] Although Mr Maroga substantially agrees with the version of events by Eskom, he paints a different picture. According to Mr Maroga, at the board meeting of 28 October 2009 a disagreement about the respective roles of the CEO and the chairman of the board arose. This resulted in him and Mr Godsell being excused from the meeting so that the nature and scope of the position of CEO and chairman could be clarified. Later that evening, he and Mr Godsell were invited to dinner. Instead of being informed of the nature and scope of their respective positions as CEO and chairman, he was informed by two members of the board that the board had accepted his offer of resignation. He left the dinner stunned by the information as he had never offered to resign.

[8] On the morning of 29 October 2009 he wrote a letter to the board again highlighting the real issues between him and Mr Godsell. He indicated in the letter that he had not offered to resign and he was not offering to resign. Despite his protestations, he was excluded from the meeting. On 2 November 2009 he received a letter from the board terminating his

employment with immediate effect on the grounds of incapacity due to poor performance.

[9] Thereafter, for a period of two weeks he and Eskom engaged in mediations to resolve the dispute. As mediation was unsuccessful, on 11 January 2010, Mr Maroga launched the main application in terms whereof he seeks an order for reinstatement.

[10] In early February 2010 Mr Maroga learnt that the Eskom board had instructed recruitment specialists to identify potential candidates for consideration and recommendation of a suitable candidate for appointment by the Minister as CEO of Eskom. As he was of the view that if new CEO is appointed pending the determination of the main application, his remedy for reinstatement would be rendered nugatory, he sought an undertaking from Eskom that it would halt the recruitment process for a CEO until the main application is determined. Eskom having failed to furnish him with such an undertaking, on 8 March 2010 he launched the present application.

[11] It is common cause in the present application that –

11.1 The main application is not based on unfair dismissal but unlawful termination of the employment contract;

11.2 The parties, where necessary in this application, rely on the evidence in the main application;

11.3 Eskom has begun a process of advertising, recruitment and interviews towards the identification of a suitable candidate for appointment by the Minister as CEO of Eskom;

11.4 The process referred to in paragraph 11.3 has not been finalized;

11.5 In the main application, the primary relief sought by Mr Maroga is reinstatement as the CEO of Eskom;

11.6 The main application is not ripe for hearing as Mr Maroga awaits certain information from Eskom before filing his replying affidavit.

[12] In order to succeed, the applicant in the present application is required to satisfy the following requirements –

12.1 a *prima facie* right;

12.2 a well-grounded apprehension of irreparable harm if the interim interdict is not granted;

12.3 a balance of convenience in favour of the granting of the interim interdict; and

12.4 the absence of any other satisfactory remedy.

[13] Prior to determining whether the applicant has satisfied the above stated requirements for an interim interdict, it is necessary to state the approach adopted by courts in determining whether an applicant is entitled to interim relief or not.

[14] In *Webster v Mitchell* 1948 (1) SA 1168 (W) the approach was stated in the following terms –

> *"The proper matter of approach is to take the facts as set out by the applicant together with any facts as set out by the respondent which the applicant cannot dispute and to consider, whether having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, prima facie established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile, subject of course to the respective prejudice in the grant or refusal of interim relief."*

This approach was approved in **Gool v Minister of Justice** 1955 (2) SA 682 (C) wherein the court stated the question is whether the applicant, having regard to the inherent probabilities, should, not could, on the facts stated obtain final relief.

[15] In **Tony Rahme Marketing Agencies SA (Pty) Ltd and Another v Greater Johannesburg Transitional Metropolitan Council** 1997 (4) SA 213 (W) at 215C-216C the court expresses the approach to be adopted as follows –

> *"The applicants seek two interim interdicts pending the determination of review proceedings they intend instituting against the respondent. No answering affidavit has been filed, the respondent arguing that the application ought to be dismissed for reasons of fact and law. Before I address the issues I have to decide, it is necessary to refer to a difference of approach in our case law regarding the test I am to apply to disputes of law. Of course, the principles to be applied to disputes regarding interim interdicts have long ago been authoritatively laid down in such cases as Webster v Mitchell 1948 (1) SA 1186 (W) ; Ndauti v Kgami and Others 1948 (3) SA 27 (W) at 36-7 and Olympic Passenger Service (Pty) Ltd v Ramlagan 1957 (2) SA 382 (D) . Are such principles to apply only in respect of factual and not in respect of legal disputes? In Mariam v Minister of the Interior and Another 1959 (1) SA 213 (T) Roper AJ (as he then was) simply applied Webster to a matter involving disputed legal issues. Viljoen J (as he then was)*

criticised this approach in Fourie v Olivier en 'n Ander 1971 (3) SA 274 (T) . The decision in Webster was intended, he said at 285, to apply only to factual disputes and not legal ones. In the case of the former a final decision would be premature but not in the case of the latter. In such a case the court was obliged to give a decision and conclude the matter finally. Viljoen J went on to say the following at 285F-H:

> *'Die Regter wat 'n aansoek om 'n interdik pendente lite verhoor wat afgemaak kan word deur 'n regsbeslissing is myns insiens nie geregtig om te sê dat hy die regsvraag halfhartig gaan benader en dit aan sy ampsbroer wat die verhoor waarneem gaan oorlaat om die saak behoorlik te oorweeg en finaal te beslis nie. Dit sou strydig wees met die beginsels in ons reg ten aansien van res judicata, dit sou onnodige koste veroorsaak en dit sou die onsuksesvolle party in die pendente lite-aansoek die reg van appèl ontsê terwyl die uitleg wat die Regter op daardie stadium aan die regsvraag heg, hoewel dit miskien nie bedoel is om die Verhoorregter te bind nie, hom in 'n groot verleentheid kan stel as hy voel dat hy met die eersgenoemde Regter wil verskil. In die hiërargie van Howe staan die Verhoorhof nie hoër as die Kamerhof waar die aansoek om 'n interdik aanhangig gemaak word nie. Dit is albei een-Regter-Howe wat oor dieselfde aangeleentheid moet beslis.'*

With respect I differ from the learned Judge. Whilst there may be situations where a Court having to decide on an interim interdict has sufficient time and assistance to arrive at a final view on a disputed legal point - in which event it probably ought to express a firm view in order to save costs - situations of urgency arise when decisions on legal issues have to be made without the judicial officer concerned having had the time to arrive at a final considered view. In such a situation he is surely forced to express only a prima facie view. I cannot see how the expression of such a view and the grant of interim relief only would conflict with principles of res judicata. I also see no embarrassment in an urgent Court Judge being overridden by a trial Judge. Each of us, privileged to hold this high and responsible office, owe, in the wielding of our considerable power, a duty only to truth and justice. The interlocutory decisions of Colleagues, and indeed those of our own, are not binding at later stages of the proceedings and should, and I trust, do yield easily to persuasive arguments indicating error or oversight."

[16] Agreeing with Goldstein J's approach in **Tony Rahme**, Mojapelo J, as he then was, in **Zulu v Minister of Defence and Others** 2005 (6) SA 446 (T) at page 461F-G said the following:

"As long as there is an issue, though disputed or doubtful, then there is a prima facie right and it is only wise to let the final relief court determine the issues finally after full ventilation thereof, provided all the other requirements for the granting of the interim interdict are satisfied. There can be no basis of the principles of res iudicata applying to the decision of the court that considered only the interim relief in such a case."

[17] In the present matter Mr Maroga states that he did not resign as CEO of Eskom. Neither was the termination of his contract justified in terms of his employment contract with Eskom.

[18] Regarding resignation, Mr Maroga says as there was disagreement between him and the Chairman of the board, although he does not say so in so many words, in frustration, he stated that he would rather resign than to work with the Chairman whose role and that of his, as CEO, were not well-defined. He states that he never offered to resign. Neither did he intend to resign. He says he was surprised to hear from the board's delegation on the evening of 28 October 2009 that the board accepted his resignation. On the morning of 29 October 2009 he wrote a letter to Eskom denying Eskom's version that he offered to resign as CEO.

[19] Eskom's version is that both Mr Maroga and the Chairman of the board tendered their respective resignations hence they were excused from the meeting of 28 October 2009 to enable the board to deliberate on the stance

taken by the two. After the matter was deliberated on, Mr Maroga's offer to resign was accepted and that of the Chairman was rejected. The two were informed accordingly and that the board's decision was accepted without demur by the two of them.

[20] The issue whether Mr Maroga offered to resign or not is hotly disputed by him. Both parties are adamant that their respective version is true and correct. This raises a serious dispute of fact that cannot be resolved on affidavits. The proper course to be followed is for the court hearing the main application to either refer this issue to oral evidence or dismiss the application if this dispute of fact arose prior to the launch of the main application. It is not for this Court, at this stage of the proceedings, to rule on this issue.

[21] On the issue of the unlawful termination of his contract, Mr Maroga states that his employment contract provides the basis and the manner in which his contract may be terminated. Contrary to the grounds for termination and the manner spelt out in the employment contract, Eskom summarily, without affording Mr Maroga an opportunity to be heard and contrary to the disciplinary code, terminated his contract.

[22] Eskom's version is that, because of Mr Maroga's poor performance, his contract was summarily terminated. The summary termination of Mr Maroga's contract, so says Eskom, is in accordance with the employment contract. Eskom says further that Mr Maroga's employment contract is not subject to the disciplinary code applicable to Eskom's employees.

[23] The employment contract provides that Mr Maroga may be summarily dismissed for misconduct. It lists various acts that constitute misconduct. Amongst the grounds listed is poor performance. However, in terms of the contract, Mr Maroga must be informed of the charges levelled against him and in the event disciplinary steps are contemplated against him, he has the right to present his defence. In the event of conviction he has a right to appeal.

[24] In the present matter, the charges of poor performance were not put to Mr Maroga to respond thereto. Frustrated with Mr Maroga's denial that he offered to resign on 28 October 2009, on 30 November 2009, Eskom summarily terminated Mr Maroga's contract as CEO.

[25] This, in my view, is unlawful termination of Mr Maroga's employment contract. Mr Maroga's rights and obligations are spelt out in the employment contract. In terms of the contract, he is entitled to be heard, one of the fundamental principle of our law. He was not afforded an opportunity to answer to the allegations of poor performance levelled against him. In fact, the evidence on record, reveal that the two acts of poor performance, namely, failure to produce a funding model to save Eskom money and to renegotiate Eskom's long-term contracts, cannot be true as at the end of December 2009, Eskom saved R10bn due to Mr Maroga's actions. With regard to Mr Maroga's alleged failure to renegotiate the long-term contracts, there was no certainty that this would be acceptable to the other parties .In any event it is common cause that this would be a costly exercise.

[26] In my view, Mr Maroga's contract was unlawfully terminated on 2 November 2009. Mr Maroga has a *prima facie* right not to have his contract unlawfully terminated

[27] Although Mr Maroga in his replying affidavit challenges the board's authority to terminate his contract it is unnecessary to express an opinion on this ground in view of the finding I made in paragraph [26] above.

[28] However this is not the end of the enquiry. Mr Maroga must prove the other requirements for an interim relief.

[29] In considering whether the balance of convenience is in favour of granting the relief sought in this application, one must have regard to nature of the remedy sought in the main application. The remedy sought in the main application, on which the interim relief depends, is the prayer for reinstatement.

[30] An order for reinstatement is an order for specific performance. The order is discretionary. An applicant whose employment contract was unlawfully terminated and who seeks an order for reinstatement, is entitled to such an order unless fairness and other factors raised by the employer render such an order inappropriate. It is, therefore, necessary to determine whether, *prima facie*, Mr Maroga, in the present matter, has made out a case for reinstatement.

[31] Mr Maroga says as CEO of an organ of state he is entitled to reinstatement particularly where his contract was unlawfully terminated. According to him, his reinstatement would send out a clear message to other organs of state to act lawfully against their employees. He further states that refusal for his reinstatement would be countenancing the unlawful conduct of Eskom. He says fairness demands that he be reinstated. It is only in the alternative that he seeks an order for damages.

[32] Eskom and the Minister say the relationship between Mr Maroga and Eskom, its board and the Minister has irretrievably broken down with the result that, in the circumstances of this matter, an order for reinstatement would not be appropriate.

[33] Examination of the evidence on record reveals the following. Mr Maroga, as CEO, is a vital link between, Eskom, its board and the Minister. For the proper functioning of the board and Eskom's smooth and efficient execution of its public duty to generate electricity, without which the entire economy of the country would fail, it is vital that there be trust between Mr Maroga, Eskom, its board and the Minister.

[34] The board and the Minister say that they are unable to trust Mr Maroga. They say Mr Maroga is not a man of honour. Despite knowing very well that the Minister did not take part in the board's closed meetings of 29 October 2009, he alleges that the Minister participated in that meeting. He

further alleges that the Minister has associated herself with the unlawful conduct of the board and to this end, she made public statements indicating support for the board. He further alleges that in justification of unlawful termination of his contract, the Minister publicly announced that he had resigned as CEO. It is further alleged that, although the Minister was given Mr Maroga's letter of 29 October 2009, in which Mr Maroga disputes that he has resigned, the Minister failed to publicly disclose this fact. The Minister is alleged further to have withheld, deliberately, the true position regarding the termination of Mr Maroga's contract. It is further alleged that the Minister colluded with Eskom in the termination of his contract.

[35] All members of the board say they have lost confidence in Mr Maroga's capacity as executive leader of Eskom. According to the board, the continued relationship between it and Mr Maroga was both intolerable and untenable. The board, the Minister and her deputy, have lost confidence in Mr Maroga as CEO and the relationship between them and him has broken down irretrievably.

[36] In ***Schierhout v Minister of Justice*** 1926 AD 99 at 107 the court pointed out that an order for specific performance, both in the English Equity Courts and the South African Courts, has long been abandoned for '*the inadvisability of compelling one person to employ another whom he does not trust in a position which imports a close relationship; and the absence of mutuality, for no Court could by its order compel a servant to perform his work faithfully and diligently*'.

[37] In **Mkhize & Others v Tembisa Town Council & Another** [1987] 8 ILJ 256 (W) at 271I-272A the court said the following –

> *"Numerous other examples of accusations, counter-accusations, misgivings over honesty, etc can be referred to. For purposes of this judgment I do not find it necessary further to elaborate thereon. Suffice it to say that the respondents' and the employers' mutual trust in each other has, in my view, been irreparably damaged to such an extent that an order for reinstatement of applicants (or for that matter any of respondent's former employees) could and would only lead to further strife, misgivings and dissatisfaction. For this reason and the reasons mentioned by second respondent, I am of the view that it would be futile to make such an order."*

[38] In **Masetlha v President of the Republic of South Africa and Another** 2008 (1) SA 566 (CC) where the relationship between the Head of the Intelligence Agency and the President of the Republic of South Africa was found to have irretrievably broken, the Court in paragraph [86] stated that:

> *"[86] It cannot be forgotten that the duties of the applicant are to head, exercise command over and control the Agency. The functions of the Agency itself include the duty to gather, evaluate and analyse domestic intelligence in order to identify any threat or potential threat to the security of the Republic or its peopie. ... It follows that in order to*

fulfil his duty in relation to national security, the President must subjectively trust the head of the intelligence services. Once the President had apprised himself of the facts from the minister, the report of the inspector-general, the various reports of the applicant himself, the meetings he had with the applicant, the attacks on his integrity and accusations of falsehoods contained in the papers on suspension proceedings, the President concluded that he had lost trust in the applicant and that it was in the national interest to terminate his appointment as head of the Agency. In my view that breakdown of the relationship of trust constitutes a rational basis for dismissing the applicant from his post as director-general of the Agency."

[39] In paragraph [88] of the judgment, the Court further stated that:

"[88] Although it is clear that there has been a breakdown in trust, that alone is not a sufficient ground to justify a unilateral termination of a contract of employment. It must however be said that the irretrievable breach of trust will be relevant for purposes of remedy. The ordinary remedies for breach of contract are either reinstatement or full payment of benefits for the remaining period of the contract. In my view, even if the contract of employment were terminated unlawfully, Mr Masetlha would not be entitled to reinstatement as a matter of contract. Reinstatement is a discretionary remedy in employment law which should not be awarded here because of the special relationship of trust that should exist between the head of the Agency and the President."

[40] In conclusion, the Constitutional Court in ruling that reinstatement is not an appropriate remedy where trust between the Head of the Intelligence and the President had irretrievably broken down said:

> "*[97] ... For reasons that I have advanced, I hold that this is not an appropriate case to order reinstatement. I must immediately add that, even if the applicant had otherwise succeeded in this court, this would not be a case for ordering reinstatement.*
>
> *[98] This is so because it would not be proper to foist upon the President a director-general of an important intelligence agency he does not trust. Nor would the public interest be served by a head of an intelligence service who says that he has lost trust and respect for his principals, being the President and the minister. ...*"

[41] In the present matter, the relationship between Mr Maroga, the board, the Minister and her deputy appear to have irretrievably broken down. The trust between the Minister and Mr Maroga no longer exists. The trust between Mr Maroga and the board is dead. What is important is not whether Mr Maroga believes that the trust may be re-established but what the other party to this mutual trust, think of the relationship. This akin to one party in a marriage relationship who alleges that the marriage relationship between the parties has irretrievably broken down while the other party professes his/her undying love to the party alleging irretrievable breakdown of the marriage. In

these circumstances for the court to refuse to end the marriage relationship between such parties would lead to further strife, misgivings and dissatisfaction. So is the position in this matter.

[42] In this matter it is untenable for the Minister, as a political head of Eskom and its sole shareholder, to have a CEO in whom she has lost all trust. It is also untenable for Mr Maroga to be a CEO of Eskom, the board whereof has lost all trust in him. It is unhealthy for Mr Maroga to be accountable to the Minister he does not trust. It is also not in the public interest that such a vital public institution such as Eskom be harm-strung by strife, misgivings and dissatisfaction. Public interest demands total confidence by the Minister and the board in its CEO and likewise the CEO in the Minister and the board. In the absence of such trust, Eskom is bound to fail in discharging its mandate. This, in my view, is not in the public interest.

[43] In further considering the balance of convenience, Mr Maroga in his founding affidavit states that should the court in the main application order his reinstatement when the new CEO had already been appointed, this would be prejudicial to such CEO as he has to be removed from the position. Mr Maroga states that this would be unsatisfactory to that person. He further states that such CEO's precarious position pending the finalisation of the main application, would create uncertainty for Eskom, the Government as the sole shareholder of Eskom, and the public as a whole. It is, therefore, according to Mr Maroga, in the public interest that no CEO be appointed pending the finalization of the main application. Finally, he states that as Mr Makwana, the

acting CEO, has been executing his duties to the satisfaction of both Eskom and the Minister, failure to appoint the new CEO pending the finalization of the main application, would not be prejudicial to Eskom. As a result of the above stated facts, Mr Maroga concludes that the balance of convenience favour the granting of the interim relief.

[44] The above allegations are denied by the respondents. In particular the first respondent denies that it is in the public interest that Eskom should be led by Mr Makwana who presently acts as the Chairperson and CEO of Eskom. Mr Makwana, who is the deponent to the first respondent's answering affidavit, states that it is essential for the restoration of market and investor confidence that Eskom appoints a CEO to embark on capital raising programme to enable Eskom to bridge its funding gap so that it may be able to provide sustainable electricity to the South African public.

[45] The balance of convenience in the present matter does not favour Mr Maroga. From his allegations, it is obvious that the prejudice Mr Maroga complains of, is prejudice to the person to be appointed as CEO pending the finalization of the main application. As I understand the law regarding application for interim relief, the prejudice that would be suffered either in the granting or refusal of interim relief, relates to the parties in the proceedings. It is not for Mr Maroga to allege prejudice to the new CEO. Contrary to Mr Maroga's allegations that the appointment of a new CEO, pending the finalization of the main application, would lead to uncertainty, the appointment of such a CEO would lead to certainty as to who is the head of Eskom and

this, in my view, would not only engender public confidence in Eskom but also restore market and investor confidence in Eskom, which is a critical state organ vital for the economy of the country.

[46] Counsel for Mr Maroga argues that the refusal of interim relief would fetter the discretion of the court hearing the main application.

[47] In **Tony Rahme**, Goldstein J pointed out that a *prima facie* view expressed by the court hearing the interim application, cannot in any manner be construed as anything but *prima facie*. Goldstein J further went on to point out such a court's *prima facie* views are not binding at later stages of the proceedings. In any event, if Eskom appoints the new CEO while the main application is pending, it does so at its own risk. Should the court in the main application order reinstatement of Mr Maroga as CEO of Eskom, then the problem as to how to deal with the new CEO is Eskom's problem as '*the employer cannot, therefore, frustrate the attainment of justice by the device of simply employing another employee on a permanent basis in the dismissed employees' position*'. See **SACCAWU and Others v Mahawane Country Club** [2002] 1 BLLR 20 (LAC) at paragraph [16].

[48] In the result I am of the view that the balance of convenience are considerably in favour of the refusal of the granting of interim relief. It is in the public interest and good corporate governance that there is certainty about the leadership of Eskom.

[49] The above finding is not the only difficulty faced by Mr Maroga in this matter. He must still prove that he has no alternative remedy. Mr Maroga's contract was for a fixed period of 5 years. The contract has about 2 years to run. His salary is fixed and determinable. Contrary to his counsel's argument that it will be difficult to quantify Mr Maroga's damages, the quantification of the damages is a mere mathematical calculation. Such damages are easily determinable. On the evidence before me, I am unable to find that Mr Maroga has no alternative remedy.

[50] In the circumstances of this matter, it is my view that Mr Maroga has failed to prove that he is entitled to final relief in the main application. In the result, I find that Mr Maroga has failed to make out a case for interim relief. The application for interim relief must fail.

[51] Counsel for both respondents argue for costs of two counsel. Counsel for the applicant argues to the contrary. The issue to be determined is one for interim relief. The issue is uncomplicated. However, because of the importance of this matter to both the respondents and the fact that this matter is of public interest, the engagement of two counsel, in the circumstances of this matter, in my view ,is reasonable.

[52] In the result the application is dismissed with costs, which costs include costs consequent upon the engagement of two counsel.

M P TSOKA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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DATE OF HEARING	
DATE OF JUDGMENT	