THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J200/18

In the matter between:

MATSHELA MOSES KOKO **Applicant**

and

ESKOM HOLDINGS SOC LIMITED **Respondent**

Heard: **06 February 2018**

Delivered: **21 February 2018**

Summary: **An application to interdict and restrain the respondent from terminating a contract of employment and to declare that an ultimatum issued by an Acting Group Chief Executive is unlawful and also to direct the respondent to comply with the contractual obligations. Mootness arises when a dispute no longer presents a live controversy between the warring parties. However, where a possibility of acting unlawfully could recur, a dispute is not moot and remains justiciable by a court of law. When a party disputes the unlawfulness of its conduct, a controversy remains even if certain events had occurred. A party consenting to an interdict-even on an interim basis-admits illegality and cannot later be heard to have acted lawfully. A direction cannot issue where a party has taken steps consistent with the terms and conditions of the employment contract. Such a direction shall be moot and**

ineffective-offending the doctrine of effectiveness. If on the uncontested evidence before court there exists a possibility of returning to the old ways, an interdict remains justiciable. Mootness on some reliefs does not disentitle a successful party of its costs. Urgency ought to be challenged at the first available opportunity and not when the horse has bolted. Held: (1) The applicant is entitled to the reliefs set out in the order. Held: (2) The respondent to pay the applicant's costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] This is the return day for an interim order. On 26 January 2018, this Court issued an interim order.[1] It is important to state upfront that essentially the interim order was obtained by agreement. The applicant's notice of motion sought a final order. On the day, the respondent did not file any affidavits. The parties approached the Court with an agreed draft

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[1] Having read the papers and having considered the matter:

IT IS ORDERED THAT:

1. The respondent (Eskom) is hereby and forthwith interdicted and restrained from unlawfully terminating the applicant's contract of employment and/or

    1.1 in breach of the terms and conditions of his employment and/or

    1.2 on the basis of a directive issued to it by the Government of the Republic of South Africa ("the Government") in terms of a statement that the government put out on Sunday, 21 January 2018, to the effect that:

    > *"The board is directed to immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr Matshela Koko…"*

    1.3 The provisions of paragraph 1 supra shall operate as an interim interdict pending the final determination of this matter.

    1.4 The matter is postponed for a hearing on 6 February 2018 at 10h00 or soon thereafter,

    1.5 The issue, at the incidence of the parties, costs for the appearances today Friday 26 January 2018, is reserved.

BY THE COURT

REGISTRAR

order. The only issue that the parties requested the Court to consider and rule on was paragraph 2.2[2] of the notice of motion. The contention of the applicant was that it needed that to form part of the agreed order, whereas the respondent contended that it should not. After hearing argument on that point alone, I sanctioned the agreed order and upheld the applicant's contention. It was unknown to me why the respondent agreed to an interdict at the time. I could only surmise that it may have discovered that the ultimatum issued by the Acting Group Chief Executive was unlawful. The applicant sought to obtain an order at 08h30 of that morning because by 10h00 of that day the applicant would have been dismissed had he not resigned.

[2] In the meanwhile, the applicant was suspended and charged with acts of misconduct. Despite these developments, the respondent chose to file an answering affidavit. Such prompted the applicant to file a reply. The matter was fully canvassed before me on the return day. After hearing submissions, I reserved judgment in order for me to carefully consider the matter.

Background facts

[3] It is common cause that the respondent is facing a financial quack mire. It requires liquidity injection to the tune of R20 billion in order to stay afloat. It is not disputed that the respondent is an essential entity within the South African economy. Its survival as an entity is of paramount economic significance. The onset of this matter is the statement dated 20 January 2018, wherein the Government of the Republic of South Africa announced several exigent measures that would be taken to bring about solidity at the respondent. These measures were announced following a meeting held between the President, Jacob Zuma; the Deputy President

[2] 2.2 on the basis of a directive issued to it by the Government of the Republic of South Africa ("the Government") in terms of a statement that the government put out on Sunday, 21 January 2018, to the effect that:

> *"The board is directed to immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr Matshela Koko…"*

Cyril Ramaphosa; the Minister of Public Enterprises, Lynne Brown and the Minister of Finance Malusi Gigaba.

[4] The measures announced included the appointment of a new Board headed by Mr Jabu Mabuza as the Chairperson of the Board and the appointment of Mr Hadebe as the Acting Group Chief Executive Officer. It is apparent that these measures were taken because the respondent was faced with various challenges caused by failures in corporate governance that resulted in a qualified audit report, austere liquidity conundrum that threatened the South African economy as a whole and the downgrade of the respondent's credit rating.

[5] Around 11 July 2017, the respondent published its financial statements for the financial year ending 31 March 2017. The external independent auditors issued a qualified audit. The qualification arose because of the R2.9 billion in irregular expenditures. One of the expenditures was the R30 million payment made to Mr Brian Molefe, the erstwhile Group Chief Executive Officer of the respondent. A matter which had caused much public spat, later to be reversed by a court of law. Another, was the alleged conflict of interest relating to the applicant's step daughter's shareholding in an entity, Impulse International (Pty) Ltd. The matter which led to the applicant being disciplined and vindicated[3].

[6] Following the qualified opinion, the Development Bank of South Africa threatened to recall its R15 billion loan to the respondent. At that point in time, the respondent was R361 billion in the red. Also, Banks froze credit lines and demanded urgent steps to be taken to correct the situation. Various institutions joined in to put more pressure on the respondent. The difficulties became somewhat insurmountable. It became increasingly imperative for the respondent to deal with the corporate governance failures that had threatened the financial effectiveness of the respondent. However, the matter before me turns on very limited facts,

[3] For reasons better known to the media and later the respondent, the disciplinary hearing was labelled a "sham".

as such a full rendition of the quack mire would serve no purpose but to elongate this judgment.

[7] The essential facts are largely common cause. Sparing the history of the dispute between the parties, which is littered in the print and electronic media, and is not worth repeating, the applicant was charged with some acts of misconduct and was cleared. Subsequent thereto, he returned to his position. Shortly thereafter, the Board of the respondent was changed. On 20 January 2018, the Presidency issued a statement. The relevant and contentious portion of the statement read thus:

> 'The board is directed to immediately remove all Eskom executives who are facing allegations of serious corruption and other acts of impropriety, including Mr Matshela Koko and Mr Anoj Singh.'[4]

[8] Following this statement, the applicant appeared before the Parliamentary Committee. Issues canvassed thereat may form part of the upcoming Judicial Commission of Inquiry into allegations of "State Capture". The applicant presented a lengthy written submission which was copied to the respondent's Acting Group Chief Executive.

[9] On 24 January 2018, the applicant was summoned to a meeting with a Mr Hadebe, the Acting Group Chief Executive of the respondent. The applicant had not met Mr Hadebe before. The meeting took place on 25 January 2018. In this meeting, and in no uncertain terms, the applicant was told that his presence at the respondent had become undesirable and if he were to return it would be detrimental to the respondent. He was informed that the lenders had expressed concern about his presence at the respondent.[5] It was mentioned to the applicant that the lenders viewed him as a stumbling block to the efforts of the respondent

[4] My own underlining and emphasis. A clear statement is that the Board as newly constituted was given a directive to remove. Clearly, this means dismissal. For Executives that faced allegations, the directive must have meant that any process if underway, ought to be expedited. However, at the time the applicant was not facing formal allegations. Despite that it seems that he had to be dismissed-removed. For what reason, it is not altogether clear from the statement. On the day the interim order issued, I enquired from both representatives as to whether the directive is an administrative decision within the contemplation of PAJA or an executive decision. No clear answer was given. Nonetheless nothing turns on that.

[5] Notably, the directive is not raised as the basis.

to clean up acts of maladministration and corruption. The applicant was there and then told that it was intolerable for him to remain in his position. He was urged to resign by 10h00 the following day failing which he would be terminated. The applicant refused to resign and in anticipation of being dismissed by 10h00 on 26 January 2018, he approached this Court for a relief. Essentially the above constitutes the relevant facts for the purposes of this judgment.

The respondent's defences on the return day[6]

[10] On the day the interim order issued, this Court was left with an indelible mark that the respondent accepted that its actions which were to ensue at 10h00 on that day (dismissal of the applicant) was unlawful. If it did not accept it, then it was unwise of it to agree to an interdict even on an interim basis. To the Court's utter amazement, the answering affidavit suggested that the applicant was not entitled to the interim interdictory relief. Urgency was also attacked. The applicant was criticized for "jumping the gun". Reliance was placed on clause 15.3 of the employment contract.[7]

[11] It was contended that the applicant would have been given the required six months' notice of termination.[8] The mootness point was mentioned on the basis that the disciplinary process in accordance with the contract of employment was in gear.[9] The disciplinary process in accordance with the contractual obligation was prompted by the urgent application. Further, it was contended that the dismissal that was to ensue was not going to be unlawful. The applicant would have been given the required notice had he not "jumped the gun". The applicant had alternative remedies in terms of the Labour Relations Act[10] (LRA).

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[6] Stated on affidavit.

[7] 15.3 This contract may be terminated by either party giving 6 months' written notice to that effect to the other party, provided that the Company shall be entitled to terminate this contract without notice for reasons justifying summary dismissal.

[8] On the uncontested facts, applicant was to be dismissed by 10h00 the following day.

[9] Paragraph 34 of the Answering Affidavit.

[10] Act 66 of 1995 as amended.

Defences in the heads of argument

[12] The argument of mootness was pursued with sufficient vigour. In fact, it appeared to have been the respondent's main and primary defence. Even during oral submissions, Mr Ngcukaitobi for the respondent had put up a spirited argument that the relief should not be granted since the relief sought had become moot[11]. The submission was that the application ought to be dismissed on the grounds of mootness. I shall in due course deal with the principles applicable to the doctrine of mootness.

[13] Without laying a factual foundation for such, it was submitted that the respondent had a fair reason to dismiss and the procedure it followed was fair. This submission was startling in that on the respondent's own version, the applicant was not dismissed. He, "jumped the gun". The procedure followed to dismiss him was not in breach of the Code of Conduct, properly construed, so the argument went. The fair reason was allegedly the demands of the lenders, classified as operational needs.

[14] On procedure, reliance was placed on the decisions of this Court.[12] Firstly reference was made to the discussion between Mr Zethembe Khoza, Professor Malekgapuru Makgoba and the applicant. These discussions took place on 10 January 2018. The facts pertaining to these discussions were appropriately pleaded by the applicant and not the respondent. He testified that on the day in question, he was engaged in a discussion by the then chairman of the respondent's Board, Mr Khoza, and Professor Makgoba, one of the two new Directors appointed to the respondent's Board in 2018. They informed him that the respondent's funders, whom he understood to be the four major South African Banks, have a perception that he is the face of corruption at the respondent. The banks were calling for his resignation. This call was being supported by

[11] He placed reliance on *National Employers Association of South Africa v Metal and Engineering Industrial Bargaining Council (MEIBC) and others* [2015] 36 ILJ 2032 (LAC).

[12] *Avril Elizabeth Home for the mentally Handicapped v CCMA and others* [2006] 9 BLLR 833 (LC) and *Nitrophoska (Pty) Ltd v CCMA and others* [2011] 8 BLLR 765 (LC).

the Minister of Finance. He was informed that the respondent has to explore termination of his services.

[15] These discussions were dubbed by the applicant to have been off the record. Despite that Professor Makgoba chose to reduce the discussion in writing in the form of short message service (sms) text. Only then was the applicant prompted to respond through his attorneys of record. The respondent's version of the discussion amounts to hearsay and is inadmissible. Applying the *Plascon Evans* rule, I reject the respondent's version. The applicant denies the version. According to the respondent, the applicant was given an opportunity to be heard before the dismissal.

[16] Secondly, reference is made to the discussion between the applicant and Mr Hadebe on 25 January 2018. There is not much difference on what was said to the applicant as testified by applicant and Mr Hadebe. Mr Hadebe testified that the applicant asked for extension of time which was refused. The applicant testified that he actually sought the legal basis for his resignation, to which Mr Hadebe refused to disclose. In addition, Mr Hadebe gave the applicant an opportunity to state his defence to which the applicant acquiesced and gave reasons why he should not be dismissed. The applicant disputes that. These differences do not bring about a genuine dispute of fact given the vacillating versions presented by the respondent. On the one hand it seeks to rely on termination by giving notice even where there is no misconduct. On the other hand, it attempts substantial compliance with the Disciplinary Code, which on its own version applies only to misconduct. If there is a genuine dispute of fact, I reject the version of the respondent as being far-fetched and actually false.

[17] The respondent also disputed non-compliance with the Code of Conduct. Another spirited argument was made around substantial compliance[13]

[13] See; *Mojaki v Ngaka Modiri Molema* [2015] 36 ILJ 1331 (LC).

and how documents are to be interpreted as decreed by the Supreme Court of Appeal.[14]

[18] In the course of these submissions, particularly those relating to procedure, I enquired from Mr Ngcukaitobi that if the dismissal was lawful or was going to be lawful what was the point of the new process under the Chairpersonship of Mr Cassim SC? He retorted by submitting that had the applicant not jumped the gun, the respondent was "good to go"-entitled to dismiss. I shall return to this submission when I deal with the issue of mootness later in this judgment.

Evaluation

[19] The applicant contends that its case is pegged on specific performance and he approached this Court under section 77(3) of the Basic Conditions of Employment Act (BCEA)[15]. On the defence of mootness, Mr Barrie SC for the applicant, submitted that the principle does not apply in that there is evidence of possible recurrence of the unlawful conduct complained of. The two defences raised by the respondent are that of mootness, which as I said appears to be the primary defence, and that of legality of its action. This legality argument is pegged on two legs. Firstly, the contract of employment permits termination on notice, even if there is no misconduct alleged. Secondly that there was substantial compliance with the Code of Conduct, which the applicant contends was part of his contract of employment. Thus, the respondent has complied with the contractual obligations and the applicant has no reasons to lament.

Is the matter moot?

[20] According to the respondent, what renders the matter moot is the on-going disciplinary enquiry under the stewardship of Mr Cassim SC. Put differently, "you wanted a disciplinary hearing before dismissal here you have it now." Stop complaining. The applicant submits that he has

[14] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[15] Act 75 of 1997.

reason to complain because on the facts of this case, the respondent is still intending and could dismiss him unlawfully as it had done so to other colleagues of his and attempted to do so with him on 26 January 2018 at 10h00.

[21] The doctrine of mootness is well developed in the American constitutional law jurisprudence. A case becomes moot if a party seeks to obtain judgment on a pretended controversy, when in reality there is none, or a decision in advance about a right before it has actually been asserted and contested, or a judgment upon some matter which when rendered, for any reason, cannot have any practical effect upon an existing controversy. Courts exists to resolve controversies and not abstract issues. As I see it, for a court to intervene and assist the warring parties, there must be controversy between the parties. The dictionary meaning of the term controversy is a dispute, argument, or debate, especially one concerning a matter about which there is a strong disagreement. Further, the controversy must be a live one. Put differently it must exist between the warring parties. A case would be moot if the parties are not adverse, if the controversy is hypothetical, or if the judgment of the court for some other reason cannot operate to grant any actual relief, and the court is without power to grant a decision. It is moot, if it no longer presents an existing or live controversy or the prejudice or threat of prejudice, which to an applicant, no longer exists[16].

[22] The mere fact that the matter is moot does not constitute an absolute bar for a court to hear a matter. The overriding factor is that the order will have some practical effect on the parties or others.[17] The Constitutional Court had set out the following as potentially relevant factors: the nature and extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; the fullness or

[16] See in this regard *Coalition for Gay and Lesbian Equality and others v Minister of Home Affairs and others* 2000 (2) SA 1 (CC) followed in *NEASA v MEIBC and others* [2015] 36 ILJ 2032 (LAC).

[17] See: *IEC v Langeberg Municipality* 2001 (3) SA 925 (CC).

otherwise of the argument advanced and resolving disputes between different courts.[18] Added to the factors is the interest of justice.[19]

[23] Quiet recently the Constitutional Court in *Pheko v Ekurhuleni Metropolitan Municipality*[20] had the following to say:

> '[32] Although the removal has taken place, this case still presents a live controversy regarding the lawfulness of the eviction. Generally, unlawful conduct is inimical to the rule of law and to the development of a society based on dignity, equality and freedom. Needless to say, the applicants have an interest in the adjudication of the constitutional issue at stake. The matter cannot therefore be said to be moot. It is also live because if we find that the removal of the applicants was unlawful, it would not be necessary to consider their claim for restitutionary relief.' [My own underlining and emphasis]

[24] Determining whether a case is moot requires consideration of the evidence placed before a court. It is not a principle that is to be plugged from the vacuum. Also of importance is the relief that is being sought by a party. In *Tshwane University of Technology v All Members of the Central Student Representative Council of the Applicant*[21] Acting Justice Wentzel had the following to say before declining to grant the relief sought:

> '[23] To my mind, it is not the function of the courts to make blanket interdicts. What the respondents in a sense want is restraining order to preclude any decision to close the residences without a Court order. It is a matter of law that this must be done lawfully and no order declaring this is necessary. If this is done unlawfully in the future, the respondents will have recourse to the courts.'

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[18] See: *MEC for Education: Kwazulu-Natal and others v Pillay* 2008 (1) SA 474 (CC) and *Minister of Justice and others v Estate Stransham-Ford* 2017 (3) SA 152 (SCA).

[19] See: *Qoboshiyane NO and others v Avusa Publishing Eastern Cape (Pty) Ltd and others* 2013 (3) SA 315 (SCA). See also *City of Tshwane Metropolitan Municipality and others v Nambiti Technologies (Pty) Ltd* [2016] 1 All SA 332 (SCA) and *Legal Aid South Africa v Magidiwana and others 2015* (6) SA 494 (CC).

[20] 2012 (2) SA 598 (CC).

[21] [2016] ZAGPPHC 881 (22 September 2016).

[25] Recently, the High Court, in *Afriforum NPC and Others v Eskom Holdings SOC Ltd and others*[22], had the following to say:

> '[107] The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has gotten underway, usually involving a change in the facts or the law, which allegedly deprived the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.
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> [110] An application for an interdict or other relief with continuing force is not rendered moot solely by the voluntary cessation of allegedly unconstitutional, illegal, unreasonable or unfair conduct, since the offending party may return to its old ways. An issue will normally not be deemed moot if it is capable of repetition, yet evading review. The court should enquire into whether the claim has been mooted because the respondent has voluntarily, but not necessarily permanently, acquiesced. So long as the person mounting the legal challenge confronts continuing harm, collateral harmful consequences that continue to endure, or a significant prospect of future harm, the case cannot be deemed moot. By similar token, in the event of a voluntary cessation of wrongful conduct, a case might well be moot if subsequent events make it sufficiently clear that the allegedly unlawful behavior may not reasonably be expected to recur.
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> [115] The essential question for decision in relation to the justiciability of the issues and the relief sought in these applications, therefore, is whether the voluntary cessation of Eskom's alleged wrongful conduct has rendered the applications moot. As just said, applications for interdictory relief or review should not be rendered moot solely by the voluntary cessation of allegedly wrongful conduct where it appears that the offending party may return to its old ways…Put differently, do the applicants still face continuing harm, enduring collateral harmful consequences or a significant prospect of future harm? Does the

[22] [2017] 3 All SA 663 (GP).

> evidence make it sufficiently clear that the allegedly wrongful conduct may not reasonably expected to recur?'

Applying the principles to the facts of this case.

[26] As I said, principles and doctrines are not simply plugged in the air and are blindly applied. The evidence before a court plays a pivotal role. The respondent did not lay facts that would sufficiently suggest that recurrence is not reasonably possible. It does not take a submission from counsel, but it requires some evidence. Counsel for the respondent submitted that once the applicant is cleared of the current charges, there is no possibility of him being dismissed in the manner that was to occur on 26 January 2018. This submission falters on two bases: Firstly in the recent past, the applicant was cleared of allegations of misconduct, yet he was threatened with dismissal on the reason that the lenders are unhappy. To this day the respondent still faces the challenge of unhappy lenders. They unwaveringly see the applicant as a face of corruption, even if he was cleared of the allegations of corruption. Secondly, the respondent to this day maintains that its actions that were to ensue on 26 January 2018 were lawful. Counsel for the respondent submitted that had it not been for the interim order, the respondent was "good to go".

[27] The respondent pleaded its case on this point as follows:

> '33 What happened here is that I informed Mr Koko that it was my intention to terminate his employment on the grounds of the concerns expressed by the lenders and the intolerability of his remaining in his position while the matter remained addressed. I am advised that in law, this is akin to an extreme operational need justifying the steps that were taken. This remains the case, although the situation has been ameliorated by the subsequent suspension of Mr Koko and the commencement of a disciplinary hearing.
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> 34 Upon receiving the urgent application brought by Mr Koko, Eskom decided to embark upon a disciplinary process on the grounds of misconduct…

> 35 The disciplinary process is in accordance with Mr Koko's contract of employment and thus renders the relief sought in this application moot. As matters stand, it is not the intention of Eskom to dismiss Mr Koko without following a disciplinary enquiry. The dismissal of Mr Koko will depend on the findings and recommendations of the independent Chair, Adv. Nazeer Cassim SC.'

[28] The above quoted evidence evinces in no uncertain terms that the respondent is still intent to terminate the applicant's employment contract on the grounds of the concerns expressed by the lenders. According to the evidence before me those were the grounds to have been used on 26 January 2018. There is no admission that this position would have been unlawful and is being jettisoned. So much so, it had to be done urgently hence the applicant was refused extension of time. On the contrary, the position was improved by the subsequent suspension and the commencement of a disciplinary process.

[29] I am inclined to agree with Mr Barrie SC that the evidence points to the fact that there is a reasonable prospect that the respondent may return to its old ways. The evidence before me suggests that there is reasonable possibility that the respondent may return to its old ways, particularly because the respondent does not see its conduct to be unlawful in any manner whatsoever. It does seem to me that the pressure from the lenders is insurmountable. There exists a great possibility that if the respondent fails to secure the dismissal of the applicant through the current process, it may return to its position which was only ameliorated by the current process. I am accordingly of the view that the reliefs sought are not moot.

[30] Another factor is that the directive issued by the office of the Presidency still stands. The applicant, when he approached this Court, on 26 January 2018, made a connection between what was to befall him, being dismissed and the directive. According to the directive, the applicant is to be removed, and not that he be subjected to a disciplinary hearing to determine whether there are grounds in law for his employment to be terminated. The applicant has rights guaranteed by his contract of

employment. The respondent is constrained to act in line with the rule of law. Unlawful actions are inimical to the rule of law.

[31] The actions of Mr Hadebe on 25 January 2018 are consistent with the directive issued on 21 January 2018. Although Mr Hadebe disputes the connection but on the balance of probabilities there is a clear connection. The fact that he did not mention the directive in the discussion is of no moment. Fact is, the directive wanted some action-removal and few days thereafter, Mr Hadebe acted. There is clearly a causal link. How else could the respondent's Board have followed the directive? It cannot be said that the respondent simply ignored the directive. If it did, it does not make such a case in its papers. On the contrary, Mr Hadebe testified that the Government was rightly concerned about the apparent lack of accountability of employees like the applicant. This suggests that the respondent saw nothing wrong with the directive. If that is the case, why not act upon it?

[32] This is an additional factor that points to the possibility of recurrence. For reasons set out above, I come to the conclusion that the case is not moot. The point of mootness is not upheld.

[33] On the evidence before me, it is clear that the respondent is intent and actually is pressured to dismiss the applicant. Should the outcome of the current process not yield the desired results, there is a great possibility of the respondent pulling the ace up the sleeve. Legal advice has already been sought and dispensed with that the steps taken are justified in law.[23] That being so, there is nothing that would prevent the respondent to flag the steps already interdicted to justify the termination once the interdict is gone. Therefore, the fear of the applicant is reasonable and ought to be entertained by this Court.

[23] Paragraph 33.2 of the answering affidavit- 'I have been advised that in law, this (the intention to terminate the applicant's employment on the grounds expressed by the lenders) is akin to an extreme operational need justifying the steps that were taken.'

Was the applicant entitled to the interim relief or not?

[34] The respondent contended, seriously so, that the applicant was not entitled to the interim relief in the first place. This was rather surprising, given the facts exposed above as to how the order was obtained. This on its own rendered the matter alive. There is controversy between the applicant and the respondent as to the legality or otherwise of the steps taken, which led to the applicant approaching this Court. This cannot be left unattended. To my mind, although the point was not raised by any of the parties during argument, if the applicant is eventually dismissed-the position that will please the lenders and the Government-and the procedure leading to his dismissal is being challenged, the steps taken may potentially become an issue. In fact, the issue, would not have been decided in the circumstances where this Court was seized with an opportunity to decide the controversy. Such a decision will benefit either of the parties when it arises at a possible unfair dismissal dispute. There lies the practical benefit.

Does the applicant have a clear right?

[35] Turning to the applicant's case. Simply put the applicant seeks a specific performance. Clause 13.1 of his contract of employment provides thus:

> '13.1 Save where specifically amended by this Agreement, the Company's standard conditions of employment as applicable to Managerial Levels shall be applicable. All other relevant Policies and Procedures are also incorporated into this agreement and the Employee shall be bound by the provisions thereof. The company shall be entitled from time to time to amend the terms and conditions of its Policies and Procedures.' [My underlining and emphasis]

[36] The respondent has in place a Disciplinary Procedure which is due to be reviewed in August 2020. The version presented to me was authorized on 10 August 2017. The Disciplinary Procedure is informed by the Constitution and other pieces of labour legislations.[24] The applicant

[24] Clause 2.2.2 of the Disciplinary Policy.

places reliance on clause 3.1 read with clause 3.2. Those clauses provides the following:

> **'3.1 PRINCIPLES**
>
> The following principles will be observed when applying the procedure:
>
> a) The principle of fairness and equity shall always be adhered to.
>
> b) Any disciplinary action, shall as far as possible emphasize corrective measures rather than punitive measures; and
>
> c) Eskom will endeavor to take disciplinary action within three (3) months from the date that it becomes aware of any misconduct.
>
> **3.2 DISCIPLINARY PROCEDURE**
>
> No disciplinary action shall be instituted against an employee unless he/she is afforded a proper opportunity to state his/her case and to defend him/herself against any allegations, which may be taken into consideration against him/her.' [My emphasis and underlining]

[37] The applicant contends that the respondent had breached the rights guaranteed in these clauses. If a party to a contract fails to perform in terms of the obligation he/she had undertaken and the contractual counterparty continues to demand performance a court shall, in principle, provided that performance is possible, and subject to the court's discretion to refuse such an order, order the promisor to perform.[25] The promissee's entitlement is to performance *in forma specifica*-performance of precisely what the debtor had bound himself to perform.[26] The disciplinary policy gives the applicant the contractual right to a hearing prior to termination of his services.[27]

[25] See: *Steenkamp and others v Edcon Limited* 2016 (3) SA 251 (CC).

[26] See: *Haynes v Kingwilliamstown Municipality* 1951 (2) SA 371 (A).

[27] See: *Denel (Pty) v Vorster* [2005] 5 BLLR 313 (SCA).

[38] To this apparent solid case, the respondent mounts the defence firstly that section 77(3) of the BCEA is of no application in that no particular clause in the employment contract has been infringed. Also, that the Disciplinary Code finds no application since the reasons to have the applicant dismissed are not related to misconduct but extreme operational risks threatening the viability of the respondent. These contentions seem to be opportunistic at the very least. The evidence of Mr Hadebe is that the applicant is alleged to be a central player in the collapse of corporate governance at the respondent. This allegation of being central threatens the viability of the respondent[28]. The lenders were no longer tolerating allegations of corruption.[29] What concerned the lenders was corporate governance failures which threatened the viability of the respondent.

[39] Therefore, in order to address the concerns of the lenders, the applicant in particular ought to have been charged with the failures in corporate governance and such requires application of the Disciplinary Code. If it walks like a duck and quacks like a duck it is a duck. To now label the concerns of the lenders as "extreme operational requirements", when in truth it is allegations of misconduct and or performance is not appropriate. The respondent knows fully well that labelling the concerns correctly suggests that the Disciplinary Code ought to be invoked. The directive is pertinently clear, it is about allegations of serious corruption and other acts of impropriety. It is for that reason that the respondent seeks to disavow the connection between the ultimatum to resign and the directive. In any event on the balance of probabilities I found that such a connection exists.

[40] Secondly, and only in argument, that there has been substantial compliance with the contractual obligation. The discussions between the applicant, Mr Khoza and Professor Makgoba and those between the applicant and Mr Hadebe are now turned into a compliance with the *Audi*

[28] Paragraph 9 of the answering affidavit.

[29] Paragraph 19 of the answering affidavit.

alteram partem rule. The events of Mr Khoza and Professor Makgoba's meeting are related by the applicant only. There was no attempt to obtain any evidence from Mr Khoza or Professor Makgoba. There is hearsay evidence by Mr Hadebe as to what he was advised, by whom it is unclear, regarding the discussions between the applicant and Professor Makgoba.[30] The applicant calls the discussions off the record discussions. I must accept them as such absent contrary evidence.

[41] Most startling is the version of Mr Hadebe. On his own version he does not describe the discussion as anything close to a hearing. If anything, he presented the applicant with a *fait accompli* as it were. All he did, after presenting the lenders' complaints, was to urge the applicant to resign. Further, he made it clear that if he did not resign by 10h00, the following day, his employment will be terminated. Even on *Avril Elizabeth's* approach, there was no opportunity for reflection before any decision is taken to dismiss. On his own version he was faced with an urgent situation, which required urgent action. In such situations as described by him, it would be befitting to refuse any form of extensions.

[42] As an indication that Mr Hadebe was not involved in a dialogue and an opportunity for reflection, he testified thus:

> '33.2 I would have given Mr Koko the required notice of termination, as stipulated above. I am advised that it is not unlawful to give Mr Koko notice of termination of his contract…However, the code applies where an employee is to be dismissed on grounds of misconduct, which is not what happened here. What happened here is that I informed Mr Koko that it was my intention to terminate his employment on the grounds of the concerns expressed by the lenders…'

[43] A submission that there was at the very least substantial compliance is not supported by the evidence before me. The high watermark of the respondent's case is exposed by the following version:

[30] Paragraph 68 of the answering affidavit.

> '58 The provisions of the disciplinary code are noted. It is denied that the provisions of the code are of application on the facts dealt with above. The facts, in any event, were exceptionally serious, justifying a departure from the provisions of the code.'

[44] It is clear from this evidence that the case is not one of substantial compliance but that of departure due to exceptionally serious facts. With this evidence, it was impermissible for the respondent's counsel to make submissions around substantial compliance.[31] The contractual arrangement did not promise the applicant a truncated process.[32] In the recent past, the respondent did not follow a truncated process, simply because it had a contractual obligation to follow a specified and the agreed process. One of the known defences for a claim of specific performance is impossibility. Such a defence has not been properly pleaded by the respondent. In any event its actions in the recent past and the current process would have defeated such a defence.

[45] Based on the authorities cited[33] by the respondent's counsel, it does seem that the applicant's case is being misunderstood. The applicant before me is not complaining about procedural fairness. The applicant is staking the fruits of his bargain[34]. He approached this Court under section 77(3) of the BCEA. I agree with the respondent's counsel that the applicant has no right not to be dismissed. However, before me, he is not staking that claim. The principle in *Denel*[35] has never been disturbed by any court[36]. The applicant has not called upon the Court to interpret the

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[31] Paragraphs 57-59 of the respondent's written heads and the bundle of authorities provided to the court after oral submissions.

[32] Clause 3.2 provides that when it is suspected that an employee has committed misconduct, one of the following disciplinary process will be followed…

[33] *Avril Elizabeth Home, Nitrophoska (Pty) Ltd, JDG Trading (Pty) Ltd v Brunsdon* [200] 1 BLLR 1 (LAC), *Somyo v Ross Poultry Breeders (Pty) Ltd* [1997] 7 BLLR 862 (LAC), *Leonard Dingler (Pty) Ltd v Ngwenya* [1999] JOL 5414 (LAC), *Mojaki, Lebu, and Semenya and others v the CCMA and others* JA26/2003 delivered 23 March 2016.

[34] In *Trotman and Another v Edwick* 1951 (1) SA 443 (A), it was held that a litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind.

[35] Ibid 25.

[36] On the contrary, this court in *Ngubeni v The National Youth Development Agency and another* [2103] ZALCJHB 269 (21 October 2013) reasoned thus: '[17*]…Instead, for reasons known only to it, the NYDA offered Ngubeni a procedure that would make any criminal court*

clauses but to enforce them. As pointed out earlier, the defence of substantial compliance has not been properly pleaded.

[46] Perhaps, if it was, it would have compelled me to gravitate towards the interpretation route to establish compliance. The only case pleaded is that of being entitled to terminate by giving a six months' notice.[37]

[47] It seems to me that the respondent labours under a misapprehension that even if the reasons that justify summary dismissal are absent, it can terminate by simply giving a six months' notice[38]. This contention seeks to ignore other clauses of the contract. Interpretation of a document requires consideration of the document as a whole.[39] Misconduct is a reason that justifies summary dismissal[40].

[48] In *Natal Joint Municipal Pension Fund v Endumeni Municipality*[41], the SCA had aptly said the following:

> 'Interpretation is the process of attributing meaning to words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the

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proud. Ngubeni accepted those terms, and the enquiry was commenced on that agreed basis. In these circumstances, it is not open to the NYDA unilaterally to change the terms of that agreement, or as it has in effect done, to renege on the agreement. [18] Having found that clause 10.1 of the employment contract requires the NYDA to afford Ngubeni a fair disciplinary hearing procedure prior to terminating his contract, it remains to consider whether the NYDA's conduct amounted to a breach of that clause. [19] In so far as it may be contended that the remedy of specific performance is either unavailable or inappropriate, the starting point is to note that in terms of s 77A (e) of the BCEA specifically empowers this court to make such orders. At the end, the court declared that the decision to dismiss was in breach of the clause that guaranteed Ngubeni a fair hearing.'

[37] Clause 15.3 provides that: This contract may be terminated by either party giving 6 months' written notice to that effect to the other party, provided that the Company shall be entitled to terminate this contract without notice for reasons justifying summary dismissal.

[38] 33.2 I am advised that it is not unlawful to give Mr Koko notice of termination of his contract.

[39] See: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

[40] See clause 15.2 of the contract of employment.

[41] Ibid 37.

> provisions appear; the apparent purpose to which it is directed and the material known to those responsible for its production'. [My underlining and emphasis].

[49] Effectively, the respondent does not have a defence to a claim for specific performance. I am not amazed by the agreement to the interim order. To my mind, the respondent should have agreed to a final order as well in order to avoid costs. I therefore unequivocally conclude that the applicant has demonstrated a clear right as guaranteed by the Disciplinary Code, which forms part of his employment contract.

The issue of urgency

[50] In his founding papers, the applicant testified that it was simply impossible to abide by the usual forms, service and time periods prescribed, as to do so would result in him being subjected to the unlawful conduct by 10h00 on Friday and him suffering irreparable harm. He then requested that the matter be addressed as one of urgency and that the non-compliance be condoned.

[51] On 26 January 2018, when the interim order issued by agreement as explained above, the respondent was represented by an attorney, Mr Kaapu. The respondent did not take issue with the urgency of the matter. In this Court, and indeed in other courts, a party can challenge the issue of urgency without filing any papers. It was thus open to the respondent to challenge the urgency then. It ought to be remembered that if a court is not satisfied that the matter is not sufficiently urgent, to warrant its attention, the only competent order it can make is to strike the matter off the roll-refuse to hear it and costs.

[52] And if another party does not believe that a court must hear a matter as one of urgency, it must indicate so and make submissions relevant thereto. Once a court issues an order, even an interim one, when on the day the other party to be affected by the order was present, the issue of urgency becomes academic as it were. The horse would have bolted.

There are instances where urgency may remain alive. Those are when the one party obtains an order in the absence of the other and the judge granting the order is not advised of a fact that would have led to the court refusing to entertain the matter as one of urgency. On the return day, a party who was absent is still entitled to challenge the issue of urgency because all the aspects of the relief sought ought to be entertained on the return day.[42]

[53] When the respondent obtained an opportunity to answer to the applicant's case-when the dust has settled as stated in the *Polyoak* matter, the deponent on behalf of the respondent simply testified that he will demonstrate that the applicant failed to establish urgency. The deponent testified that the applicant did not make out a case for bringing an application for urgent interdictory relief.[43] In relation to the facts pleaded by the applicant stated above, the deponent only offered a bare denial.[44]

[54] The deponent accused the applicant for not having a clear right and also having an alternative remedy instead[45]. This Court in *Vermaak v Taung Local Municipality*[46] had the following to say:

> 'The consideration of the first requirement being why is the relief necessary today and not tomorrow, requires a court to be placed in a position where the court must appreciate that if it does not issue a relief as a matter of urgency, something is likely to happen. By way of an example if the court were not to issue an injunction, some unlawful act is likely to happen at a particular stage and at a particular date.'

[55] On the uncontested facts before me, the applicant has satisfied the above requirement. Had the Court not issued an injunction, the applicant would have been dismissed by 10h00 on 26 January 2018, in breach of

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[42] See *Polyoak (Pty) Ltd v CWIU and others* [1999] 20 ILJ 392 (LC) and *Southern Shipyard (Pty) Ltd v NUMSA and others* 2008 ZALCCT 7 (7 November 2008).

[43] Paragraph 59 of the Answering Affidavit.

[44] Paragraph 77 of the Answering Affidavit.

[45] Paragraph 80 of the Answering Affidavit.

[46] [2013] ZALCJHB 81 (1 March 2017).

his contract-an unlawful act, as alleged by the applicant. In any event, I did not hear the respondent's counsel arguing this point with vigour. Although I did not hear him saying so, I assumed that the point was abandoned. However, in the bundle of authorities relied on, provided to the Court after hearing oral argument, the judgment of this Court[47] per Snyman AJ was included. I then gained an impression that the point is still being pressed on. For the reasons set out above, I am satisfied that the matter ought to have been heard as one of urgency.

[56] *En passant*, I do state that objections on urgency ought to be raised in *limine* and be decided upon before any submissions on the merits are made. To not do so, on a matter that is potentially not urgent, would be to actually waist the court's time. It is impermissible for a party to argue the merits and at the same time submit that the matter was not urgent, in other words the matter should not have been heard. There seems to be a growing tendency for parties to argue urgency together with the merits. This tendency is undesirable and ought not to be encouraged.

The issue of costs

[57] Both parties before me are in agreement that costs should follow the results. The respondent's counsel submitted that at the very least the applicant is entitled to the costs of the interim order. In amplification of this submission, reference was made to the fact that once the respondent ignited the current process, the applicant should have noted that the relief he is seeking was no longer necessary as it was no longer the intention of the respondent to proceed with the intended dismissal. If it was not clear to him, the answering affidavit made it clear. He should not have filed a replying affidavit since the dispute was mooted by the current proceedings.

[58] I have no reason to entertain this submission, since in my judgment the case was not mooted. On the contrary, as said above, the Court believes that the appropriate thing to have been done was to agree to a final

[47] *AMCU v Northam Platinum Ltd* Case J1671/16 delivered 19 August 2016.

order. To file an answer and allege that the act complained of was legal and an interim order was not appropriate, is nothing else but to ignite controversy compelling the court into issuing an order to resolve the controversy. Since the applicant is successful, he is entitled to his costs. The costs include the ones reserved on 26 January 2018 and those incidental to the employment of two counsel.

Conclusions and summary

[59] In conclusion and in summary, it is my considered view that the case, for reasons spelled out above, is not moot. The evidence demonstrates a reasonable possibility of recurrence. The actions of the respondent on 25 January 2018 of intending to terminate the employment of the applicant in breach of his employment contract are unlawful and ought to be declared as such. The applicant has demonstrated a right emanating from the terms of his employment contract, which right is under threat on the evidence before this Court. Given the evidence of possible recurrence, the respondent ought to be interdicted from acting unlawfully. As to costs, and guided by section 162 of the LRA, I am not averse to the submission by both parties that costs should follow the results.

[60] In the results I make the following order:

Order

1. The matter is heard as one of urgency.

2. The respondent is interdicted and restrained forthwith from terminating the applicant's contract of employment and or services in an unlawful breach of the terms and conditions of his employment contract and or on the basis of a directive issued to it by the Government of the Republic of South Africa in terms of the statement that the Government put out on Sunday, 21 January 2018 to the effect that: "*The board is directed to immediately remove all Eskom executives who are facing allegations of serious*

corruption and other acts of impropriety, including Matshela Koko…"

3. It is hereby declared that the ultimatum issued by Mr Phakamani Hadebe requiring the applicant to resign by Friday 26 January 2018, failing which his employment shall terminate by 10h00 am is unlawful.

4. The respondent to pay the costs, which include the costs of 26 January 2018 and the employment of two counsel.

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GN Moshoana

Judge of the Labour Court of South Africa.

Appearances

For the Applicant:	Advocate F G Barrie SC with him Advocate L M Malan.
Instructed by:	Asger Gani Attorneys, Pretoria.
For the Respondent:	Advocate T N Ngcukaitobi with him Advocate L J Zikalala.
Instructed by:	Bowman Gilfillan Inc, Sandton.