

SOUTH AFRICA / JUDGMENT

Isago Ka Lefika (Pty) Ltd v Sishen Iron Ore and Others (1416/2025) [2025] ZANCHC 67 (18 July 2025) [2025] ZANCHC 67

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo

CASE / FILE NUMBER

1416/2025

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IN THE HIGH COURT OF
SOUTH AFRICA
(NORTHERN CAPE
DIVISION, KIMBERLEY)

Case

No: 1416/2025

Reportable:

YES / NO
Circulate
to Judges: YES / NO
Circulate
to Magistrates: YES / NO
Circulate
to Regional Magistrates: YES / NO
In the matter between:-
ISAGO
KA LEFIKA (PTY)
LTD
Applicant
and
SISHEN
IRON ORE
First Respondent
GARETH
CHAPMAN
Second Respondent
NATIE
POTGIETER
Third Respondent

Heard:	06 June 2025
Delivered:	18 July 2025
Summary:	Urgent application. Interim interdict sought restraining and interdicting Sishen Iron Ore Company from giving effect to the Notice of Termination. Respondents directed to exhaust agreed dispute resolution mechanisms. Despite orders, respondents issued another termination notice resulting in another urgent application. Requirements for urgent applications. Requirements to be met in contempt of court applications. Requirements for interdictory relief. ORDER In the result, the
following order is made:	1. The applicant's non-compliance with the forms and service provided for in the Uniform Rules of Court is condoned and the application is heard as one of urgency in terms of Rule 6(12)(a). 2. A rule nisi is issued calling upon the respondents to show cause, if so advised, before this Court on 08 August 2025 why the following
orders should not be made final:	2.1 that the respondents are found to be in contempt of the order issued by this Court under case number 814/2025 on the 17th of April 2025. 2.2
that the following sanctions are imposed against the respondents:	2.2.1 in respect of the first respondent, it be ordered to pay a fine in the amount of R100 000.00 within seven days of the date of this order. 2.2.2 in respect of the second and third respondents, that they be committed to imprisonment for a period of 30 days, or any other relief as this Court may deem just and equitable. 2.3 that, pending the outcome and final determination of the mediation, arbitration and appeal, if applicable, on the question of the first respondent's entitlement to terminate the agreement and the validity of the termination (and the issues and disputes related

thereto), in accordance with the provisions of clauses 5.1, 5.2, 5.3, and

5.4 of Part D of the agreement:

2.3.1

the respondents be interdicted and restrained from taking any steps of whatsoever

nature to procure the services of another service

provider or entity to replace the applicant and perform plant maintenance and

related services at the Jig Plant Beneficiation and

Modular at the first respondent's Sishen Mine, or any services

similar

to that provided by the applicant in terms of the agreement.

2.3.2

the respondents be interdicted and restrained from ejecting the applicant,

its directors, or any of its employees from their site at

the first respondent's Sishen Mine; and

2.3.3

the respondents be interdicted and restrained from in any way blocking or

disallowing the applicant, its directors, or employees,

access to the first respondent's Sishen Mine.

3.

The order in paragraph 2.3 and its subparagraphs above is to operate as an interim interdict with immediate effect.

4.

In the event of the dispute resolution process continuing past the

completion date of the agreement, namely, 27 February 2026, the order

in paragraph 2.3 and its subparagraphs above shall cease

to operate

with effect from 28 February 2026.

5.

The respondents shall pay the costs of this application jointly and

severally, the one paying the other to be absolved, on scale B. These

costs include the costs reserved on 30 May 2025.

JUDGMENT

MAMOSEBO, J

- [1] The applicant, Isago ka Lefika (Pty) Ltd, and the first respondent, Sishen Iron Ore Company (Pty) Ltd, concluded a written agreement commencing on 01 March 2023 until 27 February 2026 in which the applicant supplies maintenance and related services at the first respondent's Jig Plant Beneficiation and Modular at Kathu, in the Northern Cape.

[2] On 24 February 2025 the first respondent served the applicant with a notice of termination of the agreement by 24 April 2025. The applicant declared a dispute as contemplated in the agreement. Due to the first respondent's failure to timeously respond to the request for a first negotiation meeting, as envisaged by the dispute

resolution in the agreement, it resorted to approaching this court seeking interdictory relief.

[3] The matter came before Stanton J on an urgent basis on 17 April 2025 who granted the following relief under Case No 814/2025, with the parties being the applicant against Sishen Iron Ore Company (Pty)

Ltd:

'1. The applicant's non-compliance with the forms and service provided for in the Uniform Rules of Court is condoned and the application is heard as one of urgency.

2. The respondent is hereby interdicted and restrained from implementing or giving effect to the Notice of Termination of the agreement between the parties dated 24 February 2025.

3. The parties are directed as follows:

3.1 The respondent is to give effect to the agreement, comply with its obligations in terms thereof, make payment to the applicant of what is due to it in accordance with the stipulations of the agreement and is restrained from interfering in any way with the operations of the applicant.

3.2 The applicant is to comply with all its obligations in terms of the agreement, including the performance of the services agreed to.

4. The orders in paragraphs 2 and 3 and its subparagraphs above are to operate as an interim interdict with immediate effect pending:

4.1 the outcome of the negotiation process to be conducted in accordance with the provisions of clause 25.3 of Part B of the agreement and the provisions of the order of this Court; and

4.2 the outcome and final determination of mediation, arbitration and appeal, if applicable, on the question of the respondent's entitlement to terminate the agreement and the validity of the termination (and the issues and disputes related thereto), in accordance with the provisions of clauses 5.1, 5.2, 5.3 and 5.4 of Part D of the agreement.

5. The respondent shall comply with its obligations in terms of the applicable provisions of clause 25.3 of Part B of the agreement by attending a meeting with the applicant for the purposes of negotiation between the parties within 10 days from the date of this order and, depending on the outcome of the negotiations, its further obligations relating to mediation, arbitration and appeal, if applicable.'

[4] Following the aforementioned order, the parties' attempted negotiations were unsuccessful. On 23 April 2025 Mr Natie Potgieter, Commercial Specialist, Anglo American Platinum & Kumba Iron Ore, cited as the third respondent in the application before me, directed an email to the applicant to this effect:

'As you are aware of the termination of the current contracts, we are also trying to ensure continuity of the services on site. Therefore, we are in the process of creating Purchase Orders (PO's) for the month of May and it should be issued shortly. The off-boarding of your employees will be facilitated during the course of May-month.'

[5] The respondents made an undertaking at the parties' first negotiation meeting held on 02 May 2025 to withdraw the notice issued on 23 April 2025. On 08 May 2025 the second respondent, Mr Gareth Chapman, Sourcing & Contracts Coordinator: Supply Chain, addressed a letter to the applicant confirming that the first respondent will comply with Stanton J's order. Under signature of the second respondent in a letter dated 23 May 2025 the undertaking was reneged upon in these terms:

'2. We reiterate, as per clause 3.1 of the General Conditions Part B[1], the contract between Isago Ka Lefika (Pty) Ltd (Isago) and Sishen Iron Ore Company Proprietary Limited (SIOC) is non-exclusive, and Isago is not entitled, as of right, to provide services to SIOC every month and to be paid by SIOC every month. Instead, SIOC, if it so chooses, is required to issue a purchase order before Isago can provide services and thus claim payment.

3. SIOC intends on adhering to the terms of the court order, however, there is nothing in the court order, nor the contract, that obliges SIOC to issue purchase orders to Isago. In the premises, SIOC will not be issuing any further purchase orders to Isago.
4. In light of the above and the outstanding purchase order issued to Isago, the completion date for the current engagement is 28 May 2025. Accordingly, as of 29 May 2025, Isago and its employees will no longer be permitted on site, as no new purchase orders have been issued.
5. Isago is therefore urged to notify its employees accordingly.'

[6] The applicant's attorney, Mr Ikaneng of the firm JKL Ikaneng Attorneys, directed an email to the respondents on 27 May 2025 requesting a retraction of the said letter of 23 May 2025 to no avail. The applicant's attorney then issued a Notice of referral to Mediation dated 28 May 2025.

[7] The applicant maintains that upon a proper construction of the agreement it is entitled to render its services to the first respondent and to be remunerated by way of monthly fixed fees and should the respondents be allowed to cease issuing purchase orders to the applicant or deny it and its employees access to the Sishen Mine

and Jig Plant that would be tantamount to terminating the agreement. The applicant has learnt through an email sent to it in error that there is a new contract issued with new terms, with a third party. It contended that this meant that the first respondent has failed to comply with Stanton J's order of 17 April 2025.

[8] Consequently, the applicant approached this Court again on an urgent basis seeking the following relief which was opposed:

'1. That the applicant's non-compliance with the forms and service provided for in the Uniform Rules of Court be condoned and that this application be heard as one of urgency in terms of Rule 6(12)(a);

2. That a rule nisi be issued calling upon the respondents to show cause, if so advised, before this honourable court on the 18th of July 2025 at 09:30 why the following orders should not be made final:

2.1 that the respondents are found to be in contempt of the order issued by the Court under case number 814/2025 on the 17th of April 2025;

2.2 that the following sanctions are imposed against the respondents, namely:

2.2.1 in respect of the first respondent, that it be ordered to pay a fine in the amount of R100 000.00 within seven days of the date of this order;

2.2.2 in respect of the second and third respondents, that they be committed to imprisonment for a period of 30 days, or such period as the honourable Court may deem just and equitable;

2.3 that pending the outcome and final determination of the mediation, arbitration and appeal, if applicable, on the question of the first respondent's entitlement to terminate the agreement and the validity of the termination (and issues and disputes related thereto), in accordance with the provisions of clauses 5.1, 5.2, 5.3, and 5.4 of Part D of the agreement:

2.3.1 the respondents be interdicted and restrained from taking any steps of whatsoever nature to procure the services of another service provider or entity to replace the applicant and perform plant maintenance and related services at Jig Plant Beneficiation and Modular at the first respondent's Sishen Mine, or any services similar to that provided by the applicant in terms of the agreement.

2.3.2 the respondents be interdicted and restrained from ejecting the applicant, its directors, or any of its employees from their site at the first respondent's Sishen Mine; and

2.3.3 the respondents be interdicted and restrained from in any way blocking or disallowing the applicant, its directors, or employees access to the first respondent's Sishen Mine.

4. The order in paragraph 2.3 and its subparagraphs above is to operate as an interim interdict with immediate effect.

5. The respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved.
 6. Such further and/or alternative relief as the honourable Court may deem fit.'
- [9] The leading case in urgent applications is *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another*.^[2] A court would dispense with the normal forms and service as contemplated in the Uniform Rules of Court if the applicant demonstrates that it would not be afforded substantial redress should the matter be heard in the normal course.
- [10] I heard argument on urgency and issues pertaining to the merits, having read the papers and the heads of argument. I find that it was deserving of the application to be heard on an urgent basis. There will not be any prejudice, and none has been argued. I am persuaded that the applicant may not get substantial redress should this matter be heard in due course. The issues in this application are crisp. First, an application for contempt of court and secondly, interdictory relief as set out at para 2.3 of the Notice of Motion.
- [11] Mr Roux, for the Respondents, challenged the defective Notice of Motion stating that although it is dated 30 May 2025 it required the respondents to notify the applicant's attorneys in writing on or before 06 April 2025 and to file the answering affidavit, if any, within 15 days thereafter. Counsel contended that the respondents were not afforded the 15 days as stated in the Notice to furnish an answer. Although this issue is disconcerting, the parties have responded accordingly and fully ventilated the issues. It would not be sensible to put form over substance by refusing to hear the matter

based on this technical error.

Contempt of Court

- [12] The Supreme Court of Appeal (SCA) has in *Fakie NO v CCII Systems (Pty) Ltd*^[3] made these pronouncements:

'It is a crime unlawfully and intentionally to disobey a court order. This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court. The offence has, in general terms, received a constitutional 'stamp of approval', since the rule of law - a founding value of the Constitution - 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained'.

The SCA further enunciated the test for contempt as follows:^[4]

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

[13] The requirements for civil contempt are trite. The applicant must prove the following:

- (a) The existence of a court order;
- (b) That the order was either served or came to the knowledge of the respondents;
- (c) That the respondents failed to comply with terms of the order; and
- (d) That the non-compliance was wilful or mala fide beyond reasonable doubt.

Once the applicant has established these requirements, the respondents bear an evidentiary burden in relation to (d) to adduce evidence to rebut the inference that the respondents were not wilful and mala fide.

[14] The existence of the court order is not in dispute, but whether the second and third respondents bore knowledge or were aware of the court order was questioned. In *Twentieth Century Fox Film Corporation and Others v Playboy Films (Pty) Ltd and Another*[5], the court said:

‘A director of a company who, with knowledge of an order of Court against the company, causes the company to disobey the order is himself guilty of a contempt of Court. By his act or omission such a director aids and abets the company to be in breach of the order of Court against the company.’

[15] It cannot be gainsaid that during the negotiation meeting held on 02 May 2025 the second and third respondents were in attendance and were made aware of the Court order. This knowledge is strengthened by a letter written by the second respondent dated 08 May 2025 in which he stated that the first respondent will comply with the court order. I am surprised that this is in contention at all.

[16] The applicant is urging the court to find all three respondents in contempt of the Stanton J order and this Court must impose appropriate sanctions vindicating its authority and ensuring that their contempt will not be repeated. The applicant further contends that should the respondents be further allowed to cease issuing purchase orders to the applicant or denying it and its employees access to the Sishen Mine and the Jig Plant that would effectively result in the termination of the Agreement with the applicant which the Stanton J order had prevented them to do. The applicant also contends that by denying them access and not issuing them with purchase orders the respondents are in effect interfering with their operations. Based on the aforesaid, the applicant submits that it has made out a proper case for wilfulness and mala fides on the part of the respondents.

- [17] The respondents claim that they have complied with the order and in fact issued a purchase order in June 2025 to the applicant. They maintain that their interpretation of the Stanton J order is supported by the Gauteng Division unreported judgment in *Hlwella MKJ Joint Venture (Pty) Ltd v Sishen Iron Ore Company* which, they argue, is on all fours with the case in *casu* where the agreement between the parties contained similar terms and conditions. The Court in *Hlwella* remarked that the applicant's contention that it would suffer irreparable harm in the event that the interdict is not granted, is unfounded. The respondents could elect not to issue any purchase orders, which are a prerequisite for the applicant to provide its services. As a result, the applicant would not receive any payments from the first respondent, as no services would have been rendered.
- [18] The respondents were ordered to follow the terms of their agreement to the letter. Despite Stanton J's order restraining and interdicting them from giving effect to the Notice of Termination of the agreement between the parties dated 24 February 2025, the so-called termination of convenience. In the letter dated 23 May 2025 the respondents stated that they would no longer be issuing purchase orders to the applicant effectively bringing forward the completion date to 28 May 2025 as opposed to 27 February 2026. The agreement provides for dispute resolution processes namely, negotiations, mediation, arbitration and where necessary, an appeal, which the respondents are simply disregarding.
- [19] Stanton J ordered at 4.1 of her order that the outcome of the negotiation process is to be conducted in accordance with the provisions of clause 25.3 of Part B of the agreement and the provisions of the order of this court.[6] The order at 4.2 directed that the outcome and final determination of the mediation, arbitration and appeal, if applicable, on the question of the first respondent's entitlement to terminate the agreement and the validity of the termination (and the issues and disputes related thereto), must proceed in accordance with the provisions of clauses 5.1, 5.2, 5.3 and 5.4 of Part D of the Agreement.[7]

The order by Stanton J is unambiguous.

- [20] It begs the question what then would the point be for the applicant to exhaust all the available remedies when the respondents already, without following all these available dispute resolution mechanisms, concluded that as of 29 May 2025 the applicant and its employees will no longer be permitted to be on site as no new purchase orders would have been issued? If that was even the case, why did the respondents renege and issue a purchase order only a few days later and on 03 June 2025? This, in my view, smacks of malice and wilfulness on the part of the respondents. It is unfathomable why, after issuing a purchase order on 03 June 2025, the respondents would even take it a step further and afford the applicant a day, that is until close of business on 04 June 2025, to withdraw the contempt of court application and tender costs.

[21] The intention of the parties is clear in the contract. The terms of the agreement are known to them. The express term that no services shall be provided unless a purchase order has been placed with the supplier company is common cause. The Supreme Court of Appeal enunciated in the Natal Joint judgment[8], that interpretation is the process of attributing meaning to the 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 or provisions 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 provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible, each possibility must be weighed in the light of all these factors.

[22] As already alluded to, it was contended on behalf of the respondents that they were not in contempt of the Stanton J order. The fact that there was a termination of convenience effectively from 24 April 2025 demonstrates that there is an interruption with the operations of the applicant which adversely affected its performance and a fixed monthly cost without having exhausted all the available remedies. I am not satisfied that the Hlwella judgment relied on by the respondents assists them as in this case Stanton J has directed the parties on the course to follow which, in my view, is the correct approach.

[23] Regard being had to the aforementioned, I have no doubt that the respondents, by bringing forward the completion date to 28 May 2025 and offboarding the applicant's employees, announcing that they would not be allowed on site, contravenes the order by Stanton J and ought to be held in contempt of court. The question to be answered is whether all three respondents must be held in contempt of court or only the first respondent. It must be borne in mind that the first respondent was the only respondent cited in case number 814/2025. The obligation rested with the first respondent to ensure that the Stanton J order was complied with, but because it is a corporate entity its representatives or employees must assist it to comply. I agree with the principle enunciated in the Century Fox matter. The second and third respondents as senior officials are its directing minds. From the correspondence attached to the papers and the application itself, I am satisfied that they have been actively involved in the decisions and issues involving the applicant and must also be held in contempt. They have attempted to mitigate their contempt on 03 June 2025 by issuing a purchase order which they had initially claimed they would not do. They should never have stopped.

A further interdictory relief

[24] The applicant was justified to seek a further interdictory relief as couched in para 2.3 of the Notice of Motion. Despite the respondents having argued the same clauses of 'non-exclusivity' and 'non-entitlement' and despite the applicant having succeeded in obtaining a restraining order against the first respondent before Stanton J, they did not exhaust the

available remedies but opted to bring forward the completion date to 28 May 2025 and denied the applicant's personnel permission to access the site. It was contended on behalf of the applicant that the interdictory relief sought at paragraph 2.3 of the Notice of Motion is to prevent any further non-compliance by the respondents until all avenues have been exhausted.

- [25] The respondents contend that the applicant has failed to make out a case for interdictory relief by failing to show any prima facie right open to some doubt to the interdictory relief claimed in paragraph 2.3 of the Notice of Motion. They further argued that the relief sought is final in effect as it involves interpretation of an agreement. Therefore, so the argument went, the applicant was supposed to show a clear right. According to the respondents the applicant's right to access Sishen mine was only limited to performing work in terms of an issued purchase order and absent such an order it has no right. In as far as the requirement of irreparable harm is concerned, the applicant had to show that it was entitled to demand to be issued with purchase orders, the argument proceeded.
- [26] But this persistent contention by the respondents is fallacious. Stanton J in her order interdicting and restraining the respondents from giving effect to the Notice of Termination of the agreement dated 24 February 2025 and further directing the parties to comply with all their obligations which included exhausting all the dispute resolution mechanisms as provided for in the agreement. Of significance is order 4.2 which will determine through those processes whether the first respondent is entitled to terminate the agreement and the validity of the termination in accordance with the provisions of clauses 5.1, 5.2, 5.3 and 5.4 of Part D of the agreement. The Court further directed the respondents to, within 10 days of its order, attend a negotiation meeting with the applicant and, depending on its outcome, fulfil its further obligations relating to mediation, arbitration and appeal if applicable. These directives endorse the existing right that the applicant has.
- [27] The relief sought by the applicant in the Notice of Motion is a rule nisi returnable on 18 July 2025 for the respondents to show cause why they should not be held in contempt of the court order granted on

17 April 2025 under case number 814/2025. Both parties have argued the issues fully before me. The respondents, on the other hand, urge the court to dismiss the application for contempt of court with costs on scale C including the reserved costs of 06 May 2025. The correct date for the costs was 30 May 2025 and not 06 May 2025.

- [28] Taking cue from the remarks by the Constitutional Court in *Pheko and Others v Ekurhuleni City*[9] where the Court said:

‘When a court order is disobeyed, not only the person named or party to the suit but all those who, with the knowledge of the order, aid and abet the disobedience or wilfully are party to the disobedience are liable. The reason for extending the ambit of contempt proceedings in this manner is to prevent any attempt to defeat and obstruct the due process of justice and safeguard its administration. Differently put, the purpose is to ensure that no one may, with impunity,

wilfully get in the way of, or otherwise interfere with, the due course of justice or bring the administration of justice into disrepute.’

It is therefore prudent to allow the respondents an opportunity to explain their reasons why this court should not find the second and third respondents in contempt of the Stanton J order.

[29] On the question of costs there is no reason why they should not follow the result.

[30] In the result, the following order is made:

1. The applicant’s non-compliance with the forms and service provided for in the Uniform Rules of Court is condoned and the application is heard as one of urgency in terms of Rule 6(12)(a).
2. A rule nisi is issued calling upon the respondents to show cause, if so advised, before this Court on 08 August 2025 why the following orders should not be made final:

2.1 that the respondents are found to be in contempt of the order issued by this Court under case number 814/2025 on the 17th of April 2025.

2.2 that the following sanctions are imposed against the respondents:

2.2.1 in respect of the first respondent, that it be ordered to pay a fine in the amount of R100 000.00 within seven days of the date of this order.

2.2.2 in respect of the second and third respondents, that they be committed to imprisonment for a period of 30 days, or any other relief as this Court may deem just and equitable.

2.3 that, pending the outcome and final determination of the mediation, arbitration and appeal, if applicable, on the question of the first respondent’s entitlement to terminate the agreement and the validity of the termination (and the issues and disputes related thereto), in accordance with the provisions of clauses 5.1, 5.2, 5.3, and 5.4 of Part D of the agreement:

2.3.1 the respondents be interdicted and restrained from taking any steps of whatsoever nature to procure the services of another service provider or entity to replace the applicant and perform plant maintenance and related services at the Jig Plant Beneficiation and Modular at the first respondent’s Sishen Mine, or any services similar to that provided by the applicant in terms of the agreement.

2.3.3 the respondents be interdicted and restrained from in any way blocking or disallowing the applicant, its directors, or employees, access to the first respondent’s Sishen Mine.

3. The order in paragraph 2.3 and its subparagraphs above is to operate as an interim interdict with immediate effect.
4. In the event of the dispute resolution process continuing past the completion date of the agreement, namely, 27 February 2026, the order in paragraph 2.3 and its subparagraphs above shall cease to operate with effect from 28 February 2026.

5. The respondents shall pay the costs of this application jointly and severally, the one paying the other to be absolved, on scale B. These costs include the costs reserved on 30 May 2025.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

Obo the Applicant:

Adv. A. Eillert

On instruction of:

JKL Ikaneng Attorneys

c/o L-M Attorneys & Partners Inc

Obo the Respondents:

Adv. B. Roux SC

Adv. A.G Van Tonder

On instruction of:

Cliffe Dekker Hofmeyr Inc

c/o Van De Wall Inc

- [1] '3.1 No Services shall be provided unless a Purchase Order has been placed with the Supplier by the Company for such Services.'

[2] 1977

- (4) SA 135 (W); see also East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd 2022 JDR 3786 (GP) paras 36 - 39

[3]

[2006] ZASCA 52; 2006

- (4) SA 326 (SCA) at 333C – E

[4] Ibid para 9

[5] 1978

- (3) SA 202 (W) at 203C

- [6] Clause 25.3 of Part B of the agreement is under the head Negotiation stipulates: '(a) A party declaring a dispute, must notify the other party thereof in writing (Notice of Dispute) which Notice of Dispute shall invite the other party to a meeting to be held within 10 (ten) business

days from receipt of the Notice of Dispute, to attempt to resolve the dispute within a further 10 (ten) days from the date of the parties' first meeting as aforesaid. (b) The meeting described G.C.25.3(a) must be attended by a representative of each party to this Agreement who has authority to

enter into binding agreements on behalf of that party as concerns this Agreement. (c) Should the parties fail to resolve the dispute within 10 (ten) business days of the meeting described in G.C.25.3(a), either party may refer the dispute to the form referred to in the Jurisdictional Conditions in Part B.

[6] Clause 25.3 of Part B of the agreement is under the head Negotiation stipulates:

'(a) A party declaring a dispute, must notify the other party thereof in writing (Notice of Dispute) which Notice of Dispute shall invite the other party to a meeting to be held within 10 (ten) business days from receipt of the Notice of Dispute, to attempt to resolve the dispute within a further 10 (ten) days from the date of the parties' first meeting as aforesaid.

(b) The meeting described G.C.25.3(a) must be attended by a representative of each party to this Agreement who has authority to

enter into binding agreements on behalf of that party as concerns this Agreement.

(c) Should the parties fail to resolve the dispute within 10 (ten) business days of the meeting described in G.C.25.3(a), either party may refer the dispute to the form referred to in the Jurisdictional Conditions in Part B.

[7] Clause 5. Dispute Resolution 5.1 Mediation (a) Where the dispute cannot be resolved by negotiation as described in G.C.25.3(a) above, any party may refer the dispute to mediation by way of written notice to the other party (Notice of Referral to Mediation) within 5 (five) business days after the second mentioned 10 (ten) business day period referred to in G.C.25.3(c) has lapsed. (b) Should neither of the parties have delivered a Notice of Referral to Mediation, then the Dispute shall be submitted to, and finally decided by, arbitration in accordance with J.C.5.2. (c) If a Notice of Referral to Mediation is issued in terms of J.C.5.1(a), but the parties cannot agree on the appointment of a qualified mediator within 5 (five) business days of the delivery of the Notice of Referral to Mediation, any party may approach the Legal Practice Council (LPC), or its successor body, to appoint a mediator with not less than 5 years' experience. (d) All communications made by the parties to the mediator or to each other during or in connection with the mediation are made without prejudice to any rights which they may have and the mediation proceedings shall be held on a confidential basis. (e) The mediator shall not make any decision which is binding upon the disputants, the resolution of the dispute depending entirely upon the disputants achieving agreement in respect thereof. (f) Where the parties are unable to resolve the dispute by way of mediation within 20 (twenty) business days from the date of the appointment of the mediator by the parties or the LPC, as the case may be, the dispute shall then be submitted to, and finally decided by, arbitration in accordance with J.C.5.2. 5.2 Arbitration (a) If the

dispute has not been settled by negotiation in terms of G.C.25.3(a) or mediation in terms of J.C.5.1 above, then the dispute must be resolved by arbitration. (b) Where the total claim in respect of the dispute is less than ZAR 2,000,000, the Company may in its sole discretion elect to resolve the dispute in terms of the Anglo Rules for Expedited Arbitration attached as Annex 1 of this Part D or to elect that the dispute be resolved by arbitration in accordance with J.C.5.2(c). The Company must notify the Supplier of its election by written notice within 5 business days after the lapse of the period referred to in J.C.5.1(a) if no Notice of Referral to Mediation was delivered (i.e. 5 (five) business days) or within 5 (five) business days after the lapse of the period referred to in J.C.5.1(f) if a Notice of Referral to Mediation was delivered (I 20 business days)(whichever may be applicable), failing which the dispute shall be resolved by arbitration in accordance with J.C.5.2(c). (c) Subject to G.C.25.3, J.C.5.1 and J.C.5.4, all disputes shall be finally resolved in accordance with the applicable rules of the Arbitration Foundation of Southern Africa (AFSA) or its successor body. 5.3 The Arbitration Proceedings (a) A sole arbitrator must be selected by agreement between the parties within 5 (five) business days after the lapse of the period within which the Company has to make its election in terms of J.C.5.2(b) (i.e. 5 (five) business days), or if the parties fail to agree, the arbitrator, being a practicing attorney or advocate with at least 10 (ten) years' experience, shall be appointed by the President of the LPC, or its successor body. (b) The parties shall at any time during the arbitration proceedings, without termination of such proceedings and as an interlocutory

process, be entitled to refer and have any particular portion of the subject matter of the dispute that requires specialist knowledge

settled by expert determination. (c) The arbitration shall be held in Sandton, Gauteng, South Africa and the proceedings shall be conducted in English. 5.4 Appeal (a) In the case of an arbitration held under the auspices of AFSA (or its successor body) in terms of J.C.5.2(c), the award made by the arbitrator shall be subject to a party(ies)'s right of appeal. The applicable rules of AFSA dealing with appeals shall apply to the appeal. The appeal Tribunal will consist of three appeal arbitrators, with each party nominating, within 10 (ten) business days after the notice of appeal has been delivered, one appeal arbitrator after which those appeal arbitrators will nominate the third appeal arbitrator in accordance with the following: (i) within the same foresaid 10 (ten) business days, each party shall nominate 3 appeal arbitrators and provide its nominees to the other party, who shall have the right to reject any one of such nominees without cause (the parties agreeing that any conflicted nominees will be further excluded) after which the parties will, without indicating the nominating party of any nominee, provide the shortlist of nominees to the two appeal arbitrators appointed by each party under J.C.5.4(a); and (ii) the two appeal arbitrators shall then nominate a third appeal arbitrator from the shortlist received from the parties. (b) The Appeal Tribunal's determination will be final and binding and there will be no further right of appeal.

[7] Clause 5. Dispute Resolution

5.1 Mediation

- (a) Where the dispute cannot be resolved by negotiation as described in G.C.25.3(a) above, any party may refer the dispute to mediation by way of written notice to the other party (Notice of Referral to Mediation) within 5 (five) business days after the second mentioned 10 (ten) business day period referred to in G.C.25.3(c) has lapsed.
- (b) Should neither of the parties have delivered a Notice of Referral to Mediation, then the Dispute shall be submitted to, and finally decided by, arbitration in accordance with J.C.5.2.
- (c) If a Notice of Referral to Mediation is issued in terms of J.C.5.1(a), but the parties cannot agree on the appointment of a qualified mediator within 5 (five) business days of the delivery of the Notice of Referral to Mediation, any party may approach the Legal Practice Council (LPC), or its successor body, to appoint a mediator with not less than 5 years' experience.
- (d) All communications made by the parties to the mediator or to each other during or in connection with the mediation are made without prejudice to any rights which they may have and the mediation proceedings shall be held on a confidential basis.
- (e) The mediator shall not make any decision which is binding upon the disputants, the resolution of the dispute depending entirely upon the disputants achieving agreement in respect thereof.
- (f) Where the parties are unable to resolve the dispute by way of mediation within 20 (twenty) business days from the date of the appointment of the mediator by the parties or the LPC, as the case may be, the dispute shall then be submitted to, and finally decided by, arbitration in accordance with J.C.5.2.

5.2 Arbitration

- (a) If the dispute has not been settled by negotiation in terms of G.C.25.3(a) or mediation in terms of J.C.5.1 above, then the dispute must be resolved by arbitration.
- (b) Where the total claim in respect of the dispute is less than ZAR 2,000,000, the Company may in its sole discretion elect to resolve the dispute in terms of the Anglo Rules for Expedited Arbitration attached as Annex 1 of this Part D or to elect that the dispute be resolved by arbitration in accordance with J.C.5.2(c). The Company must notify the Supplier of its election by written notice within 5 business days after the lapse of the period referred to in J.C.5.1(a) if no Notice of Referral to Mediation was delivered (i.e. 5 (five) business days) or within 5 (five) business days after the lapse of the period referred to in J.C.5.1(f) if a Notice of Referral to Mediation was delivered (I 20 business days)(whichever may be applicable), failing which the dispute shall be resolved by arbitration in accordance with J.C.5.2(c).
- (c) Subject to G.C.25.3, J.C.5.1 and J.C.5.4, all disputes shall be finally resolved in accordance with the applicable rules of the Arbitration Foundation of Southern Africa (AFSA) or its successor body.

5.3 The Arbitration Proceedings

- (a) A sole arbitrator must be selected by agreement between the parties within 5 (five) business days after the lapse of the period within which the Company has to make its election in terms of J.C.5.2(b) (i.e. 5 (five) business days), or if the parties fail to agree, the arbitrator, being a practicing attorney or advocate with at least 10 (ten) years' experience, shall be appointed by the President of the LPC, or its successor body.
- (b) The parties shall at any time during the arbitration proceedings, without termination of such proceedings and as an interlocutory

process, be entitled to refer and have any particular portion of the subject matter of the dispute that requires specialist knowledge

settled by expert determination.

- (c) The arbitration shall be held in Sandton, Gauteng, South Africa and the proceedings shall be conducted in English.

5.4 Appeal

- (a) In the case of an arbitration held under the auspices of AFSA (or its successor body) in terms of J.C.5.2(c), the award made by the arbitrator shall be subject to a party(ies)'s right of appeal. The applicable rules of AFSA dealing with appeals shall apply to the appeal. The appeal Tribunal will consist of three appeal arbitrators, with each party nominating, within 10 (ten) business days after the notice of appeal has been delivered, one appeal arbitrator after which those appeal arbitrators will nominate the third appeal arbitrator in accordance with the following:
 - (i) within the same foresaid 10 (ten) business days, each party shall nominate 3 appeal arbitrators and provide its nominees to the other party, who shall have the right to reject any one of such nominees without cause (the parties agreeing that any conflicted nominees will be further excluded) after which the parties will, without indicating the nominating party of any nominee, provide the shortlist of nominees to the two appeal arbitrators appointed by each party under J.C.5.4(a); and
 - (ii) the two appeal arbitrators shall then nominate a third appeal arbitrator from the shortlist received from the parties.
- (b) The Appeal Tribunal's determination will be final and binding and there will be no further right of appeal.

[8] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) SA 593 (SCA) para 18

[9] 2015

(5) SA 600 (CC) para 47

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