

SOUTH AFRICA / JUDGMENT

## Optimum Coal Terminal (Pty) Limited and Another v Richards Bay Coal Teminal (Pty) Limited and Others (D531/2023) [2023] ZAKZDHC 9 (1 March 2023)

[2023] ZAKZDHC 9

COURT

Kwazulu-Natal High Court, Durban

BEFORE

M R Chetty

CASE / FILE NUMBER

D531/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL

LOCAL DIVISION, DURBAN

CASE

NO: D531/2023

In

the application for leave  
to intervene by:

NATIONAL  
UNION OF MINEWORKERS  
Intervening Party  
In

re:

The

matter between: OPTIMUM  
COAL TERMINAL (PTY) LIMITED  
First Applicant  
(in  
business rescue)  
OPTIMUM  
COAL MINE (PTY) LIMITED  
Second Applicant  
and  
RICHARDS  
BAY COAL TERMINAL (PTY) LIMITED  
First  
Respondent  
TEMPLAR  
CAPITAL LIMITED  
Second Respondent  
LIBERTY  
COAL (PTY) LIMITED  
Third Respondent  
This  
judgment was handed down electronically by circulation to the  
parties' representatives by email, and released to SAFLII.  
The  
date for hand down is deemed to be 01 March 2023 (Wednesday) at  
10:30am  
ORDER  
The

following order shall  
issue: 1.  
The application by NUM for urgent interim relief in paragraph  
4(a),  
(b) and (c) of the notice of motion is dismissed with costs,  
including the costs of two counsel where so employed.

## JUDGMENT

Chetty J:

- [1] The applicant in this matter, the National Union of Mineworkers (NUM) launched an urgent application to intervene in the main dispute between Optimum Coal Mine (OCM), Optimum Coal Terminal (OCT) and Richards Bay Coal Terminal (RBCT) and in which it sought interim relief pending the determination of the main application. This application was issued on Thursday, 2 February 2023 and set down for hearing on Monday, 6 February 2023. The papers were served on the first respondent (RBCT) on 2 February 2023. RBCT was the only entity that opposed the application. At the same time, various other

voluminous affidavits were filed in the main application involving OCM, OCT, the National Prosecuting Authority (NPA) as well as the second and third respondents, being Templar Capital and Liberty Coal respectively. When the matter came before my colleague, Balton J, in the motion court on 6 February 2023, the papers had expanded to being in excess of 6 000 pages. It was impossible for all of these papers to have been read over the weekend, and the application was accordingly adjourned by consent of the parties, who were able to secure an earlier date of 16 February 2023 for the hearing of the matter on the opposed roll.

- [2] It is perhaps prudent at the outset to record that while access to the courts is guaranteed to all to have their disputes adjudicated, courts are not to be abused by litigants with a deluge of papers at short notice, only for the legal representatives to conclude amongst themselves that it would not be possible for the court to hear the matter on the allocated date when it was originally set down. Litigants are to be mindful of the case load of judges, particularly where it is expected that apart from other matters on the motion court roll, attention should also be given to reading several thousand pages at short notice. Convenience to the court and the judges presiding is an important consideration when deciding to launch urgent litigation of this nature. The failure to do so, in my view, is tantamount to an abuse of the court process.
- [3] As stated earlier, the urgent relief sought by NUM was for it to be granted leave to intervene as a ‘third party’ in the main application between OCT and OCM against RBCT. The main application in essence concerns a contractual dispute in which RBCT terminated, on 31 January 2023, OCM and OCT’s entitlement to use the facilities at the coal terminal in Richards Bay for the purpose of exporting coal. On 6 February 2023 an order was taken by consent in terms of which NUM was granted leave to intervene as an applicant in the main application and that its founding affidavit in the intervening application, be admitted as part of the papers in the main application. The parties, subject to other procedural issues concerning the exchange of further affidavits, agreed to have NUM’s interim application for a status quo order argued on 16 February

2023. Accordingly, the issue for determination was that set out in paragraph 4 of the notice of motion, which reads as follows:

‘4. That the status quo (as it existed before 31 January 2023) be preserved by interdicting RBCT with immediate effect from doing any of the following until this court finally determines the urgent relief claimed in the main application by the first and second applicants :

- a. interfering with or preventing the first applicant’s use of the Richards Bay Coal Terminal (‘the Terminal’) and the land, buildings, machinery, plant, equipment, and installations as they exist at the terminal in the same way as first applicant or its nominees or agents have been using these facilities at all material times before 31 January 2023, for the exportation of coal through the terminal;

- b. transferring or terminating the first applicant's right to use the Terminal and the land, buildings, machinery, plant, equipment, and installations as they exist at the terminal in the same way as first applicant or its nominees or agents have been using these facilities at all material times before 31 January 2023, for the exportation of coal through the terminal; and
  - c. initiating a transfer of ownership of the first applicant's shareholder interest (as defined in clause 1.1.52 of the Shareholders Agreement).'
- [4] By the time the matter came before me, NUM had whittled down the papers to just over 800 pages, which it contended were relevant to the determination of the relief it sought. RBCT on the other hand contended both in its answering affidavit and in its heads of argument that the relief sought by NUM could not be determined in a silo, and divorced from the main application. For that reason, RBCT contends that the application is intrinsically linked to the main application pursued by Optimum[1], and therefore this application by NUM is either to be dismissed or adjourned for determination at the time of the main application being heard. At the request of RBCT's legal representatives, a further set of documents was filed, increasing the volume of documents in excess of 2 500 pages. In either eventuality (of the application being dismissed or adjourned to be heard with the main application), RBCT contends that it should be awarded its costs in opposing the application. NUM on the other hand contends that the relief which it seeks, described as 'interim interim relief' is urgent in light of the impact that the contractual dispute between the parties in the main application, has for their members, and the adverse impact on their right to earn a livelihood.
- [5] At the hearing on 16 February 2023, counsel for the applicants in the main application as well as those appearing on behalf of the business rescue practitioners were present, but did not participate in the merits of the application. Conspicuously, there was no appearance for the NPA, which had secured an order in the Gauteng High Court, Pretoria on 23 March 2022, in terms of which all shares held in the OCT as well as the business of OCM were preserved in terms of s 38 of the Prevention of Organised Crime Act 121 of 1998.
- [6] The judgment of the Gauteng High Court by Justices Fourie and Mbongwe further prevented the disposal of the business of OCM unless the curator bonis appointed by the court (Mr P F van den Steen) and the business rescue practitioners in respect of OCM and OCT agreed to do so in writing, or where the court has issued an order authorising such disposal. Importantly, in terms of the order referred to above, the curator bonis was authorised to 'assume control of the property'. To the extent that the curator was clothed with the necessary authority with regard to the shares and shareholding forming part of OCT and OCM, the order directed that the curator 'act as shareholder in place and stead of the relevant owners'.
- [7] In their opposing affidavit, RBCT pointed out that neither the NPA nor the curator were joined as parties in the application brought by NUM. To this end, it was contended by RBCT's counsel that the court is entitled to take into account what the NPA (who have been granted leave to intervene as a party in the main application) stated in its affidavits in the main

application. Similarly, it was contended that regard could be had to the report filed by the curator pursuant to the order of the Gauteng High Court. During the course of his argument, counsel for NUM referred to extracts from the NPA's affidavit, which it submitted supported NUM's claim to the relief it seeks in this application. That was disputed by RBCT. Reference will be made below to those particular aspects of the NPA's affidavit.

- [8] Prior to the commencement of the hearing RBCT filed an application in terms of Uniform rule 7(1) challenging the authority of those representing NUM to bring the present proceedings. In this regard a supporting affidavit to the challenge contended that on the basis of a newspaper article, the deponent to the affidavit filed by NUM, namely Mr Richard Zenzile Mguzulu (Mr Mguzulu), did not have the necessary authority to launch the application to intervene, particularly as the branch which he purports to represent, no longer exists. In *Ganes and another v Telecom Namibia Ltd* 2004

- (3) SA 615 (SCA) para 19 the court held:

‘. . .The deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.’

- [9] A resolution taken by the leadership of NUM, however, confirmed that Mr Mguzulu was indeed duly authorised, and that the attorneys acting in the present application, were also duly authorised to do so. After considering the proof of authority, I was satisfied that the challenge in terms of Uniform rule 7(1) had been properly met.
- [10] It is not necessary to set out in any great detail the interrelated web of the Optimum business entities, save to record that both OCT and OCM have been placed into business rescue. OCM operates a mine while OCT is a shareholder and derives an entitlement to use the RBCT facility to export coal, on the assumption that it is not in breach of any provision of the Shareholders Agreement. Since being placed into business rescue, OCM has effectively outsourced the mining activities to mini-pit operators, who employ miners, the latter being members of NUM. It is in this context that NUM essentially contends that the actions by RBCT have a ‘knock-on’ effect for its members, depriving them of their right to a livelihood. The founding affidavit goes a step further, contending that the conduct of RBCT ‘directly and irreversibly affects the rights and interests of thousands of NUM members’. Of particular importance is that the business rescue practitioners (BRPs) of OCM have agreed to pay outstanding salaries and retrenchment packages owing to NUM's members on an ongoing basis. In this respect it is contended that the mini-pit operators pay a royalty to OCM, with the remuneration earned in this process enabling the BRPs to pay the former employees approximately R10 000 per month. If the status quo order is not granted, so it was contended, this impedes on the business of the pit operators to export their coal using RBCT's facilities, effectively placing in jeopardy the ability of the BRPs to continue paying the monthly retrenchment tranches to NUM's members. It is further contended that the area in which the miners reside is economically depleted, with no alternatives to earn a

livelihood.

- [11] The main application between Optimum and RBCT (with the NPA and NUM being granted leave to intervene) relates to the entitlement of Optimum to export coal through the use of the facility at RBCT. According to RBCT, Optimum's entitlement came to an end on 31 January 2023 and therefore no basis exists in law for a contract to be created by the court to reinstate one which has come to an end by effluxion of time. See *Absa Ltd v Moore and another* 2016 (3) SA 97 (SCA) para 42.
- [12] Moreover, the relief which NUM seeks in this interim application in paragraph 4 of the notice of motion essentially mirrors the relief which Optimum seeks in the main application. It is for this reason that RBCT contends that there is no self-standing relief which NUM seeks in this application in its own right, and that it has no real and substantial interest in the relief sought in the main application. It was further contended on behalf of RBCT that NUM is not a party to the contractual relationship between Optimum and RBCT. It is not disputed that NUM is not a shareholder in RBCT. Ordinarily, it would follow that NUM would have no entitlement of its own to demand performance by RBCT. RBCT relies in this regard on *National Gambling Board v Premier of KwaZulu-Natal and others* [2001] ZACC 8; 2002 (2) BCLR 156 (CC) para 41 where the court held:

'An applicant for an interim interdict must show a prima facie right to the main relief pending which the interim interdict is sought.' (Footnote omitted, my underlining.)

- [13] The same point was stressed in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and others* [2022] ZACC 44 where in the minority judgment, Unterhalter AJ, states the following with regard to the approach in determining whether to grant interim relief:

'[64] A very long line of cases, stretching back to the authoritative pronouncement of our modern law in *Setlogelo*, has made it plain that a prima facie right, though open to some doubt, is the standard used to assess the applicant's prospects of success in obtaining final relief. The enquiry is of necessity provisional because the available evidence is usually incomplete, untested under cross-examination (where there are disputes of fact), and the case may yet be more fully developed.

- [65] What the standard requires has given rise to no small measure of difference. According to *Webster v Mitchell*, as qualified in *Gool*, the test is whether the applicant has furnished proof which, if uncontradicted at trial (here in the review), would entitle the applicant to final relief. The Court will then consider the case of the respondent to decide whether it casts serious doubt on the case of the applicant. If it does, the standard is not met. In *Ferreira*, a majority of a Full Court considered this test to be too exacting. It held that the prospects of success of the claim for the principal relief, albeit weak, may nevertheless suffice. This is so because other requirements for the grant of an interim interdict may be strongly grounded and hence compensate for the weakness as to prospects. This, it was thought better chimed with the holding in *Eriksen Motors*. More recently, this Court, in

Economic Freedom Fighters held that—

*“before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review. The claim for review must be based on strong grounds which are likely to succeed. This requires the court adjudicating the interdict application to peek into the grounds of review raised in the main review application and assess their strength. It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict.”* *Emphasis added.*.)’ (Footnotes omitted, my underlining.)

[14] Counsel for NUM correctly pointed out that the point of departure between the judgement of Unterhalter AJ and Madlanga J (who wrote for the majority) was whether the residents’ associations were able to show some right which they could assert against Eskom, despite there being no privity of contract between the residents’ associations and Eskom. On the contrary, it was common cause that the residents were paying for the provision of electricity. The problem arose where the municipalities failed in paying for the supply of electricity to them by Eskom, resulting in Eskom reducing the supply of electricity to the municipalities, thereby causing serious harm to the residents – described by Madlanga J at para 191 as being ‘subjected to such abject misery and horrendous violation of fundamental rights’.

[15] In a powerful retort to the judgment of Unterhalter AJ, the majority judgment expressed itself thus:

‘[283] I am satisfied that the residents put up enough for purposes of showing a decision that has had an adverse impact on their rights. I do not understand the difficulty the first judgment has with that, especially since it accepts that the residents have pleaded an infringement of the right to life, the right to human dignity, the right of access to water, the right to basic education and the right to an environment that is not harmful to health or well-being.

[284] Let us strip all this to its bare essentials. A decision substantially reducing the supply of electricity was taken. That decision resulted in a “human catastrophe” characterised by gross violations of the residents’ fundamental rights. The residents were not given notice before the decision was taken. No fair process of whatever nature preceded the decision. On first principles, the residents have shown that they have a viable case in the intended PAJA review; a case founded on section 6(2)(c) read with section 4(1) of PAJA. Why the first judgment does not see that escapes me. This is a far cry from the first judgment’s suggestion that my judgment relies on nothing more than “deplorable social and economic effects” that leave a judicial lacuna.’ (Footnote omitted.)

[16] I am bound by the decision of the majority in Eskom Holdings. However, I do not consider the majority’s reasoning to be on all fours with the facts of this particular case. In Eskom Holdings the decision to reduce the supply of electricity to the residents of the two townships resulted in what the court described as a ‘human catastrophe’. The actions taken by Eskom against the municipalities was intended to extract from them payment of overdue debts. It was part of a debt collection strategy. In the present case there is no evidence of

ulterior motive behind RBCT's termination of the export entitlement, although it was contended by NUM that RBCT's actions have the effect of driving OCT and OCM into liquidation.

- [17] Further in Eskom Holdings, the residents based their claim against Eskom on the infringement of various rights - right to life, to human dignity, access to water, basic education and the right to a healthy environment. In the present case, NUM bases its case speciously on the right to fair labour practices under s 23 of the Constitution in circumstances where RBCT is far divorced from being an 'employer' to the miners purportedly affected by RBCT's decision of 31 January 2023. In Eskom Holdings, the residents had constitutionally protected rights, which they contend could be enforced against Eskom, even if there was no direct contractual relationship between the parties.[2]
- [18] Of relevance to this debate is the decision of the Constitutional Court in Pretorius and another v Transport Pension Fund and others 2019 (2) SA 37 (CC) where Froneman J, writing for the court, noted that contemporary labour law takes a broader view of the fair labour rights provision in s 23(1) of the Constitution, noting that fewer people are now in 'formal employment relationships'.

The court found compelling reasons not to restrict the protection of s 23 only to those who have contracts of employment. The focus in that case was whether there were contracts of employment which formed the underpinning to rely on a s 23(1) right. In the present matter, NUM contends that the employment

relationship matters not. NUM's members have no relationship whatsoever with RBCT, other than that they work for mini-pit operators who utilise OCT's export entitlement.

- [19] In summary, I do not read Eskom Holdings as supporting NUM's claim that even in the absence of any relationship to a party – contractual or otherwise – that you are entitled to claim enforcement of a right, which was never in existence prior to a particular act or specific conduct. Moreover, Madlanga J did not suggest that Eskom is not entitled to act in a particular manner to avert, for example, the collapse of the electricity grid. But, it (Eskom) is not a law unto itself – it has to act in accordance with the Constitution and the law. In my view, at a prima facie level, no constitutional obligations to remote third parties can be said to arise from a contractual termination by RBCT of OCT's

export entitlement.

- [20] The crucial enquiry in this application is the right which NUM contends is deserving of protection at an interim level, pending the determination of the main Optimum application, which itself is concerned with interim relief pending arbitration proceedings into the contractual dispute between the parties.
- [21] It is further contended by NUM that the actions of RBCT in terminating the entitlement to export coal as of 31 January 2023 will likely plummet Optimum into liquidation, in circumstances where neither the creditors nor employees of Optimum would be paid.

Moreover, the founding affidavit paints a picture that in the event of a status quo order (restoring matters to the position as it existed prior to 31 January 2023) not being granted, it's members who number approximately 2 000, would be severely impacted as their livelihoods will be affected. NUM contends that in so far as a weighing up of competing interests (the balance of convenience test) RBCT is not likely to suffer any prejudice in the event of the order being granted. Conversely, if the order is not granted, the impact on the union's members and their extended families who rely on them for support, will be calamitous.

- [22] As set out above, the relief which NUM seeks in this application is identical to that which Optimum seeks as an interim measure in the main application. During the course of the hearing I enquired from NUM's counsel of the precise nature of the right which NUM was asserting against RBCT. In response, Mr Badenhorst SC who appeared on behalf of NUM, submitted that the rights at risk are those foreshadowed in paragraph 22 of the founding affidavit, which makes reference to RBCT's 'unconscionable conduct' which 'will infringe the employees' rights to fair labour practices as entrenched in section 23 of the Constitution and those contained in the BCEA to payment of other remuneration, and the LRA, including the right to be the employed and the right to fair labour practices'.
- [23] In response, Mr Voormolen SC on behalf of RBCT, submitted that there can be no basis for NUM asserting or attempting to enforce rights under s 23 of the Constitution against RBCT in the absence of an employment relationship between RBCT and NUM's members. For this reason, it was argued that there is no basis in law for NUM to seek relief against RBCT, as to do so would require the assumption of an employment relationship between the parties, alternatively, creating a contract between the parties where none exists. If NUM's members do have a right, it was submitted, this must be asserted against the mini-pit operators. Moreover, if any parties are to assert a contractual right against RBCT it would be a party to the Shareholder Agreement. NUM does not fall into this category. For this reason, amongst others, it was contended that NUM has failed to make out a prima facie case for interim relief.
- [24] In so far as NUM is required to show that it will suffer irreparable harm if the 'status quo order' is not granted, it bears noting that the parties intended approaching the Judge President for an allocation of a preferment date for the hearing of the main application, possibly in early March 2023. The proceedings in the main application were launched in late January 2023. Those proceedings, similarly to this instituted by NUM, seek interim relief pending an arbitration. The question which arises is what material prejudice will NUM suffer between 16 February 2023 (when this matter was heard) and early March 2023 when the main application is set to be heard? Counsel for NUM submitted that its members are suffering continuing prejudice by not earning an income following the termination of export facilities at RBCT as at 31 January 2023. However, if this is the case, it would follow that the plight of the affected miners is no different from that of any employee who has been visited by an unfair labour practice. There is nothing unique that escalates the urgency in this matter compared to any other labour dispute. In any event, NUM has failed to show the

irreparable harm that its members would suffer between the date when this application was heard and the date when the main application is to be heard. As stated earlier, the difference in time between the two is probably three weeks.

[25] As to whether NUM's members have no alternate relief other than to have approached the court on an urgent basis, there is a dispute between the versions of the parties. NUM states that its members are in desperate circumstances, as many of them support extended families. Almost all reside in an area where there are no alternate employment opportunities available. On the other hand, RBCT disputes this contention, relying on an investigation which it conducted in November 2022 into the operations of OCT and OCM. In this regard RBCT states in its answering affidavit that it commissioned a technical

assessment by Isandla Coal Consulting, an independent consultant, into the operations of OCM and the current mini-pit operators. The aim of the assessment was to verify the existence of and the scale of various mining operations, as well as the output of coal. According to the assessment, OCM enables coal mining activities by five mini-pit mining contractors from sites, producing approximately 910 000 tonnes per month. In contrast, according to RBCT's records, prior to 31 January 2023, approximately only 300 000 tonnes of coal per month were exported through its facility, utilising OCT's entitlement. This raises the spectre that a significant amount of coal is being extracted from OCM mining sites, but which is not making its way through RBCT's export facility. It follows then that the mini-pit operators, and by necessary implication the NUM members who are employed at these sites, are able to secure alternate sources of income other than through the export of coal via RBCT. The miners have, it would seem from the independent report, a significant source of income on which to rely, other than revenue earned from coal exported through RBCT.

[26] A dispute of fact arises on the papers in that NUM contends that its members will lose their jobs 'if OCM is precluded one day longer from exporting its coal through the Richards Bay terminal access to which is wholly controlled by RBCT'. It further contends that the 'affected workers (who are innocent victims) should not have to endure such extreme hardship merely because the main application has not yet been accommodated by the court as a result of scarce judicial resources'. Counsel for NUM placed heavy reliance on the English decision of *American Cyanamid v Ethicon Ltd* [1975] 1 All ER 504 (HL) at 511b-c where the court stated:

'Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark on a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.'

- [27] I am not persuaded on the papers before me that the factors to be taken into account in determining whether to grant an urgent interim interdict are indeed 'evenly balanced'. As stated earlier there is a dispute of fact on the papers as to whether NUM's members will suffer irreparable harm if an interdict is not granted in their favour. There is no direct response from NUM to the allegations made by RBCT of almost 600 000 tonnes of coal being unaccounted for in terms of its point of final destination, and obviously the revenue derived from such production. In my view, this throws a shadow over the allegations of the dire circumstances facing NUM's members should this interim relief not be granted. This aspect of irreparable harm is also linked, in no small measure, to the issue of the urgency in launching this application.
- [28] The founding papers are at best 'thin' when dealing with the issue of urgency. I am mindful that the papers sketch out the plight of communities and members attributed to RBCT's conduct in terminating the coal export entitlement of OCT. Inevitably, most litigants who approach the court seek relief to redress a wrong and this is generally accompanied by levels of anxiety for a speedy adjudication. However, the authorities are explicit that Uniform rule 6(12)(b) requires an applicant to specifically make out a case for urgency in the founding affidavit. The applicant must also satisfy the court that it will not be afforded substantial redress at the hearing in due course. See *New Nation Movement NPC and others v President of the Republic of South Africa and others* 2019 (9) BCLR 1104 (CC) para 8. In this case, it involves a delay of a few weeks until the main application is heard dealing with essentially the same issues. Nothing has been placed before me to indicate the irreparable harm that NUM members will suffer between 16 February 2023 when the matter was argued and the hearing of the main application, alternatively prejudice suffered between 6 and 16 February 2023 when the matter was adjourned.
- [29] In my view, the arguments which NUM raises before me can no doubt be advanced at the main application in the dispute between Optimum and RBCT. There is no compelling reason why NUM could not wait its turn in the queue, or better still, have its views ventilated at the main application. The latter course is one of the options which the first respondent's (RBCT) submitted would be proper in this case in as much as the interim application is inter-twined with the facts of the main application. For these reasons, I am not satisfied that the matter warranted being set down on the extremely shortened notice to
- RBCT and for it to have been placed on the motion court roll on 6 February 2023. Although the matter was adjourned to 16 February 2023, it ought not to have been catapulted ahead of other litigants to be given preference. Absent any other considerations, I would have ordinarily struck it from the roll with costs on 6 February 2023. In light of the parties having agreed to argue the matter as an opposed motion on 16 February 2023, it was incumbent on me to consider the merits of the application.
- [30] A further factor which, in my view, militates against the granting of interim relief sought by NUM is the views expressed by the NPA in its intervening application. Of particular importance is the affidavit by Ms Rabaji-Rasethaba, the Deputy National Director of Public

Prosecutions and Head of the Asset Forfeiture Unit of the NPA. The NPA have sought leave for the affidavit to form part of the papers in the main application. I am uncertain whether such leave has been consented to by Optimum. Whatever the position, the affidavit forms part of the papers before me and different extracts were relied upon by both NUM and RBCT, as will appear below. The approach of the NPA to the main application, which relief mirrors that sought by NUM in this application, is evident in paragraph 27 of the affidavit of Ms Rabaji-Rasethaba. It states the following:

‘. . .The NPA support the resolution of RBCT to suspend the export allocation of OCT. At present, that allocation is being used, not for the benefit of OCM or its creditors, but rather to dissipate value from OCM at the expense of its creditors. Thus, the current use of the allocation subverts the purpose of both the preservation order and of the business rescue process itself. Until such time as Mr Knoop and his fellow business rescue practitioners have made new arrangements which ensure that the export allocation of OCT is used for the benefit of OCM, the public interest requires that steps be taken to prevent that allocation being used to effect further dissipation of value from OCM.’

[31] Ms Rabaji-Rasethaba proceeds to set out a range of options, presented by the curator, allowing the use of the OCT allocation, but based on a pre-requisite that the contracts with the mini-pit operators come to an end. This proposal from the curator resulted in him receiving death threats, leading to him requesting the court to terminate his appointment. The affidavit of the NPA is clear that it supports the position adopted by RBCT as a necessary measure to prevent the dissipation of value from OCM.

[32] On the other hand, counsel for NUM submitted that the contents of paragraph 31 of Ms Rabaji-Rasethaba’s affidavit paints the opposite picture, where she says that:

‘while the NDPP supports the imminent suspension of the OCT allocation, it would not support any steps by RBCT to terminate that entitlement in perpetuity. Any determination of the OCT allocation would cause the loss of billions of rands of value from OCT and OCM and may well be a breach of the preservation order for that reason.’

[33] I do not interpret the contents of paragraph 31 of the NPA’s affidavit as supporting the case of NUM (or by implication OCT). On the contrary, the overriding picture that emerges is that the NPA supports the position adopted by RBCT to suspend OCT’s export allocation through Richards Bay. In any event, this being interim proceedings, it is not for this court to make definitive findings in relation to the main application which is to be heard in due course.

[34] In light of what has been stated above, I am of the view that NUM has failed to make out a case for the urgent interim relief it seeks. I am not persuaded that the matter was so urgent that it could not wait to take its turn to be argued together with the main application. Moreover, as I have pointed out above, the application for struggles to get out of the starting blocks in satisfying the pre-requisites for interim relief. Even though the facts in this urgent application and the main application are intertwined, I do not think that this is a case where a decision as to whether the applicant has established a *prima facie* to interim relief, should

be deferred to some other court. As Madlanga J said in Eskom Holdings para 251:

‘There are legal questions that are capable of easy resolution to any judge worth their salt. Those must be decided definitively. If,

as a matter of law, the right asserted by the applicant for interim relief is held not to exist at all, that will be the end of the matter.’

[35] Counsel for NUM submitted that in the event that the court was disposed to dismiss the application, the principles in *Biowatch Trust v Registrar, Genetic Resources, and others* 2009

(6) SA 232; 2009

(10) BCLR 1014 (CC). should apply and no order of costs should be made. I disagree as there is no ‘challenge to the constitutionality of a law or of State conduct’ present in this matter. Even if this application could be described as involving constitutional issues, the Constitutional Court in *Lawyers for Human Rights v Minister in the Presidency and others* 2017

(1) SA 645; 2017

(4) BCLR 445 (CC) para 18 warned that the *Biowatch* rule does not mean risk-free constitutional litigation. Having regard to the character of the litigation, I am of the view that *Biowatch* does not apply to this case, nor is the losing party to be shielded from costs consequent of its failure.

Order

[36] I make the following order:

1. The application by NUM for urgent interim relief in paragraph 4(a) to
- (c) of the notice of motion is dismissed with costs, including the costs of two counsel where so employed.

M R Chetty

Appearances

For the applicant (NUM): C Badenhorst SC and M Desai Instructed by: Ulrich Roux and associates  
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## Judgment

handed down electronically to all parties.

[1] I use the term ‘Optimum’ to refer to both Optimum Coal Mine (OCT) and Optimum Coal Terminal

[2] See Eskom Holdings para 192 where the court says: ‘. . . I do so because a fundamental flaw permeates the first judgment and is central to the conclusion my colleague reaches on the merits. That flaw is the idea in the first judgment that the residents should have asserted and proved the existence of a specific constitutional right to be supplied with electricity by Eskom. As I demonstrate more fully later, that idea is mistaken. The residents do not have to rely on any such constitutional right. They assert several other rights protected by the Bill of Rights, which I highlight above. Without question, the residents do enjoy constitutional protection of those rights.’

[2] See Eskom Holdings para 192 where the court says:

‘. . . I do so because a fundamental flaw permeates the first judgment and is central to the conclusion my colleague reaches on the merits. That flaw is the idea in the first judgment that the residents should have asserted and proved the existence of a specific constitutional right to be supplied with electricity by Eskom. As I demonstrate more fully later, that idea is mistaken. The residents do not have to rely on any such constitutional right. They assert several other rights protected by the Bill of Rights, which I highlight above. Without question, the residents do enjoy constitutional protection of those rights.’

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