THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: J 890/17

TASIMA (PTY) LTD **Applicant**

and

ROAD TRAFFIC MANAGEMENT CORPORATION **First Respondent**

DEPARTMENT OF TRANSPORT **Second Respondent**

DIRECTOR GENARAL: DEPARTMENT OF TRANSPORT **Third Respondent**

MINISTER OF TRANSPORT **Fourth Respondent**

EMPLOYEES LISTED IN ANNEXURE "A" TO THE NOTICE OF MOTION **Fifth to Eighty Fourth Respondents**

MAKHOSINI MSIBI **Eighty Fifth Respondent**

Heard: **22 January 2019**

Delivered: **19 February 2019**

Summary: Application in terms of section 18 of the Superior Courts Act to enforce an order of the Labour Appeal Court in respect of a section 197 of the LRA transfer pending further appeal proceedings.

JUDGMENT

PRINSLOO, J

Introduction

[1] The Applicant (Tasima) approached this Court on an urgent basis for an order that paragraph 57.1 of the Labour Appeal Court (LAC) order[1], read with paragraph 63.1 of the Labour Court order of 25 May 2017, operates and is extant until the final determination of all present and future leave to appeal applications and appeals against the LAC order. Tasima further seeks an order that the First Respondent (RTMC) is to take transfer of the Fifth to Eighty Fourth Respondents (the employees) as its employees, on terms no less favourable than their contracts of employment with Tasima.

[2] In the alternative, the Applicant seeks an order that, notwithstanding any application for leave to appeal, until the final determination of all present or future leave to appeal applications and appeals against the LAC order, the RTMC be ordered to pay the employees' salaries on a monthly basis on or before the 25th of each month.

[3] The RTMC opposed the application.

Background

[4] This matter has a long and litigious history, of which the end is unfortunately not yet in sight.

[5] A brief background of this matter is necessary to put the current application in proper context. The LAC correctly observed that the relationship between the parties turned into a litigation storm and that a narrative entitled "War and No Peace" could be compiled based on the litigation history of the parties. I do not intend to deal with all the litigation, but will briefly refer to the litigation that is relevant for the present application.

[6] For a period of almost 15 years, Tasima was responsible for the development, operation, management, control and maintenance of the electronic national traffic information system (eNaTIS). The eNaTIS and the rendering of eNaTIS services was the sole business of Tasima, it represented the entirety of

[1] JA 77/2017.

Tasima's business and revenue generation and all the employees employed by Tasima, were dedicated solely to the eNaTIS and the rendering of the eNaTIS services. The said employees are the employees before this Court.

[7] The eNaTIS is self-financing through the generation of transaction fees, which at all times have accrued to the State through the RTMC as the relevant state functionary. The Tasima employees were paid for years with the funds the State received from the eNaTIS transaction fees. The RTMC receives the transaction fees as part of its annual income.

[8] On 9 November 2016, the Constitutional Court in *Department of Transport and Others v Tasima (Pty) Ltd*[2] ordered Tasima to hand over and transfer the eNaTIS and services to the RTMC within 30 days of the date of the order. This order followed lengthy litigation pertaining to the lawfulness of the extensions of the agreement and contempt orders by various Courts.

[9] The Constitutional Court[3] ordered Tasima and RTMC to 'meet within 10 days to agree on how the transfer is to be facilitated. Should this agreement fail to materialise, the transfer is to take place in accordance with a default regime in terms of the underlying original Turnkey Agreement'. In the course of negotiating the transfer, as per the Constitutional Court order, the RTMC's attorneys sent correspondence to Tasima's attorneys during February 2017, confirming that section 197 of the Labour Relations Act[4] (LRA) applies, that it would honour the provisions of the section and that the RTMC was ready to receive the transferred employees on the same terms and conditions of their current employment.

[10] On 1 March 2017, the RTMC's attorneys confirmed that the RTMC has agreed, without any reservation, to take over all of Tasima's employees in terms of the provisions of section 197 of the LRA. It appears from the correspondence that was exchanged between the parties' legal representatives that there was a dispute about the handing over of the eNaTIS and services, the details of which are not relevant for purposes of this

[2] 2017 (2) SA 622 (CC).
[3] *Ibid* n 2.
[4] Act 66 of 1995 as amended.

application. This however, appeared to have had a hugely negative impact on the negotiations between the parties.

[11] What is evident is that on 2 March 2016, the RTMC's attorney confirmed that the issue of section 197 of the LRA, the functions to be transferred and handed over, and commitment to an uninterrupted and expeditious handover, was settled on the part of the RTMC and that the RTMC had agreed to take over the Tasima employees unreservedly, subject to compliance with the provisions of the LRA.

[12] It is clear from the correspondence between the legal representatives, that it was understood by both Tasima and the RTMC that the Tasima employees would be transferring to the RTMC with the transfer of the eNaTIS and services. This was also expressed in the affidavit deposed to by the RTMC's Chief Executive Officer, Mr Msibi, in papers before the Constitutional Court, where he stated *inter alia,* that the RTMC would take over the employees of Tasima in terms of section 197 of the LRA. Evidently the applicability of section 197 of the LRA was not in dispute.

[13] On 5 April 2017, the transfer of the eNaTIS occurred when the RTMC took over Tasima's premises. The RTMC subsequently reneged on the previous representations and refused to give effect to section 197 of the LRA. This caused Tasima to launch an urgent application under case number J 890/17 to secure a declaration that the employees had transferred to the RTMC by virtue of section 197 of the LRA.

[14] The said urgent application was heard on 16 May 2017 and on 25 May 2017 Steenkamp J handed down his judgment wherein he declared that, with effect from 5 April 2017, the contracts of employment of the employees automatically transferred from Tasima to the RTMC in accordance with the provisions of section 197 of the LRA[5]. An order was also granted that pending the final determination of the matter, the RTMC was ordered to pay the employees their salaries etcetera, with effect from 5 April 2017.

[5] *Tasima (Pty) Ltd v Road Traffic Management Corporation and Others (*2017) 38 ILJ 2385 (LC).

[15] The RTMC filed an application for leave to appeal against the judgment of Steenkamp J and also launched an application under section 18(2) and (3) of the Superior Courts Act[6], for the interim relief granted by Steenkamp J to be suspended pending the appeal. The application was not successful and as a result the RTMC made payment in respect of the employees' salaries etcetera for the period May 2017 until November 2018, as per the interim order.

[16] The appeal was heard by the LAC[7] on 8 November 2018 and on 21 December 2018 judgment was handed down. The LAC upheld the declaration that the employees' contracts of employment had transferred automatically from Tasima to the RTMC in accordance with section 197 of the LRA. The order was however amended to reflect the proper date of the transfer to be 23 June 2015. The appeal succeeded in respect of the interim order that the RTMC had to pay the employees' salaries and the order in paragraph 63.2 of Steenkamp J's judgment was set aside.

[17] On 21 December 2018, and following the LAC judgment, Tasima requested the RTMC to confirm whether it would be abiding by the LAC judgment and order and if not, whether it would, pending any appeal thereof, be paying the employees' monthly salaries.

[18] The RTMC has indicated that it would approach the Constitutional Court to appeal the LAC judgment.

[19] Tasima has approached this Court on an urgent basis for an order to enforce the LAC judgment and order of 21 December 2018 pending any application for leave to appeal and subsequent appeal to the Constitutional Court.

Points *in limine*

[20] In opposing this application, the RTMC has raised two points *in limine.* It is unfortunate that the RTMC adopted this approach rather than deal with the merits of this application, as it not only burdened Tasima to put up an answer to the points so raised, but it also burdened this Court to, on an urgent basis,

[6] Act 10 of 2013.
[7] JA 77/2017, JA 78/2017, JA 28/ 2018 and JA 134/2017.

deal with meritless points *in limine.* The points *in limine* caused lengthy arguments to be presented in Court and required a substantial amount of effort and time to be addressed in this judgment, which was quite unnecessary.

[21] Be that as it may, in support for its points *in limine,* the RTMC referred to paragraph 2 of the founding affidavit wherein it was stated that 'Webber Wentzel, Tasima and I are duly authorised by the relevant employees to bring this application on their behalf. Indeed, the relief sought herein is sought fundamentally in the interest not of Tasima itself, but the interests of all of Tasima's erstwhile employees and thus Tasima litigates herein in the interest of the fifth to eighty fourth respondents and the public.'

[22] According to the RTMC, the said paragraph 2 means that Tasima is the applicant and that it had been authorised to institute this litigation on behalf of its employees and that Tasima is not seeking relief for itself, but that it does so in the interest of its employees and the general public.

No proper authority

[23] The first point *in limine* is that there is nothing that indicates that Tasima, Webber Wentzel attorneys and Mr Vabaza (the deponent to the founding affidavit) have been properly authorised to litigate against the RTMC. According to the RTMC this is a fatal defect and the application should be dismissed on this basis alone.

[24] In the replying affidavit, Mr Vabaza stated that it was unclear what the basis of the challenge was. He explained that Tasima, through Webber Wentzel attorneys, has been litigating against the Department of Transport and RTMC since 2012, without there being any question ever raised as to the issue of authority. During this period Mr Vabaza has also deposed to multiple affidavits on behalf of Tasima.

[25] Mr Vabaza explained that there are 68 employees remaining as relevant employees and Tasima has filed confirmatory affidavits of 66 of the said employees. Each of the 66 employees deposed to an affidavit wherein they

confirmed the contents of the founding affidavit, wherein it was recorded that that Tasima, Webber Wentzel attorneys and Mr Vabaza had been authorised to bring the application on the employees' behalf. Furthermore, each of the confirmatory affidavits stated that the relevant employee understands that in seeking the relief sought in these proceedings, Tasima is acting on his or her behalf and in his or her interest. The employees confirmed that they are not in a financial position to litigate in respect of their rights against the RTMC.

[26] The basis of the challenge to authority became only clear during argument.

[27] In argument, Mr Hopkins for the Respondents, submitted that Tasima is a private company and it is trite that private companies may only litigate if their boards of directors authorised them to do so. There is no allegation or evidence in this application that Tasima's board has authorised this application.

[28] Tasima's suggestion that the employees authorised the application, is of no value as only the board of directors and not the employees can authorise a company to litigate. Mr Vabaza in his founding affidavit merely stated that he is authorised to depose to the affidavit. Mr Vabaza should have been authorised to institute litigation on Tasima's behalf and therefore the RTMC disputed that Tasima and the deponent are properly authorised.

[29] In his argument, Mr Hopkins referred to Henochsberg[8] wherein it is explained that section 66 of the Companies Act[9] enables the company's directors to cause the company to participate in legal proceedings and for this purpose they must authorise the institution of the proceedings and the prosecution thereof. There must be evidence before the Court that the person purporting to represent the company has been authorised accordingly with regard to the particular proceedings.

[8] Henochsberg on the Companies Act 71 of 2008, Volume 1, First Edition, Lexis Nexis page 253 – 258.
[9] Act 71 of 2008.

[30] Mr Hopkins also relied on *Ganes and Another v Telecom Namibia Ltd*[10] *(Ganes)* where the Supreme Court of Appeal (SCA) held that the institution of the proceedings and the prosecution thereof must be authorised. He submitted that *in casu,* the deponent stated that he is authorised to depose to the affidavit, not that he is authorised to institute the litigation on Tasima's behalf. This is the exact shortcoming the SCA held to be fatal in *Ganes*.

[31] Mr Hopkins referred to *Sibuya Game Reserve and Lodge (Pty) Ltd and Others v Geoffrey Martin Cook and Others*[11] where the lack of authority to bring an application on behalf of a private company and close corporation applicants was raised as a point *in limine.* The Court upheld the said point *in limine* on the basis that no evidence was placed before it to demonstrate that the applicants had authorised the proceedings.

[32] Mr Hopkins submitted that the lack of authority was raised in the opposing affidavit and Tasima could have and should have fixed it in reply, but this was not done. The application as it stands, is unauthorised and that is fatal to the application.

[33] In argument, Mr Franklin for Tasima, submitted that the point taken on the issue of authority is without merit and is bad in law.

[34] This is so because Tasima, through Webber Wentzel attorneys, has been litigating against the RTMC since 2012, without any question ever raised as to the issue of authority.

[35] The challenge to authority, as raised in the opposing affidavit, stated that there is nothing that indicates that Tasima, Webber Wentzel attorneys and Mr Vabaza have been properly authorised to litigate against the RTMC. Mr Franklin submitted that Tasima had indeed been authorised by the affected employees, as is evident from their confirmatory affidavits. In respect of Mr Vabaza, Mr Franklin submitted that as the deponent to an affidavit, he does

[10] 2004 (3) SA 615 (SCA) at 624, (2004) 25 ILJ 995 (SCA).

[11] Unreported judgment of the High Court of South Africa, Eastern Cape Division, Grahamstown, handed down on 11 December 2014 under case number 4512/14.

not need to be authorised. In respect of the authority of Webber Wentzel attorneys, it was submitted that they too had the authority to act on behalf of Tasima.

[36] Mr Franklin submitted that if the RTMC wanted to challenge the authority to act, the correct procedure was to file a notice in terms of Rule 7 of the Uniform Rules. Mr Franklin referred to *Unlawful Occupiers, School Site v City of Johannesburg*[12] *(Unlawful Occupiers)* in support of his submissions.

Analysis

[37] In *Eskom v Soweto City Council* [13] *(Eskom),* issue was taken with the deponent's authority to institute legal proceedings, as the deponent was authorised to make the affidavit and not to bring the application and there was no resolution filed in proof of the deponent's authority. The Court held that:

> 'The care displayed in the past about proof of authority was rational. It was inspired by the fear that a person may deny that he was party to litigation carried on in his name, his signature to the process, or when that does not eventuate, formal proof of authority would avoid undue risk to the opposite party, to the administration of justice and sometimes even to his own attorney.
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> The developed view, adopted in Court Rule 7(1), is that the risk is adequately managed on a different level. If the attorney is authorised to bring the application on behalf of the applicant, the application necessarily is that of the applicant. There is no need that any other person, whether he be a witness or someone who becomes involved especially in the context of authority, should additionally be authorised. It is therefore sufficient to know whether or not the attorney acts with authority.
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> As to when and how the attorney's authority should be proved, the Rule-maker made a policy decision. Perhaps the risk is minimal that an attorney will act for a person without authority to do so, proof is dispensed with except only if the other party challenges the authority. See Rule 7(1) of the Uniform Rules. Courts should honour that approach. Properly applied, that should lead

[12] 2005 (4) SA 199 (SCA).
[13] 1992 (2) SA 703 (W) at 705C-J.

> to the elimination of many pages of resolutions, delegations and substitutions still attached to applications by some litigants….'

[38] The Court further held that insofar as the application was delivered under the name and signature of the attorney, he purportedly did so on behalf of the party he represented and if he was authorised to do so, the other party was bound to accept that, irrespective of whether the deponent was authorised to bring the application.

[39] Of importance is the Court's finding that if there were qualms about whether the application was authorised, the authority had to be challenged on the level of whether the attorney held empowerment and apart from informal requests or enquiries, the remedy was to use Rule 7(1). It was not to hand up heads of argument, apply textual analysis and make submissions about the adequacy of the words used by the deponent about his own authority.

[40] In *Ganes*[14] the SCA has held that:

> '…The deponent to an affidavit in motion proceedings need not be authorized by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorized. In the present case the proceedings were instituted and prosecuted by a firm of attorneys purporting to act on behalf of the respondent. In an affidavit filed together with the notice of motion a Mr Kurz stated that he was a director in the firm of attorneys acting on behalf of the respondent and that such firm of attorneys was duly appointed to represent the respondent. That statement has not been challenged by the appellants. It must, therefore, be accepted that the institution of the proceedings was duly authorized. In any event, rule 7 provides a procedure to be followed by a respondent who wishes to challenge the authority of an attorney who instituted motion proceedings on behalf of an applicant. The appellants did not avail themselves of the procedure so provided. (See *Eskom v Soweto City Council* 1992 (2) SA 703 (W) at 705C-J.)'

[41] It is evident from *Ganes*[15] that it supported the view taken in *Eskom* and confirmed that the procedure to be followed to challenge authority, is set out

[14] *Supra* n 10 at para 19.

in Rule 7 of the Uniform Rules and where that procedure is not used, it must be accepted that the institution of the proceedings was duly authorised.

[42] In *Unlawful Occupiers*[16] the SCA endorsed the approach adopted in *Eskom* and *Ganes* and held that:

> 'The issue raised had been decided conclusively in the judgment of Flemming DJP in *Eskom v Soweto City Council* 1992 (2) SA 703 (W), which was referred to with approval by this court in *Ganes and another v Telecom Namibia Ltd* 2004 (3) SA 615 (SCA) 624I-625A. The import of the judgment in *Eskom* is that the remedy of a respondent who wishes to challenge the authority of a person allegedly acting on behalf of the purported applicant, is provided for in rule 7(1).
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> …
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> However, as Flemming DJP has said, now that the new rule 7(1)-remedy is available, a party who wishes to raise the issue of authority should not adopt the procedure followed by the appellants in this matter, ie by way of argument based on no more than a textual analysis of the words used by a deponent in an attempt to prove his or her own authority. This method invariably resulted in a costly and wasteful investigation, which normally leads to the conclusion that the application was indeed authorised. After all, there is rarely any motivation for deliberately launching an unauthorised application. In the present case, for example, the respondent's challenge resulted in the filing of pages of resolutions annexed to a supplementary affidavit followed by lengthy technical arguments on both sides. All this culminated in the following question: Is it conceivable that an application of this magnitude could have been launched on behalf of the municipality with the knowledge of but against the advice of its own director of legal services? That question can, in my view, only be answered in the negative.'

[43] The same question arises *in casu.* Is it conceivable that an application, such as the present one, could have been launched without the knowledge of Tasima and without Webber Wentzel attorneys being properly authorised?

[44] The answer has to be no. The parties have been involved in litigation since 2012 in a number of Courts, including the Constitutional Court, and in all

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[15] *Supra* n 10.
[16] *Supra* n 12 at para 14 and 17.

those proceedings Tasima was represented by Webber Wentzel attorneys. As recent as November 2018, Tasima and RTMC appeared in the LAC and obtained judgment in December 2018. The purpose of this application is to enforce the order made by the LAC, pending any further appeal process and it is inconceivable that the RTMC would at this stage of the proceedings and for the first time ever challenge the authority to litigate.

[45] The RTMC had to follow the procedure set out in Rule 7 of the Uniform Rules and as was confirmed by the SCA, and should not have adopted the procedure it did by raising it very briefly and scantly in the answering affidavit and dealt with it in the heads of argument.

[46] A proper reading of Henochsberg[17] also does not support the RTMC's argument. Henochsberg stated that there must be evidence before the Court that the person purporting to represent the company has been authorised accordingly. In motion proceedings the best evidence would be an affidavit by an officer of the company, annexing a copy of the relevant resolution of the board, but such evidence is not necessary in every case. Each case must be considered on its own merits and the Court must decide whether enough has been placed before it to warrant the conclusion that it is the company which is litigating and not some unauthorised person on its behalf.

[47] This approach was also recorded in *Eskom*[18] where the Court held that in the absence of a prescribed mode of proof of authority, it is a factual question whether a particular person holds a specific authority, which may be proved in the same way as any other fact. Adjudication involves consideration of what the credible evidence means, the extent of, quality of, and sometimes the absence of contradiction or other reason to remain unconvinced.

[48] Another difficulty for the RTMC is that in the opposing affidavit the challenge to authority was not properly set out. It was raised as a blanket challenge, which caused Tasima to respond to the extent that it was not sure what the

[17] Id n 8.
[18] *Supra* n 13.

basis for the challenge was and an attempt was made to address the challenge, as Tasima understood it.

[49] *In casu,* there is no proper challenge to the authority to litigate, as provided for in Rule 7 of the Uniform Rules and absent such a challenge, I have to accept that the institution of the proceedings was duly authorised. There is however another factual reason why I accept this and that is because the same parties have been involved in litigation since 2012, where the same attorneys had been representing Tasima and in my view, the RTMC is very well aware of the fact that Webber Wentzel attorneys have been duly authorised to institute these proceedings. Had this not been the case, the RTMC would have raised the issue regarding authority as far back as 2012 or soon thereafter.

[50] There is no merit in the first point *in limine* raised by the RTMC and I find the point raised and the arguments in respect of the authority to act, unnecessary and wasteful, to say the least.

No locus standi

[51] The second point *in limine* is that Tasima has no *locus standi* and much is made of this in the RTMC's opposing affidavit.

[52] It is telling that Mr Hopkins made no effort to address this issue and he did not make a single submission on this point in his heads of argument.

[53] I do not intend to deal with this point in detail in circumstances where the party who raised it, made no effort to address it in its heads of arguments. In my view this is indicative of the lack of merit in this point.

[54] Be that as it may, there is no merit in this point as Tasima has an obvious interest in the matter and has pursued its interest before the Labour Court and the LAC, where it secured judgments in its favour. Tasima has standing to litigate in its own interests and on its own behalf and has a clear interest in having the orders it secured, enforced pending an appeal, as provided for in section 18 of the Superior Courts Act.

The section 18(3) application

The applicable principles:

[55] Section 18 of the Superior Courts Act regulates the circumstances under which a party may apply for an order that departs from the ordinary consequence of filing an application for leave to appeal. The default position is that 'the operation and execution of a decision which is the subject of an application for leave to appeal … is suspended pending the decision of the application or appeal'.

[56] In general terms the operation and execution of a decision (other than a decision not having the effect of a final judgment) is suspended pending the outcome of an application for leave to appeal or appeal. The court may however order otherwise if it is established on a balance of probabilities that the applicant will suffer irreparable harm if the court does not so order, and that the other party will not suffer irreparable harm if the court so orders[19].

[57] Section 18 of the Superior Courts Act provides that:

'18 Suspension of decision pending appeal

(1) Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.

(2) Subject to subsection (3), unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision that is an interlocutory order not having the effect of a final judgment, which is the subject of an application for leave to appeal or of an appeal, is not suspended pending the decision of the application or appeal.

(3) A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.

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

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

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

[19] See: *Luxor Paints (Pty) Ltd v Lloyd and Another* (2017) 38 ILJ 1149 (LC).

highest court;

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

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

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

[58] The provisions of section 18 of the Superior Courts Act introduced a two-fold test of which the requirements call for an enquiry firstly, as to whether 'exceptional circumstances' exist and secondly whether the applicant showed the presence and the absence of irreparable harm on a balance of probabilities.

[59] The applicant must prove on a balance of probabilities that it will suffer irreparable harm should the order for leave to execute or enforce the judgment or order not be granted pending the appeal and that the respondent, who seeks leave to appeal, will not suffer irreparable harm if leave to execute is granted pending appeal.

Analysis

[60] The question is whether or not a proper case exists to grant leave to put the LAC order into operation pending the appeal process.

[61] *In casu,* the LAC confirmed that the contracts of employment of the employees transferred automatically from Tasima to RTMC, in accordance with the provisions of section 197 of the LRA. The LAC confirmed that the date of the legal cause of the transfer was 23 June 2015.

[62] Tasima's case is that section 197 of the LRA applies by operation of law and as a result, the employees have transferred to RTMC by operation of law and they must be paid by the RTMC. This Court, per Steenkamp J as well as the LAC have found that by operation of law, the employees have transferred to the RTMC and there is no basis for the RTMC to allege that Tasima remains

the employer or that it is liable to pay the employees' salaries. By virtue of the operation of law, the employees have transferred to the RTMC who, as the employer, is liable to pay the employees' their remuneration.

[63] Tasima seeks an order that the RTMC is to take transfer of the employees, alternatively pay the employees their remuneration. Tasima does not claim any payment from the RTMC as its tenure came to an end and it performs no work.

Exceptional circumstances

[64] The first issue to be decided is whether there are exceptional circumstances.

[65] What constitutes 'exceptional circumstances' had been considered in *Incubeta Holdings (Pty) Ltd and Another v Ellis and Another*[20] and the Court held that exceptionality must be fact-specific and circumstances which are or may be 'exceptional' must be derived from the actual predicaments in which the given litigants find themselves. The Court held that:

> 'In my view the predicament of being left with no relief, regardless of the outcome of an appeal, constitutes exceptional circumstances which warrant a consideration of putting the order into operation. The forfeiture of substantive relief because of procedural delays, even if not protracted in bad faith by a litigant, ought to be sufficient to cross the threshold of 'exceptional circumstances.'

[66] *Incubeta*[21] has been quoted with approval by the SCA[22] and it is clear that the determination of whether exceptional circumstances exist, is a fact specific enquiry and each case has to be decided on its own facts as there is no definition of exceptional circumstances.

[67] Tasima submitted that there are a number of factors, each of which suffices as an exceptional circumstance, but cumulatively they satisfy the test.

[20] 2014 (3) SA 189 (GJ) at para27.
[21] *Ibid* n 23.
[22] See: *Ntlemeza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA), *University of the Free State v Afriforum and Another* 2018 (3) SA 428.

[68] Those factors are firstly that the RTMC filed an application in terms of section 18(2) and 18(3) of the Superior Courts Act in July 2017 and the starting point for that application was that the facts of this case constituted exceptional circumstances.

[69] Secondly, the RTMC has unequivocally represented to Tasima, the employees, the High Court, the Constitutional Court and Parliament that section 197 of the LRA applies and that all employees would be transferred accordingly. The RTMC's subsequent attempt to resile from this position, is exceptional. Mr Franklin submitted that the RTMC cannot be permitted to run two diametrically opposed versions before Court, depending upon which one suits its needs at the time. The RTMC must be held to its representations that section 197 of the LRA applies and that the employees would be transferred accordingly.

[70] Thirdly, the RTMC's prospects of success on appeal are negligible. Prospects of success are to be considered as a factor in deciding whether or not to grant the exceptional remedy of execution of a judgment or order pending appeal. Tasima's case is that the section 197 of the LRA issue had been through two layers of specialist Labour Courts, which both rejected the RTMC's arguments and it was evident that section 197 of the LRA applies and that the RTMC has no prospects of success on appeal.

[71] Fourthly, Tasima was a special purpose vehicle, whose sole source of income was payments by the State for its management, maintenance support and operation of the eNaTIS and thus the State effectively always paid the employees. Tasima has no business at all, cannot employ the employees and receives no revenue with which to pay the employees. Tasima cannot afford to pay the employees' salaries and it has no obligation to do so.

[72] Fifthly, if no enforcement or payment regime is ordered at this stage, it may be many months or even years before a final determination on the application of section 197 of the LRA is made, during which period the employees will receive no salaries and their livelihood will be in jeopardy in those

circumstances. These circumstances may eventually render the actual order moot and the relief ultimately received, may become academic.

[73] Sixthly, a pending appeal without enforcement of the LAC order, will undermine the legislative intention behind section 197 of the LRA and the employees might find themselves in a position which the section was expressly designed to prevent.

[74] In the opposing affidavit, the RTMC submitted that, what was set out in Tasima's founding affidavit (paragraphs 49 – 73) to be exceptional circumstances, are not exceptional circumstances as contemplated in section 18(3) of the Superior Courts Act and that the reasons for saying so, would be dealt with by the RTMC's counsel in open Court. In the body of the opposing affidavit, the RTMC's response to paragraphs 49 – 73 of the founding affidavit is that the lack of exceptional circumstances was dealt with and the deponent had nothing more to add. Surprisingly, in the heads of argument filed on behalf of the RTMC, Mr Hopkins made no submissions in respect of exceptional circumstances and argument on this aspect was not advanced in Court.

[75] The RTMC in its opposing affidavit failed to mobilise any factual attack on the exceptional circumstances set out in the founding affidavit, however it submitted that there are two exceptional circumstances that militated against an order to disturb the ordinary position. Those are the fact that Tasima already benefitted significantly from its own unlawful actions at the expense of the RTMC and the fact that the RTMC had for the past 17 months, picked up the salary bill in circumstances where the LAC made it clear that Tasima should have done so.

[76] The two issues have been disputed by Tasima, which submitted that there was no finding that it has acted unlawfully or benefitted from unlawful actions, as alleged by the RTMC. All payments made to Tasima were made under contract or in terms of Court orders. Furthermore, the payment of salaries for the past 17 months were made in compliance with an extant Court order and is irrelevant for purposes of considering exceptional circumstances.

[77] I do not intend to deal with the detail of the issues raised by the RTMC as the issues are unrelated to the questions this Court has to consider. The Labour Court and the LAC ordered that the employees transfer to the RTMC and it is irrelevant what payments Tasima previously received. Suffice to say, having considered the issues and the response thereto, they do not detract from or diminish the existence of exceptional circumstances.

[78] It is astonishing that the RTMC has left the material allegation that it has presented to the High Court, the Constitutional Court and Parliament that section 197 of the LRA applies and that all employees would be transferred accordingly and that it subsequently sought to resile from that position and run a diametrically opposed version, unchallenged. The RTMC's attitude in respect of section 197 of the LRA and its application is indeed remarkable.

[79] The RTMC has not disputed that Tasima was a special purpose vehicle, whose sole source of income was payments by the State for its management, maintenance support and operation of the eNaTIS, that it has no other business at all, cannot employee the employees elsewhere and receives no revenue with which to pay the employees.

[80] *In casu,* I am satisfied that the factors listed *supra,* considered cumulatively, are sufficient to constitute exceptional circumstances.

Irreparable harm

[81] I turn now to deal with the second leg of the enquiry: 'irreparable harm'.

[82] Tasima must prove on a balance of probabilities that irreparable harm will be suffered should the order it seeks not be granted. Tasima has to show that it will suffer irreparable harm should the order for leave to execute or enforce the judgment and order of the LAC not be granted pending the appeal and that the RTMC will not suffer irreparable harm if leave to execute is granted pending appeal.

[83] Tasima's case is that it, the employees and/or the public will suffer irreparable harm should the LAC judgment and order not be implemented in the

immediate future, notwithstanding an appeal or appeal process by the RTMC. The irreparable harm goes beyond mere loss of income or employment.

[84] This is so for the following reasons: firstly, the employees' livelihoods and those of their dependents are compromised for as long as the RTMC refuses to pay their salaries, notwithstanding the fact that they are the RTMC's employees by operation of law. The employees have structured their affairs to have monthly debit orders which go off their bank accounts after they are paid on the 25th of each month and they have other regular monthly expenses and payments to make such as *inter alia,* groceries, school fees, rates and taxes. If the employees are not paid, it will cause irreparable harm to them, including action by creditors against them, the discontinuation of critical services to them, eviction from their homes and will imperil the employees' credit ratings should they fail to make payments. The employees and their dependents depend on being paid their salaries monthly to service their debts and for their very livelihood. Many are wholly reliant on their monthly income and they will suffer extreme prejudice if their salaries are not paid.

[85] The employees' income, lives and livelihoods are at stake and they cannot be expected to endure months of non-payment of their salaries, particularly where many are sole breadwinners for their dependants.

[86] Secondly, it was always understood that the eNaTIS and services, including the employees, would transfer to the RTMC and the employees and Tasima were alive to the fact of such transfer and they structured their affairs accordingly. It was understood that by virtue of the provisions of section 197 of the LRA as well as the RTMC's acceptance that the section 197 of the LRA applies, that the employees would transfer accordingly. The RTMC however reneged on its undertakings and seeks to ignore the provisions and application of section 197 of the LRA and continues to do so, despite the LAC judgment and order.

[87] Thirdly, by operation of law, the RTMC became the new employer and the employees have no legal claim to be paid their salaries by Tasima.

[88] Fourthly, the employees are left in the invidious position of notionally being employed, yet their new employer refuses to take them over and to pay their salaries. They may in the interim be forced to seek out alternative employment, which is not assured and may be on terms less favourable than those they are entitled to if taken over and paid by the RTMC. If alternative employment is found, it would bind the employees into other employment obligations, contrary to the intention of section 197 of the LRA. Once the employees have accepted alternative employment, it may not be possible to return to the RTMC, should the appeal be heard in due course and this violates their rights under a successful section 197 of the LRA outcome. This harm is no doubt irreparable.

[89] Lastly, Tasima, as the employees' old employer, was a special purpose vehicle, which has transferred the special purpose for which it existed, it has no other business at all and receives no revenue with which to pay the employees. At the moment it faces financial claims from a number of third parties and has not been paid for the services it rendered between October 2016 and April 2017. The RTMC on the other hand is receiving the eNaTIS related revenue, which is ample to cover the salary bill for the employees. In fact, the RTMC has been covering the salary bill for the past 17 months, which is indicative of the RTMC's ability to pay the employees.

[90] In its opposing affidavit, the RTMC submitted that Tasima will not suffer irreparable harm, firstly because it has no standing and in the event that it has standing, it has not put up any facts to demonstrate that it will suffer irreparable harm. I have already found that Tasima has standing and therefore I will focus only on the latter part of the RTMC's case.

[91] In respect of Tasima, the RTMC's case is that Tasima baldly states that it cannot pay the employees because it does not have the money to do so, but the allegation that it has insufficient funds is not backed up by any evidence. Tasima had to put up its financial statements to show its financial inability to pay and the failure to produce its financials or any other evidence to substantiate its allegations, leads to the ineluctable inference that Tasima has the funds to pay the employees' salaries.

[92] The RTMC further submitted that Tasima has received in excess of R2,5 billion from operating the eNaTIS over the past few years and the question is where is that money and why there is no telling where it is, which leads to the inescapable inference that the money is still in Tasima's bank account.

[93] This response has no merit for a number of reasons. Firstly, this issue is irrelevant in respect of showing the employees' harm. Secondly, the RTMC has not disputed that Tasima was a special purpose vehicle, that it has no other business at all, cannot employ the employees elsewhere and generates and receives no revenue with which to pay the employees' salaries. It is further not disputed that Tasima faces financial claims from a number of third parties and has not been paid for the services it rendered between October 2016 and April 2017. The RTMC disputes Tasima's averments that it is unable to pay for the sole reason that Tasima has not disclosed its financial statements.

[94] The RTMC's case is that because Tasima has not disclosed its financial statements or bank account statements, the inference must be made that the money it received for operating the eNaTIS is still available in its bank account. This response is bizarre. Tasima responded that the RTMC well knows that the funds it received historically did not simply accrue for its benefit but were used to pay a network of dozens of service operators. Tasima's case that it now faces financial claims from third parties, which supports Tasima's version that it used to pay service providers, is undisputed.

[95] In respect of the employee's, the RTMC submitted that there is no evidence to suggest that they would suffer irreparable harm. The argument is that the employees will not suffer any harm at all if somebody pays their salaries, they will not suffer any harm if the RTMC does not pay them, as Tasima is by law required to do so.

[96] It is evident from the papers filed that each of the relevant employees has in their own affidavits, explained the irreparable harm that would befall them should they not receive payment of their monthly salaries. The RTMC has not

challenged these facts and it is thus incontestable that, should the employees not be paid, they will suffer irreparable harm.

[97] I have repeatedly alluded to the fact that the RTMC has not disputed that Tasima was a special purpose vehicle, that it has no other business at all, cannot employ the employees elsewhere and generates and receives no revenue with which to pay the employees. It is undisputed that the RTMC previously accepted that section 197 of the LRA applies and that the employees would transfer accordingly. In addition, the Labour Court and the LAC ordered that the employees transfer to the RTMC and it cannot be said that in those circumstances Tasima is by law required to pay the employees' salaries, the opposite is quite true.

[98] The RTMC's specific response to what was set out in Tasima's founding affidavit (paragraphs 74 – 84) in respect of irreparable harm, was that it was dealt with and that the deponent had nothing more to add. The issue of irreparable harm was responded to as alluded to *supra.*

[99] Apart from taking issue with Tasima's failure to disclose its financial or bank statements, the RTMC has not put forward any facts to dispute or displace Tasima's averments on irreparable harm.

[100] Mr Hopkins submitted that the requirements of section 18(3) of the Superior Court Act are not satisfied if Tasima cannot show that it would suffer irreparable harm and the allegation that the employees would suffer irreparable harm is not sufficient to satisfy the requirement of section 18(3) of the Superior Court Act. His argument is that the employees would only suffer irreparable harm if Tasima cannot pay their salaries, yet Tasima says its own financial health is irrelevant to the employees' irreparable harm. Tasima did nothing to substantiate the allegations that it does not have the means to pay the employees' salaries.

[101] It is not uncommon in section 197 of the LRA cases for the old employer to litigate or pursue the case on behalf of its former employees, as they are normally not in a financial position to do so. This case is no different. In fact, the employees in their individual affidavits confirmed that they understand that

Tasima is acting on their behalf and in their interests and that they are not in a financial position to litigate in respect of their own rights against the RTMC. The harm to be suffered by the employees is a factor that this Court should consider.

[102] The disclosing of financial or bank statements is not the begin all and end all. In its founding affidavit, Tasima has dealt with its constrained financial position, given the fact that it is owed millions of Rands for the period it has rendered the eNaTIS but was not paid for it, it is facing a number of financial claims by third party service providers and the fact that it is not generating or receiving any income. None of these issues were disputed by the RTMC. The RTMC's position is that Tasima has received funds in the past and as it has failed to disclose its bank statements, the only inference is that the money is still in its bank account. That can never be the only inference based on the facts placed before me, more specifically because of the fact that the funds received were used to run the operations and did not accrue solely for Tasima's benefit, the fact that Tasima is owed money and faces financial claims from service providers and has not generated any income.

[103] In my view the irreparable harm is obvious. Given that the eNaTIS had transferred to the RTMC, Tasima has no business at all and receives no revenue with which to pay the employees. The employees will no doubt suffer irreparable harm if they are not paid their salaries.

[104] The value of the relief that Tasima, and effectively the employees, had obtained, will become worthless if leave to enforce the LAC's order is refused.

[105] This is however not the end of the enquiry. Tasima must also prove on a balance of probabilities that the RTMC will not suffer irreparable harm if leave to execute is granted pending an appeal process to the Constitutional Court.

[106] Tasima's case is that the RTMC will suffer no harm, much less irreparable, in the event that the LAC judgment and order is enforced pending the RTMC's appeal. The employees have at all times tendered their services to the RTMC and the RTMC has the opportunity to receive the services of the employees and to have the benefit of their services. The RTMC clearly has a need for the

services, given the fact that the RTMC advertised for positions with the skillsets of the employees as recently as 9 November 2018, even after the hearing of the matter by the LAC.

[107] The RTMC cannot argue that it is over-capacitated, as that is not a defence to the operation of section 197 of the LRA.

[108] There is no financial prejudice for the RTMC in circumstances where the eNaTIS is self-financing and the salaries of the employees could be paid from the income that the system generates. Such income exceeds the amount of the salaries to be paid. Furthermore, the RTMC was able to comply with the interim order and pay the employees' salaries from April 2017 until December 2018, without there being any irreparable harm.

[109] The RTMC has indicated that it will have recourse to the *condictio indebiti* in order to recover amounts paid.

[110] For these reasons, Tasima submitted that the RTMC will not suffer irreparable harm.

[111] The RTMC submitted that its financial position is not as painted by Tasima in that it operated at a deficit of approximately R 239 million in the 2017/1018 financial year. The RTMC is cash strapped and cannot afford any additional liabilities.

[112] The RTMC submitted that irreparable harm is determined by considering whether what was paid as salaries, could later be recovered and if it could, the harm is reparable and if not, the harm is irreparable. The RTMC's case is that in its founding affidavit Tasima submitted that it has no money and is unable to meet claims for money and if this is to be accepted, the RTMC's harm will be irreparable as it would be required to pay salaries with no prospect of recovering anything at all.

[113] In my view there is no merit in the RTMC's submissions. This is so because affordability is irrelevant in circumstances where section 197 of the LRA applies. Even if I am wrong on that, the RTMC was clearly able to afford the

employees' salaries from April 2017 until December 2018, notwithstanding the picture it now wants to paint in respect of its poor financial position.

[114] Furthermore, the RTMC did not dispute Tasima's allegations that the eNaTIS is self-financing and that it receives millions of Rands in transaction fees, from which the employees' salaries could be paid.

[115] The RTMC's arguments regarding Tasima's contention that it has no money and that its harm will be irreparable as it would be required to pay salaries with no prospect of recovering anything at all, is misplaced. Tasima is not the party to be receiving any payments from the RTMC, instead it will be the employees. The RTMC did not deny that it could use the services of the employees and enjoy the benefit thereof and thus it would receive value for the payments it makes in respect of salaries. The RTMC will be paying for services rendered by the employees and I fail to see any harm in that.

[116] Even if the RTMC succeeds with its appeal, it will in the meantime have the benefit of the employees' services and pay their salaries in return for services rendered, that does not constitute irreparable harm. This is a benefit Tasima cannot enjoy, as it no longer operates at all.

[117] In conclusion: it is evident from the circumstances *supra*, that Tasima and the employees will indeed suffer irreparable harm if the LAC's judgments and order are not put into operation and that the RTMC will not suffer irreparable harm if the order is put into operation. The section 18 test is met on both counts of the second leg.

[118] It follows that all the requirements under sections 18(1) and (3) of the Superior Courts Act have been satisfied.

Costs

[119] The last issue to be decided is the issue of costs.

[120] Insofar as costs are concerned, this Court has a broad discretion in terms of section 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

[121] Tasima claims that it is entitled to punitive costs because it should never have been necessary to launch this application.

[122] Mr Hopkins submitted that the costs should follow the result.

[123] The Constitutional Court in *Zungu v Premier of Kwazulu-Natal and Others*[23] confirmed that the rule of practice that costs follow the result does not apply in labour matters, but that the Court should seek to strike a fair balance between unduly discouraging parties from approaching the Labour Court and have their disputes dealt with and, on the other hand allowing those parties to bring to this Court cases that should not have been brought to Court in the first place.

[124] In this matter I have to strike a fair balance and in doing so I have considered the fact that there is no existing or continuing collective bargaining relationship that may be harmed by making an order for costs. I have also considered the conduct of the parties and more specifically that of the RTMC in reneging on its acceptance that section 197 of the LRA applies, causing this application to be filed and in opposing this application, the RTMC raised meritless points *in limine* and instead failed to address material allegations that had a significant bearing on the determination of this application.

[125] Accordingly, I make an order as follows:

Order

1. Paragraph 57.1 of the Labour Appeal Court order of 21 December 2018, read with paragraph 63.1 of the Labour Court order, dated 25 May 2017, operates and is extant until the final determination of all leave to appeal applications and appeals against the Labour Appeal Court order;

2. The Road Traffic Management Corporation (First Respondent) is ordered to comply with the Labour Appeal Court's order of 21 December 2018, read with paragraph 63.1 of the Labour Court order, dated 25 May 2017, by taking transfer of the Fifth to Eighty Fourth Respondents, excluding

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those listed in annexure B to the Applicant's notice of motion, within 24 hours of this order being granted.

3. The First Respondent is ordered to pay the Applicant's costs on a party and party scale, which cost is to include the cost of one counsel.

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Connie Prinsloo

Judge of the Labour Court of South Africa

Appearances:

Applicant:	Advocate A E Franklin SC with Advocate J P McNally SC
Instructed by:	Webber Wentzel Attorneys
First Respondent:	Advocate K Hopkins
Instructed by:	Dexter Selepe Attorneys