THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: 14705/14

EISENBERG DE SAUDE	**FIRST APPLICANT**
IMMIGRATION MANAGEMENT SERVICES SA t/a VISA ONE	**SECOND APPLICANT**
HELMUT BENTE	**THIRD APPLICANT**
HELENE SOFIA MARGARETA VAERLIEN	**FOURTH APPLICANT**
FREDERIC ALAIN LANDOLT	**FIFTH APPLICANT**

And

THE DIRECTOR-GENERAL OF THE DEPARTMENT OF HOME AFFAIRS	**FIRST RESPONDENT**
THE MINISTER OF HOME AFFAIRS	**SECOND RESPONDENT**
THE DIRECTOR OF IMMIGRATION SERVICES: WESTERN CAPE	**THIRD RESPONDENT**

Coram: ROGERS J

Heard: **27 AUGUST 2015**

Delivered: **15 SEPTEMBER 2015**

JUDGMENT

ROGERS J:

Introduction

[1] In this interlocutory application the applicants seek a declaration regarding the interpretation of orders made on 13 November 2014 and 27 February 2015 and an order requiring the first respondent to appear in person to be questioned regarding non-compliance with these orders.

[2] The first applicant ('EDS') is a firm of attorneys specialising in immigration and citizenship law. The second applicant ('IMS') is a service provider in the same field. The third to fifth applicants are among their clients. In this judgment, I shall refer to EDS and IMS collectively as 'the applicants' (the third, fourth and fifth applicants have played no significant part). I shall refer to the persons for whom EDS and IMS act as 'clients'. The first, second and third respondents are the Director-General of the Department of Home Affairs, the Minister of the said Department and the Director of Immigration Services: Western Cape.

[3] All references to sections in this judgment are to sections of the Immigration Act 13 of 2002 unless otherwise stated.

August – November 2014

[4] On 18 August 2014 the applicants instituted urgent proceedings for 11 September 2014 alleging that the Department had been guilty of unreasonable delay in processing 977 matters for their clients, particulars of which were set out in ten lists. The ten lists and the numbers of allegedly outstanding matters were as follows:

- List 1: applications for temporary residence ('TR') permits in terms of s 10 – 625;
- List 2: applications for permanent residence ('PR') permits in terms of s 27 – 107;
- List 3: internal administrative reviews, in terms of s 8, of decisions refusing TR permits – 63;
- List 4: internal administrative reviews, in terms of s 8, of decisions refusing PR permits – 34;
- List 5: applications for the administrative correction of TR permits – 108;
- List 6: applications for the administrative correction of PR permits – 4;
- List 7: exemption applications in terms of s 31 – 2.
- List 8: application in terms of s 29(2) to set aside the declaration of a person as a prohibited person – 1.
- List 9: applications for citizenship in terms of the South African Citizenship Act 88 of 1995 ('the Citizenship Act') – 28.
- List 10: applications, in terms of s 5(8) of the Citizenship Act, for the reconsideration of refusals of citizenship – 5.

[5] The relief sought were orders (i) reviewing and setting aside the failure of unknown officials to decide the matters within a reasonable time; (ii) directing the respondents to 'determine and deliver to' the applicants decisions on the matters in question within specified periods ranging from 15 to 60 calendar days depending on the category; (iii) declaring what 'deliver' meant for purposes of the order; (iv) laying down a procedure to be followed if an outstanding case had been misplaced by the Department. (The 15-day period applied to administrative corrections, the 30-day period to matters concerning TR, exemptions and status as a prohibited person, and the 60-day period to matters concerning PR and citizenship.)

[6] The matter stood down on 11 September 2014. On 15 September 2014 the State Attorney, representing the respondents, wrote to EDS, confirming the respondents' willingness to a hearing on the semi-urgent roll with dates for filing

affidavits. The respondents undertook, in the same letter, to determine and deliver the outstanding matters in accordance with the time periods specified in the notice of motion and to follow the requested procedure in respect of any outstanding matters where the files had been misplaced.

[7] On 16 September 2014 Bremridge AJ by agreement postponed the application for hearing on the semi-urgent roll on 13 November 2014 with a timetable for answering and replying affidavits. The applicants say that they agreed to this in view of the respondents' undertakings.

[8] The respondents did not file answering papers. On 23 October 2014 the applicants filed a supplementary affidavit in which they said that 699 matters were still outstanding. They attached revised lists. In respect of lists 1, 3, 5, 6 and 7 a significant number of matters were still outstanding despite the fact that the periods mentioned in the respondents' undertakings (15/30 calendar days) had expired. For example, there were 380 outstanding applications for TR permits (list 1) and 56 outstanding internal reviews in respect of TR permits (list 3). In respect of lists 2, 4, 9 and 10, where the period of the undertaking was 60 calendar days (and thus due to expire on 14 November 2014), little progress had been made. The outstanding applications for PR (list 2) had only reduced from 107 to 92 while no inroads at all had been made in respect of citizenship applications (list 9) or the reconsideration of refusals of citizenship (list 10). The respondents had also not invoked the procedure relating to misplaced files.

[9] The matter came before McCurdie AJ on 13 November 2014. The respondents had still not filed papers though I infer that they were represented by counsel (the learned judge stated in her order that she had heard counsel for the parties). She granted the relief sought in the notice of motion. This meant that the specified periods for compliance (15 to 60 calendar days) would expire on 28 November 2014, 13 December 2014 and 12 January 2015 depending on the category.

December 2014 – February 2015

[10] On 27 January 2015, by which stage all the periods set by McCurdie AJ had expired, EDS wrote to the State Attorney summarising the current position. They said 506 matters remained outstanding, with significant non-compliance across all categories. For example, the outstanding matters included 243 TR applications (out of an initial 625), 72 PR applications (out of an initial 107), 49 TR reviews (out of an initial 63), 83 TR corrections (out of an initial 108) and 27 citizenship applications (out of an initial 28). EDS complained that this gross failure had occurred without explanation. The respondents were notified that, unless all the outstanding decisions were delivered by 30 January 2015, the applicants would approach the court for further urgent relief.

[11] There having been no response, the applicants on 10 February 2015 brought an application in terms of rule 6(11) for hearing on 26 February 2015 for orders (i) declaring that the respondents had failed to comply with McCurdie AJ's order; (ii) directing them to do so within 15 working days in respect of lists 2, 4, 9 and 10 and within 10 working days in respect of the other lists; (iii) directing the respondents to identify, for each list, a departmental official in Gauteng who would bear ultimate responsibility for finalising the list and to file an affidavit from such official explaining the reasons for non-compliance and the steps taken and to be taken to ensure compliance; (iv) granting the applicants leave, if there was not compliance with the court's further order, to set the matter down before the urgent judge on at least two clear working days' notice, at which hearing the identified officials should be present; (v) directing that, if the respondents failed to identify officials as aforesaid, the Director-General appear in person to explain why the respondents should not be held in contempt; (vi) that the respondents pay the costs on the scale between attorney and client. According to the affidavit made in support of this application, the outstanding matters remained as per the letter of 27 January 2015.

[12] I was the urgent judge on 26 February 2015. On that day the respondents belatedly filed an opposing affidavit, their first in the proceedings. The affidavit was by Mr Ronney Marhule ('Marhule'), the Director: Temporary Residence Visas. He denied that the respondents were in contempt. He said that the Department, 'with its

already strained resources', had since the granting of the order on 13 November 2014, 'constantly been working towards finally adjudicating' the outstanding matters.

[13] He explained the Department's procedure for processing applications for TR and PR. In the case of TR applications, the procedure is as follows: (i) The application is received at a regional office, where its correctness is checked by an office clerk who makes certified copies of original documentation, receives payment and issues a receipt. (ii) The applicant is interviewed and fingerprinted and an interview report compiled. (iii) The Department requests a report from the State Security Agency, which can take between six to twelve months. (iv) The application is couriered to the Department's head office in Pretoria. (v) At the Pretoria adjudication hub the applicant's supporting documentation is verified with other agencies such as South African Revenue Service and the South African Qualifications Authority. The applicant's personal details are verified against the Department's movement control system. The authenticity of earlier TR permits is confirmed. (vi) The TR adjudicator then makes a decision. (vii) The application and decision are sent to the Department's administrative support staff who capture same on the Department's track-and-trace system, whereafter they are sent to the postal dispatch hub, from where they are couriered from Pretoria to the relevant regional office. An SMS notification is sent to the applicant that the outcome can be collected at the regional office within five working days. (viii) Upon receipt, the regional office updates the matter on the track-and-trace system.

[14] Marhule stated that until recently there were 20 full-time TR adjudicators. This increased to 30 as from 1 February 2015. The Department expects an adjudicator to process 20 TR applications per day. The Department's head office receives about 1500 TR applications per day. (This suggests that each adjudicator would need to deal with 50 applications per day to avoid mounting backlogs.) The targeted turnaround time for TR applications is eight weeks

[15] In the case of PR applications, the adjudication process in Pretoria is more rigorous: (i) The matter is assessed by a PR adjudicator who prepares a submission for the Adjudication Committee. (ii) From the Adjudication Committee the matter goes to the Chief Director: Permits and then to the Deputy Director-General:

Permanent Residence Immigration Services. (iii) The final decision is made by the Director-General himself.

[16] Marhule stated that there are 20 full-time PR adjudicators. The Department's head office receives about 40 PR applications per day from all around the world. Until recently the Department expected each PR adjudicator to make five submissions per day, increased as from 1 February 2015 to ten. (In contrast to TR applications, this suggests an over-capacity of adjudicators. However, the Adjudication Committee and other officials involved in the process, including finally the Director-General, would have to do deal with all 40 applications per day to avoid mounting backlogs.) The targeted turnaround time for PR applications is six to eight months.

[17] Marhule claimed that there were only 76 outstanding matters, particulars of which he set out in annexures. Those annexures dealt only with lists 1 to 5 and reflected the following figures for outstanding matters: 30 (list 1); 17 (list 2); 20 (list 3); 7 (list 5) and 2 (list 7).

[18] In respect of lists 1, 3 and 5 (TR applications, TR reviews and TR corrections), the 'reasons' recorded in the annexures for the absence of decisions were in all cases 'copies required' (Marhule did not allege that the Department had requested copies of these matters in accordance with McCurdie AJ's order. It appears from the applicants' subsequent affidavit dated 7 April 2015, referred to below, that a departmental official, Mr Muravha, had in the latter part of December 2014 requested copies of certain cases. The second applicant delivered these on memory sticks, receipt whereof was acknowledged by Mr Muravha on 13 January 2015. If these were the cases to which Marhule was referring, it was not true as at 26 February 2015 that copies were outstanding. If Marhule was referring to other cases, the failure to have requested copies in accordance with McCurdie AJ's order is unexplained.)

[19] In respect of list 2 (PR applications), one of the files was recorded as having been 'referred to inspectorate' (presumably the Inspectorate established in terms of s 33) while the other 16 were recorded as having been 'presented to the committee'

(presumably the Adjudication Committee) on dates ranging from 18 to 20 February 2015. Why they had only reached this stage of the process as at 18-20 February 2015 does not appear.

[20] Marhule concluded by observing that the various officials, in addition to their daily load, had to deal with the applications involved in the present case and more than 800 applications which were the subject of an order made by Saldanha J on 8 August 2012 in an application brought by Intergrate Immigration Services CC. (These latter proceedings were mentioned in the founding papers. The Department apparently failed to comply with Saldanha J's order, as a result of which Cloete AJ (as she then was) on 28 November 2012 made a declaration of non-compliance and ordered compliance by 14 December 2012, an order with which there was also not compliance until further litigation which concluded in the second half of 2013.)

[21] Later on 26 February 2015 the applicants, through Ms de Saude of EDS, filed a short replying affidavit. She said that Marhule's figures were 'grossly erroneous'. The outstanding matters as a 10 February 2015 numbered 503. Although she had not been able to check the most recent figures, the applicants had certainly not received more than 100 applications since 10 February 2015, she suspected considerably fewer. There were at least 400 applications outstanding. She said that whenever the applicants received an outcome they removed it from their lists. If the matter was still on their lists, it meant the outcome had not been received. She said that their clerks attended at the Department's Cape Town office every one to two days.

[22] Having heard counsel, I made an order on 27 February 2015. Although the order was not by agreement, its various components were discussed during argument and my impression is that both sides regarded the order as acceptable. The order was in summary the following: (i) It was declared that the respondents had failed to comply with McCurdie AJ's order (para 1). (ii) The respondents were directed to comply with the said order within 10 working days in the case of lists 1, 3, 5, 6, 7 and 8 and within 20 working days in the case of lists 2, 4, 9 and 10 (para 2). (iii) Within five working days from the later of these dates, the applicants were to file an affidavit and schedules setting out which applications in their view remained

outstanding, together with such further facts as they deemed relevant (para 3). (iv) Within a further five working days the respondents were to file an affidavit and schedules by the Director-General personally setting out which applications in his view remained outstanding, together with such further facts as he deemed relevant (para 4). (v) If the applicants still considered there to be non-compliance, they were granted leave to set the matter down for hearing before the urgent judge, on at least ten clear working days' notice to the respondents, for a finding that respondents were in contempt (para 5). (vi) If the applicants considered that the Director-General should be present on the said occasion, they were granted leave to seek a direction from a judge in chambers, not less than five clear working days before the hearing and on not less than 48 hours' notice to the respondents, that the Director-General be ordered to appear in person to answer such questions as the court might direct to him or permit to be asked (para 6). (vii) The costs stood over for later determination (para 7).

March – April 2015

[23] On 7 April 2015 the applicants filed the affidavit contemplated in para 3 of the above order. They alleged that there had been virtually no progress on lists 6 to 10. In regard to lists 1 to 5, they said that in general the Department's officials had been 'responsive, open and efficient'. There were nevertheless a number of outstanding cases on these lists.

[24] The applicants provided updated figures, distinguishing between matters that were 'outstanding' and those which according to the Department had been 'dispatched' (ie allegedly en route from Pretoria to Cape Town). Although the 'dispatched' matters were not categorised by the applicants as 'outstanding', they stated that 'dispatched' was not a reliable indicator that the decisions would in fact be available in Cape Town within a reasonable time. According to the Department, the majority of the 'dispatched' matters had been dispatched on 20 or 25 March 2015 yet as at 2 April 2015 they were still not available in Cape Town for collection. (It may be added that in terms of the orders of 13 November 2014 and 27 February 2015 the outcomes had to be available in Cape Town for collection within the specified period. Dispatch from Pretoria was not in itself compliance.)

[25] There were also several other problems. For example, despite notification that decisions were available for collection, they were sometimes not in fact available when the applicants arrived to collect them. Another problem was that the Department was claiming that certain outcomes had been collected whereas the applicants had no record of this. Very occasionally a client would collect a decision personally. However, the Department failed to identify which such outcomes had allegedly been collected by clients personally, making it difficult for the applicants to verify the information. There was also inconsistent information supplied by different officials regarding the status of outstanding matters.

[26] Another issue raised in the affidavit concerned the insertion of permits into passports. This relates only to TR permits. The permits are printed on stickers. For some months the Department allowed the applicants to collect stickers and insert them into their clients' passports. This meant that the applicants did not need to have their clients' passports before collecting the permits. This practice was convenient because it might take time to obtain the passport, particularly if the client was travelling. However, towards the end of March 2015 the Department terminated this practice. According to an email dated 30 March 2015 from Mr E Bosch (Deputy Director: Investigations, Counter Corruption, Western Cape), 'best practice' dictated that permits must be endorsed into the passports by a departmental official before the passports left the Department's premises.

[27] In summary, the applicants alleged the state of play to be the following (the figures in brackets are the numbers of matters outstanding as at the date of McCurdie AJ's order): list 1 – 44 outstanding, 30 dispatched (380); list 2 – 40 outstanding, 17 dispatched (86); list 3 – 37 outstanding, 8 dispatched (56); list 4 – 7 outstanding, 0 dispatched (31); list 5 – 23 outstanding, 21 dispatched (102); list 6 – 2 outstanding, 0 dispatched (2); list 7 – 2 outstanding, 0 dispatched (2); list 8 – 1 outstanding, 0 dispatched (1); list 9 – 27 outstanding, 0 dispatched (28); list 10 – 5 outstanding, 0 dispatched (5). There were thus, on the applicants' version, at least 188 matters 'outstanding' and another 76 'dispatched', all of these representing non-compliance with the orders.

[28] On 21 April 2015 the respondents filed an affidavit by Ms Yumna Abrahams ('Abrahams'), a Control Immigration Officer employed by the Department in Cape Town. This was followed by a confirmatory affidavit dated 30 April 2015 from the Director-General, Mr Mkuseli Apleni, confirming Abrahams' affidavit. The Director-General's affidavit, read with that of Abrahams, constituted a somewhat belated affidavit as contemplated in para 4 of the order of 27 February 2015.

[29] The Director-General said that, because he does not deal personally with the cases forming the subject matter of the proceedings, he had asked Abrahams to liaise with other officials to determine the status of the various cases. He said he had read her affidavit and confirmed its contents. It was clear, he said, that the Department's officials had done everything within their power to finalise the outstanding cases and that the remaining non-compliance was not occasioned by deliberate conduct by departmental officials. (It does not appear to be entirely accurate to say that the Director-General does not deal personally with any of the cases. He is, according to the Department's earlier affidavit, the final decision-maker on PR applications.)

[30] He prefaced these allegations by stating that he had at all material times been aware of the court orders and that the time periods set therein were not met. This was not on account of any indolence by departmental officials. He asked the court to take into account that, despite South Africa's many problems, it is still an attractive country to many foreigners. The Department not only has to deal with the cases which form the subject matter of the present litigation but with thousands of other persons seeking to live, work or study in South Africa. The Department operates within certain constraints which at times impact adversely on service delivery: 'I know that this cannot be an excuse, but it is a fact which I as the Director-General in the Department, have to live with.'

[31] Abrahams stated that she had perused the applicants' lists of 7 April 2015 and compared them with the Department's records. She attached an annotated version of the applicants' lists. The annotations were: 'A' – available for collection; 'C' – collected by the applicants; Grey Areas – collected by the applicants (the distinction between this category and 'C' is unclear); 'DFM' – dispatched to foreign

mission; 'OEA' – outcome explained in affidavit. The annotation 'DFM' relates to cases where the final outcome is dispatched to a foreign mission for collection by the client (ie where the application had been made abroad). On the Department's approach, only the 'OEA' cases could be regarded as outstanding. These were as follows: list 1 – 6; list 2 – 11; list 3 – 12; list 4 – 2; list 5 – 2; list 6 – 1; list 7 – 2; list 8 – 0; list 9 – 7; list 10 – 1. Some of the OEA cases had allegedly been 'dispatched'. In other cases it was said that the Department was 'attending to the finalisation' of the matter or that it was 'at the adjudication hub' or that it was 'pending with inspectorate' or that it had been approved but the decision still had to be issued. Other explanations included the need for passport or ID numbers or copies of the applications.

[32] In regard to the insertion of stickers into passports, Abrahams alleged that in terms of regulation 7(7) this had to be done by a departmental official.

May – August 2015

[33] On 28 May 2015 the applicants delivered the present interlocutory application. In Part A they seek orders (i) declaring that, on a proper interpretation of the orders of 13 November 2014 and 27 February 2015, the respondents have to deliver decisions in Cape Town without requiring the applicants to produce the clients' passports; and (ii) directing the Director-General to appear in person at the hearing of Part B to answer such questions as the court may direct to him or permit to be asked. In Part B they seek orders (i) declaring that the respondents are in contempt of the orders, alternatively that their failure to comply with the orders is inconsistent with the Constitution and unlawful, alternatively that they have failed to comply with the orders; (ii) directing the respondents to take all necessary and urgent steps to comply with the orders within one week, including making arrangements to visit the applicants' offices to copy at their own expense all documentation needed to comply with the orders; (iii) costs on the attorney and client scale.

[34] Save for the relief sought in respect of the insertion of TR stickers into passports, the above application can be viewed as brought pursuant to paras 5 and

6 of the order of 27 February 2015. It is also in the nature of a reply to the affidavits of Abrahams and the Director-General together with updated information. Mr Eisenberg ('Eisenberg') on behalf of the applicants says in supporting affidavit that, even on the respondents' version, there were 44 outstanding matters when Abrahams deposed to her affidavit (being all the 'OEA' matters). He alleges that there are in fact still 66 cases outstanding. A major cause of discrepancy, according to the applicants, is that the Department is incorrectly claiming that certain outcomes have been collected by the clients whereas this is factually incorrect – this applies mainly to lists 1 and 9. He adds that there are another 30 matters (over and above the 66) regarded by the applicants as 'live', in that the outcomes have not yet been collected in Cape Town but are allegedly available for collection once the applicants are able to produce their clients' passports.

[35] Eisenberg also questions the reliability of Abrahams' affidavit in other respects. It is common cause that Abrahams met with representatives of the applicants on 16 April 2015 with a view to reaching clarity on the status of the various cases. Eisenberg says that at this meeting she gave the applicants' representatives a list reflecting inter alia a number of cases of which the Department allegedly had no trace; yet barely a week later some of these matters featured in her affidavit as having been collected by the clients in question.

[36] In regard to the Part B relief, Eisenberg alleged that the Department undoubtedly had the resources to comply with the orders. He asked the court to infer that the only explanation for non-compliance was that the Department could not be bothered to comply. He submitted that dolus eventualis was a sufficient basis for a finding of contempt. He emphasised the Department's non-compliance with three sets of time limits, namely those in their undertaking of 15 September 2015, in the order of 13 November 2014 and in the order of 27 February 2015. He asked the court to view this non-compliance against the background of non-compliance with similar orders in past cases (particulars of which were furnished in the founding papers of August 2014). The systemic failings which had led to past non-compliance were simply not addressed. He said that the outstanding cases only received real attention after the order of 27 February 2015, which presaged that the Director-General himself might need to explain continuing non-compliance. Even then, so

Eisenberg complained, the task of monitoring compliance was left to a 'relatively junior official', namely Abrahams.

[37] Towards the end of June 2015 the applicants' counsel approached me to ascertain whether I could hear Part A in chambers during recess. I replied that it was not essential that I be the judge to deal with the matter and that, if they considered the case sufficiently urgent, they should approach the duty judge during recess, failing which I would be willing to hear the matter in the third term. The parties chose the latter course, and so the matter came before me on 27 August 2015, Mr Simonsz appearing for the applicants and Mr Albertus SC leading Mr Papier for the respondents.

[38] The respondents did not file further affidavits. When I enquired about the current status of outstanding matters, Mr Simonsz handed up an updated schedule. Although the schedule was not verified by affidavit, I note that 32 of the 44 matters previously classified by the respondents as 'OEA' are still, according to the applicants, outstanding.[1] In other words, 12 of those matters have, on the applicants' version, subsequently been collected or are allegedly available for collection. Of the 66 cases previously regarded by the applicants as outstanding, 55 (including the 32 outstanding 'OAE' cases) are recorded in the updated schedule as still outstanding.

The insertion of stickers into passports

[39] The relief claimed in respect of the insertion of stickers into passports is framed as a declarator concerning the interpretation of the orders of 13 November 2014 and 27 February 2015. The later of these orders did not deal with the term 'deliver'. In the earlier order it was declared that 'deliver' for purposes of the order meant (my underlining):

[1] The following clients by list number (the list numbers in this judgment are as per the first column of the consolidated schedule of 7 April 2015 as updated by the applicants from time to time – these numbers, unlike those in the second and third columns, have remained constant): list 1: 234; list 2: 302, 303, 360, 362, 363, 370; list 3: 392, 400, 406, 407, 414, 415, 417, 422, 428, 429; list 4: 430, 448; list 5: 541; list 6: 553; list 7: 555, 556; list 9: 564, 569, 570, 577, 582, 583, 584; list 10: 585.

'4.1. The Respondents must inform the Applicants in writing and/or via electronic mail as soon as a decision on any of the applications referred to in paragraphs 2 and 3 above ("the overdue applications") arrives at the Cape Town offices of the Department of Home Affairs;

4.2. When the Applicants arrive at the Cape Town offices of the Department of Home Affairs to collect decisions on overdue applications, the decisions shall be made available to them immediately and shall not be unreasonably delayed by reason of any ticketing system or other internal procedure; and

4.3. The Respondents shall, within three (3) days of the date of this order, inform the Applicants in writing of an official at the Cape Town offices of the Respondents who shall be responsible for the delivery of any decisions on the overdue applications.'

[40] The underlined words are those which the applicants say should be interpreted to mean inter alia that the respondents cannot insist that the applicants produce their clients' passports for the insertion of stickers by the departmental officials and must instead hand over the stickers for later insertion by the applicants.

[41] In their founding papers of August 2014 the applicants stated that the outstanding cases (then numbering 977) were all lodged before 26 May 2014 and were thus governed by the Immigration Act as it read prior to the amendments effected by the Immigration Amendment Act 3 of 2007, which came into force on 26 May 2014. Similarly, the new Immigration Regulations promulgated with effect from 26 May 2014 were said not to be applicable. The respondents, in opposing the declarator, relied inter alia on regulation 7(7) of the old Immigration Regulations. Mr Simonsz submitted that there was no corresponding provision in the new Immigration Regulations. However, I think the applicants' stance in the founding papers was correct: applications submitted prior to 26 May 2014 were to be finalised in accordance with the law then applicable. The provisions discussed below are thus those in force prior to 26 May 2014.

[42] As noted, the dispute regarding the insertion of stickers is relevant only to TR permits. These are dealt with in s 10 read with ss 11 to 23. These sections refer simply to permits issued by the Director-General. Applications for TR permits are further regulated by regulation 7 of the old Immigration Regulations. Regulation 7(1) sets out the documents to be submitted as part of the application. These include a

valid passport. In terms of regulation 7(2) this must be an original or duly authenticated copy. I understand that in practice an authenticated copy is submitted. Regulation 7(7) reads as follows:

'(7) Any temporary residence permit contemplated in section 10 of the Act shall –

(a) be entered in or affixed to the passport of the applicant or, in the case of an applicant already present in the Republic who has provided proof that he or she has been unable to obtain a passport, on a document on which at least the applicant's full names, date of birth and passport number shall appear; and

(b) only be valid if an entry stamp has been affixed thereto at the port of entry or, in the case of a permit issued at an office of the Department within the Republic, the stamp of that office.'

[43] The passports in which TR permits are entered or affixed are foreign passports (the holder of a South African passport would be a South African citizen and would thus not require a TR permit).

[44] Mr Simonsz pointed out that regulation 7(7) does not state that the affixing of the permit must be done by the Department. That is so but one would nevertheless expect that, where a permit is issued in a form requiring endorsement into a passport, the affixing would be a departmental responsibility. The Department has an obvious interest in ensuring that the TR permit is affixed to an original passport corresponding with the certified copy attached to the application. Regulation 2(1)(e) appears to me to support this conclusion. Among the requirements with which a passport must comply for purposes of the Regulations is that it should contain 'at least one unused page when presenting the passport for purposes of endorsing a visa or a permit'. The word 'presenting' here must mean presenting the passport to the Department for purposes of endorsement by the latter's officials.

[45] I need not finally decide whether the Department could, in terms of the Act and Regulations as they read prior to 26 May 2014, lawfully delegate the function of affixing TR permits to external immigration practitioners. The Department, having regard to its prior practice, appears to have regarded this as permissible. On the assumption that this is so, the question nevertheless remains whether the

Department's recent insistence that its own officials affix the stickers into the clients' passports contravenes McCurdie AJ's order as properly interpreted. Para 4.2 envisages that the applicants (ie EDS and IMS), not their clients, will collect 'decisions', ie (for present purposes) the TR permits. Para 4.2 requires that the decisions should, 'immediately' on their arrival in Cape Town, be made available to the applicants. The word 'immediately' must be understood with reference to what follows, namely that the making available of the decisions should not be 'unreasonably delayed by reason of any ticketing system or other internal procedure'.

[46] At the time McCurdie AJ made her order the practice prevailing between the parties was that the Department allowed EDS and IMS to collect the stickers and affix them to their clients' passports. This practice was not mentioned in the affidavits which served before McCurdie AJ, presumably because it was not anticipated that the Department would depart from it. What was said in support of the relief granted in para 4 of the order was that the respondents had over the years 'adopted a number of internal bureaucratic measures' that would frustrate the purpose of an order in the applicants' favour. The only example given was that the Department in Cape Town had recently adopted a rule that an immigration practitioner was not allowed to submit more than five permit applications per day and was not allowed to collect more than five permit decisions per day. If that rule were applied to the 977 cases which were the subject of the proceedings, it would take 196 working days to collect the permits.

[47] Since McCurdie AJ's attention was not directed to the question of the affixing of TR residence permits into passports, I am loath to interpret her order as settling this question. (The same is true, insofar as relevant, to the proceedings leading to my order of 27 February 2015.) On the assumption that the Department could lawfully have delegated the affixing function to EDS and IMS, what happened in late March 2015 was that the Department terminated the delegation. I do not think that this can be said to be an act falling within the words 'any ticketing system or other internal procedure'. It is quite unlike the quota system mentioned in the founding papers. The Department is not requiring that the clients themselves present their passports. It has not adopted a procedure in terms whereof the decisions are not

immediately available to EDS and IMS upon presentation of the original passport. It should also be borne in mind that a TR permit is not valid for use until affixed to a passport. Accordingly, the period during which (under the old practice) the applicants had stickers in their possession but were awaiting the original passports from their clients was not a period during which the TR permits were of practical use to their clients.

[48] I conclude that the applicants are not entitled to the relief sought in para 1 of Part A.

Oral evidence

[49] The other part of the relief sought in Part A (the merits of Part B are not presently before me) is an order that the Director-General appear in person at the hearing of the Part B relief to answer such questions as the court may direct to him or permit to be asked. The Part B relief is concerned with the respondents' non-compliance with the orders of 13 November 2014 and 27 February 2015 and whether such non-compliance constitutes contempt, alternatively a violation of the Constitution. Part B also seeks an order that the outstanding cases be finalised within one week.

[50] The applicants' request that the Director-General be ordered to appear in person to be questioned accords with para 6 of the order of 27 February 2015. Although I gave that order, I did not finally determine whether and in what circumstances the Director-General should be ordered to appear, if at all. The order as a whole was intended to convey to the respondents the importance of compliance. Paras 4 and 6 in particular emphasised the need for accountability at a high level, by requiring an affidavit from the Director-General personally and by foreshadowing that he might have to appear on a future occasion to explain any continuing non-compliance. Such questions would not necessarily have related to contempt; the court might have wished to know why particular cases were still outstanding, with a view to giving further directions.

[51] The purpose for which the applicants seek to subject the Director-General to questioning appears to be primarily in relation to the contempt relief sought in Part B. The requirements of contempt are trite: an order, service on or knowledge by the respondent, non-compliance with the order, and wilfulness and mala fides. In regard to the burden of proof, there is a distinction between contempt proceedings directed at committal and contempt proceedings directed at other relief such as a declaration of contempt, fines and mandatory orders. In the case of committal, the respondent, though not an accused person for purposes of s 35 of the Constitution, is entitled to analogous procedural protections. In particular, the applicant must prove the requisites of contempt beyond reasonable doubt, though once the applicant has proved the first three elements (the order, service/notice and non-compliance) the respondent bears an evidential burden to raise reasonable doubt on wilfulness and mala fides (*Fakie NO v CCII Systems (Pty) Ltd* 2006 (4) SA 326 (SCA) para 42; *Meadow Glen Home Owners Association & Others v Tshwane City Metropolitan Municipality & Another* 2015 (2) SA 413 (SCA) para 16; *Pheko & Others v Ekurhuleni Metropolitan Municipality (No 2)* 2015 (6) BCLR 711 (CC) paras 33-36). In cases where committal is not at stake, the applicant need only prove the first three elements of contempt on a balance of probability (*Pheko* para 37). And since *Fakie* was only concerned with the question whether the common law approach was appropriate for committal cases under our new constitutional dispensation, it would seem that in cases not involving committal the pre-*Fakie* common law applies: the applicant bears the burden of proof on a balance of probability in relation to the order, service/notice thereof and non-compliance; the respondent then has a full onus to prove on a balance of probability that the non-compliance was not wilful and mala fide (see *Fakie* para 12 and the cases cited in footnote 22).

[52] The applicants in the present case do not seek committal. The primary relief in Part B is a declaration that the respondents are in contempt together with an order directing compliance within one week. If the applicants were seeking committal, the nature of the proceedings would almost certainly have made it inappropriate to compel the Director-General to submit to cross-examination. A respondent at risk of committal should be at liberty to determine what evidence if any he will tender to raise reasonable doubt on wilfulness and mala fides. The same does not hold true for contempt proceedings of the present kind, which are not

concerned with committal. It would not necessarily be objectionable, where there is a dispute of fact, to direct a deponent to appear for oral examination. Quite apart from the order of 27 February 2015, this is one of the powers which the court has in terms of rule 6(5)(g).

[53] However, an alternative course, where there is a dispute of fact, is to refer the disputed issue or issues to oral evidence, leaving it to the litigants to decide what witnesses they will call. I have come to the conclusion that this is the preferable course to follow. While I would expect the Director-General to be able to give relevant evidence and while he may be at risk of a contempt finding if he does not testify, a proper investigation into the respondents' non-compliance with this court's orders is likely to require evidence from other officials as well and possibly also from the applicants. If the Director-General were the only witness, he is likely to be questioned on many matters which could more appropriately be answered by other officials. I must bear in mind that he is a senior official with many demands on his time. He should not be made to spend more time in the witness box than is necessary.

[54] I raised with counsel the possibility of a referral to oral evidence in place of the requested examination of the Director-General. The Part A prayers include the customary request for further and/or alternative relief. The applicants, presumably in the light of para 6 of the order of 27 February 2015, asked for oral evidence from the Director-General. I have explained why I am reluctant to follow that course. However, if oral evidence on contempt is otherwise warranted because of disputes of fact, it would not be unfair to the respondents to make such an order in lieu of a direction that the Director-General submit himself for questioning. The court has a wide discretion in terms of rule 6(5)(g) with a view to achieving a just and expeditious decision (*Lombaard v Droprop CC & Others* 2010 (5) SA 1 (SCA) para 25). In *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) Murray AJP said, with reference to Rule 9 of the rules then applicable in the Transvaal Provincial Division, that the calling of evidence rests with the judge regardless of whether the parties request it (at 1168). The same is true of rule 6(5)(g) though fairness would generally require the judge to raise the matter with counsel before making a ruling (I did so in this case).

[55] On the papers there is a factual dispute on the elements of wilfulness and mala fides. This goes to the respondents' state of mind. The applicants cannot be expected to have direct and personal knowledge thereof but they have legitimate grounds for challenging the respondents' explanations. The non-compliance has been substantial, both in number and duration. One may infer that the respondents would not have given the undertakings they did through their attorneys on 15 September 2014 unless they believed they could comply with them. Yet on the unchallenged evidence relatively little progress had been made by the time McCurdie AJ granted her order on 13 November 2014. While there is some dispute about the precise extent of the non-compliance at later dates, it was undoubtedly still substantial in late February 2015 and a non-trivial number of cases remained outstanding as at May 2015 and were still outstanding at the end of August 2015. Many of the applications forming the subject matter of the litigation were submitted to the Department during the latter part of 2012 and during 2013. The Department has fallen woefully short of its targeted turnaround times in respect of these matters.

[56] I have no reason to doubt, as the Director-General says, that the Department faces challenges in fulfilling its constitutional mandates. However, a distinction must be drawn between matters with which the Department is dealing in the ordinary course and those which it has been ordered to finalise within a specified period. Once matters have become the subject of a court order, they require such priority as is needed to ensure compliance with the order. If the Department, when sued, considers that the matters in question are not entitled to priority attention, it may oppose the application and appeal the order if aggrieved. But here the Department did not file papers in opposition to the relief sought before McCurdie AJ and did not appeal her order. The respondents thus had to give these matters (and any others which were the subject of court orders) priority attention so that they could be finalised within the periods specified by the court. The respondents could not adopt the attitude that these matters would simply be processed in the ordinary course alongside thousands of others and thus suffer whatever systemic delays arose from departmental under-capacity, inefficiency and the like.

[57] The Director-General in his affidavit of 30 April 2015 says that non-compliance with the orders was not on account of any indolence on the part of

persons in the Department and that they had done everything in their power to finalise the outstanding applications. However, the order was not directed at officialdom in general but at the Director-General, the Minister and the Director of Immigration Services: Western Cape. The question in the Part B relief is whether these three respondents, not lesser officials, did everything within their power to ensure that there was compliance with the orders. The respondents' affidavits lack the particularity to enable a court properly to judge this question. I am of course not suggesting that the respondents were under a duty to process the outstanding matters personally. However, a court, in assessing the question of wilfulness, might wish to know details of the instructions given from time to time by the respondents to subordinate officials to ensure compliance and the steps taken to monitor obedience to their instructions. Emails, memoranda and minutes of meetings may be germane to this enquiry. This is particularly so in the light of previous cases of a similar kind where the respondents were also guilty of non-compliance (more of which below).

[58] It might be said that the applicants could attempt to persuade a court, on the papers, that there is no genuine dispute of fact on wilfulness, given the absence of particularity of the foregoing kind, viewed in the context of the extent of non-compliance and prior litigation. However, the *Fakie* case illustrates the dangers which face an applicant who adopts such a course (see paras 54-58). Conversely, the respondents might regard it as unfair for them to be condemned without the opportunity of providing the sort of detail which is more suited to an oral hearing than affidavits.

[59] In *Fakie* para 38 Cameron JA approved the statement in an earlier case that contempt is not an issue between the parties but between the court and the party who has not complied with the order (*Federation of Governing Bodies of South African Schools (Gauteng) v MEC for Education, Gauteng* 2002 (1) SA 660 (T) at 673D-E). He also quoted with approval from *Victoria Park Ratepayers' Association v Greyvenouw CC* [2004] 3 All SA 623 (SE) where Plasket J observed that the effectiveness and legitimacy of the judicial system lie at the heart of the contempt remedy. There is thus a public interest element in contempt proceedings (see also *Glen Meadow* para 18).

[60] More recently, in the *Pheko* case Nkabinde J, writing for a unanimous court, said the following in the opening paragraphs of her judgment:

'[1] The rule of law, a foundational value of the Constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depends upon it. As the Constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this that disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced.

[2] Courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. In doing so, courts are not only giving effect to the rights of the successful litigant but also and more importantly, by acting as guardians of the Constitution, asserting their authority in the public interest. It is thus unsurprising that courts may, as is the position in this case, raise the issue of civil contempt of their own accord.'

[61] Later in her judgment she said this (footnotes omitted):

'[25] Before I deal with these issues, it is important to outline the current status of our law regarding contempt of court orders with reference to the decision of the Supreme Court of Appeal in *Fakie.* I do so while keeping in mind the difficulties inherent in compelling compliance from recalcitrant state parties in a manner that displays the courts' discontent with disregard for the rule of law.

[26] The starting point is the Constitution. It declares its own supremacy and this supremacy pervades all law. Section 165 vouchsafes judicial authority. It provides that courts are vested with judicial authority and that no person or organ of state may interfere with the functioning of the courts. The Constitution explicitly enjoins organs of state to assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. In order to ensure that the courts' authority is effective, section 165(5) makes an order of court binding on "all persons to whom and organs of state to which it applies". These obligations must be fulfilled. It is significant that this subsection specifically mentions organs of state, for "justiciability and powers of constitutional review make sense only if non-judicial authorities cannot and do not undo court orders and/or their consequences". These sections, read alongside the interpretive injunction of the supremacy clause, demonstrate why continual non-compliance with court orders and decisions would, inevitably, lead to a situation of constitutional crisis.

[27] Notwithstanding this clear constitutional imperative that the authority of our courts is to be respected and upheld, certain state parties have, on occasion, displayed a troubling disregard for judicial orders. It is not difficult to reference examples of cases involving contempt, by state organs, of court orders where, most troublingly, constitutional rights are in issue. The cases are by no means exhaustive of state parties' non-compliance with the orders and decisions of our courts; they are included merely to illustrate the extent and nature of this phenomenon. What they show is not merely that state parties are failing, in a very serious way, to meet their constitutional obligations, but that these failures have real and serious consequences for those whose interests they are there to serve.'

[62] The authorities I have mentioned emphasise the constitutional importance of compliance with court orders. This is something in which organs of state should lead by example. There has been significant non-compliance in the present case. The rights of many individuals to fair and timely administrative action have been compromised. This is not the first time that orders have been made against the respondents for the timeous finalisation of immigration matters; nor is it the first time that there has been non-compliance with such orders. Recent examples include an order on 23 November 2011 by Cloete AJ (as she then was) in opposed proceedings in Case 2178/2011 (reported sub nom *Eisenberg & Associates & Others v Director-General, Department of Home Affairs & Others* 2012 (3) SA 508 (WCC)), an order by consent on 18 May 2012 by Van Staden AJ in Case 10043/2011 and an order on 8 August 2012 by Saldanha J in Case 6078/2012. In Case 10043/2011 there was non-compliance with the order, giving rise to contempt proceedings before Savage AJ as she then was (see her judgment of 27 November 2012 available on SAFLII at [2012] 199 WCHC). There was similar non-compliance in Case 6078/2012, followed by a further order on 28 November 2012. In her judgment in Case 10043/2011 Savage AJ concluded that she could not on the papers reject the respondents' assertion of an absence of wilfulness and mala fides but she declared there to have been non-compliance, directed compliance within two weeks (failing which the Director-General was to appear before court on 14 December 2012 and provide reasons why he should not be held in contempt) and made a special costs order. In the course of her judgment she said this (para 34):

'This order should stand as a stark reminder to the Director-General and the respondents that orders of this court are not advisory, to be complied with as and when it proves

possible, but that adherence to their terms is critical in displaying a fundamental commitment to our constitutional democracy, without which the rule of law stands to be severely prejudiced. This is more so for the respondents who as part of the public administration are required to act in accordance with the law and the values and principles enshrined in section 195 of the Constitution.'

[63] These are powerful considerations in favour of a proper investigation, by way of oral evidence preceded by discovery, of the non-compliance.

[64] Mr Albertus submitted that I should not refer the matter to oral evidence because it cannot be said that oral evidence is likely to tip the balance of probability in the applicants' favour on the issues of wilfulness and mala fides (cf *Bocimar NV v Kotor Overseas Shipping Ltd* 1994 (2) SA 563 (A) at 587D-G). This submission erroneously assumes that the onus on these issues rests on the applicants. In any event, and on the assumption that the probabilities on the papers favour the respondents, I cannot exclude as a reasonable possibility that this balance will be disturbed by oral evidence.

[65] At the conclusion of argument I asked counsel to discuss and submit to me a draft order if I were minded to refer the contempt issue to oral evidence. I also suggested that it might be sensible, in order to keep the oral hearing within manageable bounds, to limit the enquiry to an agreed list of matters which were outstanding as at 27 August 2015 (the date of the hearing before me), even though the evidence bearing on wilfulness and mala fides was likely to be more general in nature. It appears preferable, on reflection, to take the date of Abrahams' affidavit, namely 21 April 2015, as the relevant date, excluding however cases which the applicants accept have since then been finalised.

[66] On 4 September 2015 Mr Simonsz submitted his proposed draft order together with an updated schedule distinguishing between matters 'outstanding', 'available' and 'dispatched to foreign mission'. The respondents' counsel responded on 10 September 2015, suggesting some modifications to the draft order. They did not comment on the updated schedule.

[67] Some of the 'outstanding' cases on the updated schedule are cases which were on the respondents' own version outstanding as at 21 April 2015. The explanations provided by Abrahams in respect of these outstanding matters included that the case was pending with the inspectorate, that the case had been finalised and the decision would be 'reissued', that the decision had been or would be dispatched or that the case was awaiting finalisation.[2] In one case there appears to have been no explanation offered.[3] These cases, 16 in all, are according to the applicants still outstanding. At least in respect of these matters, the respondents will bear the burden of proving an absence of wilfulness and mala fides. The period for which they remained outstanding after 21 April 2015 may cast a backward shadow on this question.

[68] There are another nine cases which according to the applicants are still outstanding and in regard to which Abrahams' explanation was that the matters could not be traced and that the applicants would have to provide copies or further information.[4] She does not say that the respondents timeously followed the procedures set out in para 5 of McCurdie AJ's order, in terms whereof they were to notify the applicants within two weeks of any misplaced applications. Her affidavit seems to have been the first occasion where the difficulty in tracing these matters was mentioned (there is no overlap between them and those of which Marhule on 26 February 2015 said 'copies required'). I thus consider that respondents bear the burden of proving an absence of wilfulness and mala fides in the delay in the finalisation of these cases (even if, contrary to the applicants' latest schedule, they have in the meanwhile been finalised).

[69] There are another four cases which according to the applicants are still outstanding and in regard to which Abrahams' explanation was that the internal reviews had been rejected.[5] She does not in terms state that the rejection decisions were duly communicated. However, I do not think I can find on the affidavits that it is common cause that these matters were, as at the date of Abrahams' affidavit, outstanding. If the applicants wish to include non-compliance in respect of these

[2] Clients 302, 303, 360, 363, 370, 398, 400, 417, 429, 430, 448, 541, 554, 570 and 585.
[3] Client 428.
[4] Clients 415, 555, 556, 557, 564, 569, 577, 582 and 583.
[5] Clients 406, 407, 414 and 422.

matters for purposes of the contempt hearing, they will bear the onus of proving the non-compliance.

[70] There is an outstanding case where Abrahams' explanation is that IMS followed an incorrect procedure[6] and another where she said that the client should make representations to the foreign mission in China.[7] In the absence of further information I do not think these two cases should be treated as instances of admitted non-compliance. Once again, if the applicants wish to have them included in the Part B hearing, they must prove the non-compliance.

[71] There are 24 cases which the applicants regard as currently outstanding but which according to Abrahams had been collected as at 21 April 2015.[8] There is thus a factual dispute regarding whether there was still non-compliance as at that date (though there may well have been non-compliance at an earlier stage). Once again, if the applicants want these matters to be included in the Part B hearing, they will need to prove the non-compliance.

[72] There are a number of other cases on the latest list marked as 'available' or 'dispatched to foreign mission'. If, in respect of any of these cases, the applicants contend that the decisions are not in truth available in Cape Town or have not been dispatched to the foreign mission, they will need to prove the non-compliance.

[73] The applicants may be content to confine the contempt hearing to those cases identified above where I have found that the respondents will bear the burden of establishing an absence of wilfulness and mala fides. However, my order will make provision for the applicants to press for contempt in relation to those cases where I have found that they bear the burden of proving non-compliance. If they so elect, they will have the duty to adduce evidence first on the non-compliance in respect of such matters.

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[6] Client 234.
[7] Client 392.
[8] Clients 357, 358, 368, 369, 456, 457, 458, 459, 553, 560, 561, 562, 563, 571, 572, 573, 574, 578, 579, 580, 581, 586, 587 and 588.

[74] As will be apparent from the above discussion, the issues I intend to refer to oral evidence are (i) the existence and extent of non-compliance in respect of the matters mentioned in paras 69 to 72 above; (ii) whether the respondents were wilful and mala fide in their non-compliance in respect of the matters mentioned in 67 and 68 above and in respect of any further non-compliance proved by the applicants in terms of (i). Having regard to the other relief sought in Part B, provision should also be made for the furnishing of information as to matters still outstanding at the time of the Part B hearing.

[75] As is standard in referrals to oral evidence, witness statements must be filed in advance of the oral hearing of the evidence of witnesses who have not already made affidavits and of the evidence of deponents not already contained in their affidavits. The filing of witness statements must be preceded by discovery. The parties will not be obliged to call persons who have made affidavits or whose witness statements have been filed but the affidavits and statements of such persons will then be disregarded on the issues referred to oral evidence (see *Drummond v Drummond* 1979 (1) SA 161 (A) at 166 in fine; *Lekup Prop Co No 4 (Pty) Ltd v Wright* 2012 (5) SA 246 (SCA) para 32).

[76] The respondents' counsel objected to the inclusion in the draft order of a right to subpoena witnesses, whether or not they have agreed to furnish a statement. They expressed the concern that this power might be abused by the applicants to harass the Director-General. The right to subpoena witnesses is a standard provision in referrals to oral evidence (following one of the leading cases, *Metallurgical and Commercial Consultants Pty Ltd v Metal Sales Co (Pty) Ltd* 1971 (2) SA 388 (W) at 396G-397B; see also *Kalil v Decotex* supra at 982H-I and 983H-I). I do not think the power should be excluded in this case. The court's inherent jurisdiction remains to set aside any subpoena which is vexatious or an abuse of process. In assessing that question the court would take into account that the subpoenaed witness cannot be cross-examined by the party who calls him.

[77] Finally, I should record that it is not necessary that I should be the judge to hear the oral evidence and determine Part B (see *Metallurgical and Commercial Consultants* supra at 395 in fine). It may be a convenient use of judicial resources

for the matter to remain with me but I leave that to the parties in consultation with the Judge-President.

Costs and order

[78] The applicants asked in prayer 3 of Part A that costs stand over for determination together with the costs of Part B. However, I have found against them on prayer 1 of Part A, a discrete issue. There is no reason not to determine those costs now. Since the respondents did not file affidavits in opposition to the interlocutory application, their costs on this issue are limited to the hearing of 27 August 2015 and the preparation of heads of argument. In my view the applicants should pay half of those costs.

[79] I thus make the following order:

1. The application for the relief claimed in prayer 1 of Part A of the notice of application dated 28 May 2015 is dismissed.

2. In lieu of the relief sought in prayer 2 of Part A of the said notice of application, the following issues arising in respect of Part B are referred to oral evidence, to be heard on a date to be determined by the registrar on a semi-urgent basis:

(a) whether, in relation to the matters identified in 3 below, the respondents' non-compliance with this court's orders of 13 November 2014 and 27 February 2015, was wilful and mala fide;

(b) subject to 5 below, whether, in relation to the matters identified in 4 below:

(i) there was non-compliance with this court's orders as at 21 April 2015;

(ii) if so, whether such non-compliance was wilful and mala fide.

3. The matters referred to in 2(a) above are the following matters on the schedule attached hereto as 'X', namely matters 302, 303, 360, 363, 370, 398, 400, 415, 417, 428, 429, 430, 448, 541, 554, 555, 556, 557, 564, 569, 570, 577, 582, 583 and 585.

4. The matters referred to in 2(b) above are all matters on the said schedule other than those identified in 3 above.

5. The applicants shall, within two weeks of this order, file a notice stating whether and to what extent they elect to proceed with Part B relief in respect of the matters contemplated in 2(b) read with 4 above. To the extent that the applicants elect not to proceed with Part B relief in respect of some or all of the said matters, the referral in 2(b) shall lapse.

6. If the applicants elect to proceed with Part B relief in respect of some or all of the matters contemplated in 2(b) read with 4 above, they shall have the duty to present oral evidence first on the alleged non-compliance with the orders in relation to those matters.

7. The respondents shall have the duty to present oral evidence first on the issues of wilfulness and mala fides contemplated in 2(a) and, to any extent applicable following the applicants' said election, 2(b)(ii) above.

8. Within one month of the filing of the notice in 5 above, the parties shall make discovery under oath of all documents relevant to the issues in 2(a) and, to any extent still applicable, 2(b) above. The provisions of rule 35 shall apply to such discovery and to the inspection and production of documents.

9. The oral evidence shall be that of such witnesses as the parties respectively choose to call, provided that, in respect of evidence of a person who has not made an affidavit in the proceedings and in respect of evidence by a deponent not already contained in such deponent's affidavit, a witness statement by the person or deponent, setting out the evidence in question, shall be filed in accordance with the following timetable, namely:

(a) by the applicants in relation to the issue in 2(b)(i) (to any extent still applicable) – four weeks prior to the hearing;

(b) by the respondents in relation to the issues in 2(a) and 2(b)(i) and (ii) (to any extent still applicable) – three weeks prior to the hearing;

(c) by the applicants in relation to the issues in 2(a) and 2(b)(ii) (to any extent still applicable) – two weeks prior to the hearing.

10. Notwithstanding 9 above, the court may at the hearing, on good cause shown, permit a person to be called despite the fact that no statement has been served in respect of his or her evidence.

11. Either party may subpoena a person to give evidence at the hearing, whether or not such person has consented to furnish a statement.

12. The fact that a party has served a witness statement or subpoenaed a witness shall not oblige such party to call the witness concerned.

13. If a deponent or witness is not called to testify, the affidavit or statement of such deponent or witness shall be disregarded in the determination of the issues referred to oral evidence.

14. Not later than one week before the hearing of Part B the parties shall meet and file a list identifying (i) those matters which both sides agree are still outstanding; (ii) agreed particulars to why those matters are still outstanding, alternatively particulars of the parties' respective allegations as to why those matters are still outstanding; (iii) those matters which the applicants allege still to be outstanding but which the respondents allege to have been finalised. Witnesses called by the parties may be examined and cross-examined with a view to resolving any factual differences in regard to the said list.

15. The applicants shall pay 50% of the respondents' costs in respect of the appearance on 27 August 2015 and the preparation of heads of argument relating to that appearance, including the costs of two counsel.

16. Save as aforesaid, costs shall stand over for determination at the hearing of Part B.

ROGERS J

APPEARANCES

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