



THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no Circulate to other Judges: yes/no Circulate to Magistrates: yes/no

Case Number 3367/2020

In the matter between:

ESKOM HOLDINGS SOC LTD

Applicant

and

MATJHABENG LOCAL MUNICIPALITY

1st Respondent

**THE EXECUTIVE MAYOR:
MATJHABENG LOCAL MUNICIPALITY**

2nd Respondent

**THE MUNICIPAL MANAGER
MATJHABENG LOCAL MUNICIPALITY**

3rd Respondent

THE SHERIFF BLOEMFONTEIN WEST

4th Respondent

ABSA BANK LIMITED

5th Respondent

CORAM: BERRY, AJ

HEARD ON: 02 MARCH 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 17 March 2023.

JUDGEMENT BY: BERRY, AJ

JUDGMENT

- [1] The Applicant obtained judgment for debt against the 1st Respondent under case number 924/2013 on 18 September 2014.
- [2] The Applicant attached money held in a bank account by the 1st Respondent in execution of the judgment debt.
- [3] The 1st Respondent in today's proceedings approached the Court for relief and after negotiations between the parties, the following Order was made by agreement between the parties on 11 September 2020.

"IT IS ORDERED THAT: (by agreement)

1. The First Respondent ("*Eskom*") shall immediately uplift the attachment of funds in the bank account of Applicant ("*the Municipality*") held with ABSA Bank Limited ("*Absa*"), which attachment was perfected on **4 September 2020** and for this purpose, will immediately instruct the Second Respondent and Absa, in writing, to uplift the uplift (sic) and release the said attachment of the account.
2. Pending the final determination of the action under case number **5830/2019**:
 - 2.1 the funds currently in the bank account of the Applicant as at the date of attachment, namely **R2 781 586.14**, will remain under attachment with the Sheriff of Bloemfontein West, to be held in the Sheriff's trust account which is to be a separate interest bearing account; and
 - 2.2 Eskom undertakes not to execute the terms of paragraphs 1 and 2 of the order of the above Honourable Court under case number **924/2013**, dated **18 September 2014**.
3. The Municipality undertakes unconditionally to provide Eskom with security for the judgment under case number 924/2013 and any judgment which the above Honourable Court may pronounce in respect of its claim in the main action under case number **5830/2019**, for the amount of **R2 525 017 401.66** ("*the Security*").
4. The Security will be provided in the form of the registration of a Covering Bond ("*the Bond*") to be registered over one hundred and thirty-nine (139) farms registered in the

name of the Applicant within its municipal boundaries (*"the Farms"*), all of which, on date of registration of such bond will be unencumbered.

5. The Municipality will, within fourteen (14) days of date of this order, provide Eskom's attorneys with a full description of the Farms, as per an electronic Deeds Search.
 6. The Municipal Manager of the Municipality shall immediately on request but no later than twenty (20) days of this order provide Eskom's attorneys with all such consents / authorisations required together with all documents necessary and take all necessary steps in order to secure the registration of the Bond over the Farms.
 7. Should the Municipality fail to comply with any terms of this order, Eskom shall, by delivering of written notice to the sheriff, be entitled to appropriate the funds held in trust by the Sheriff of Bloemfontein West and proceed with further execution steps in respect of the order under case number 924/2013.
 8. Eskom will instruct its attorneys to attend to the registration of the Bond and the Municipality will be responsible for – and will pay the fees and disbursements associated with the preparing and registration of the Bond, which costs will be paid on demand.
 9. The Applicant withdraws this application.
 10. The costs of this application stands (sic) over for adjudication with the main action under case number 5830/19."
- [4] The Applicant approached the Court to find the First Respondent in contempt of the Order granted on 11 September 2020 and direct the 1st Respondent to provide the necessary security by executing and causing the registration of a covering bond in favour of Eskom over 139 farms, registered in the name of Matjhabeng Municipality which is situated within its municipal boundaries.
- [5] The Applicant seeks further ancillary relief to implement the 11 September 2020 Order directing oversight to monitor compliance and implementation of the 11 September 2020 Order.

- [6] Paragraph 3 and 8 of the 11 September 2020 Order are the issues of contention in this Application.
- [7] In Par 3 of the Order the 1st Respondent undertakes to unconditionally provide Eskom with security for the judgment under case number 924/2013 and any judgment which the above Honourable Court may pronounce in respect of its claim in the main action under case number **5830/2019**, for the amount of **R2 525 017 401.66** (*'the Security'*).
- [8] Par 8 provides that the Applicant will instruct its attorneys to attend to the registration of the Bond and the 1st Respondent will pay the fees and disbursements associated with preparation and registration of the Bond.
- [9] The Applicant also seeks an Order directing the 5th Respondent to pay R13 371 059.91 to the Applicant's attorney for the cost of registering the covering bond in terms of Par 8 of the 11 September 2020 Order.
- [10] The dispute between the parties arose about the terms of the covering bond and the costs to register the bond.
- [11] According to the 1st Respondent, the Applicant contents that the wording of Par 3 of the Consent Order enables it to stipulate the conditions of the bond.
- [12] The 1st Respondent contents that the party's failure to agree on the terms of the bond, should be referred for Intergovernmental Relations Framework Dispute Resolution or Mediation, as both parties are governmental institutions.
- [13] The 1st Respondent elected to register the bond using their own attorneys because of the cost implications if they were to use Applicant's attorneys, as provided for in Par 3 of the 11 September 2020 Order.

- [14] When the 1st Respondent lodged a bond for registration over the 139 farms, the Deeds Office raised queries which made registration of a bond over all 139 farms impossible.
- [15] The queries ranged from the transfer of erven forming part of townships and erven having been transferred to third parties. Eventually only 69 of the identified farms did not have encumbrances on them and the 1st Respondent could only register the bond over 69 farms.
- [16] The Applicant took the stance that the covering bond should contain an acknowledgment of indebtedness for R2 525 017 401.66.
- [17] The 1st Respondent disputes that this amount is indebted to the Applicant.
- [18] The Applicant demanded that the bond should contain an undertaking that the 1st Respondent will make payment in respect of all the amounts to be covered by the bond.
- [19] The 1st Respondent was not satisfied with the terms of the draft bond provided to it by the Applicant's attorneys.
- [20] It had a condition requiring the 1st Respondent to acknowledge its indebtedness to the Applicant in the amount of R289 692 525.66 and it also required that the rent income derived from the properties would fall to the benefit of the Applicant.
- [21] The main issues in dispute are the amount to be secured by the bond and the associated costs of registering the bond.
- [22] The 1st Respondent disputed the claim instituted under case number 5830/2019 and instituted a counter claim; thus, it was not agreeable to register a bond for debt which formed the subject of ongoing litigation.

- [23] The monetary judgment the Applicant has against the 1st Respondent is for R2 525 017 401.66 under Case Number 924/2013.
- [24] The 1st Respondent's attorney addressed a letter to the Applicant's attorney on 03 December 2020 wherein the 1st Respondent tendered that it would register the bond using its own attorneys to save costs and proposed that the dispute about the conditions of the bond should be referred for Inter-Governmental Relations Framework dispute resolution or mediation.
- [25] In the letter the attorney refers to Par 7 of the 11 September 2020 Order which reads:
- “7. Should the Municipality fail to comply with any terms of this order, Eskom shall, by delivering of written notice to the sheriff, be entitled to appropriate the funds held in trust by the Sheriff of Bloemfontein West and proceed with further execution steps in respect of the order under case number 924/2013.”
- [26] The 1st Respondent's attorney advised the Applicant's attorney that their remedy lies in Par 7 of the Order. He denied that the 1st Respondent was in breach of the Order.
- [27] The letter contains, almost as if it was a side issue, a statement that the funds attached by the Sheriff has in any event been released.
- [28] The perception that the funds had been released by the Sheriff may have been one of the reasons that the Applicant proceeded with the Contempt Application.
- [29] I was advised from the bench that the funds were not released by the Sheriff and was still under his control at the time of hearing this Application.
- [30] This brings us to Par 7 of the Order and the question whether contempt of Court proceedings is the correct remedy under the circumstances of this case.

- [31] Anyone has a right to approach a Court for relief, but where the relief is already stipulated in a Court Order, which was granted by agreement between the parties, the question arises whether a party can request relief that differs from the relief the parties agreed to in the Consent Order.
- [32] Whilst we are dealing with a Court Order, one should not lose sight of the fact that the Court Order simply reflects the agreement between the parties.
- [33] In **SA Sentrale Ko-op Graanmaatskappy v Shifren en Andere** 1964 (4) SA 760 (A) the Court dealt with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in a commercial environment, and the infringement of the right to contractual freedom.
- [34] Parties are bound to the agreements they conclude. The principle of ***Pacta Sunt Servanda*** is fundamental to our law.
- [35] In its most basic form, the principle refers to private contracts and prescribes that the provisions of the agreement is law between the parties to the contract. If a party neglects to abide by the terms of the agreement between them, the conduct is against the law.
- [36] The Court found in **Shifren** that there is no basis upon which a non-variation clause could be deemed to be against public policy.
- [37] In **Brisley v Drotsky** 2002 (4) 1 (SCA) at 11B-H the Court held that **Shifren** gave greater weight to the parties' original exercise of contractual freedom, than to their capacity to undo their original choice without limitation. The **Shifren** principle essentially delineates that - where such provisions are itself entrenched in the agreement between the parties, the original agreement is incapable of being validly altered without complying with certain prescribed formalities.

- [38] The principle in **Shifren** is that where the parties incorporated a formalities clause which entrenches a prohibition against an oral variation, there was no reason to find that one party cannot hold the other party bound thereto.
- [39] The policy is one of certainty which aims to give effect to the intention of the parties and to guard against disputes and difficulties of proof which can arise in oral agreements¹.
- [40] In **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at Par [57] the Constitutional Court held that public policy requires parties to honour contractual obligations that have been freely and voluntarily undertaken. The principle of **Pacta Sunt Servanda** is a profoundly moral principle on which the coherence of any society relies.
- [41] The majority held the **Pacta Sunt Servanda** principle –
“... gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity.”
- [42] At Par [69] the Court held that the onus rest on the party seeking to avoid the enforcement clause to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances.
- [43] In clarification of what is required to avoid being bound by a contractual term, freely and voluntarily agreed upon, the Supreme Court of Appeal considered the judgement of **Barkhuizen** in **Bredenkamp v Standard Bank of SA Ltd** 2010 (4) SA 468 (SCA) and held at Par [50]:
“I do not believe that the judgement in **Barkhuizen** held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public consideration found in the Constitution or elsewhere, is implicated.”

¹ Shifren at 768 G-H.

[44] In **Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs and Another** 2010 (4) SA 261 (ECM), the Eastern Cape High Court considered what is required to avoid being bound by a contractual term, freely and voluntarily agreed upon, and commenced its assessment of the question in relation to an entrenchment clause by stating at paragraph 2:

“As the law stands at present, there are no exceptions to the application of a Shifren principle, and there are no decided cases not overturned on appeal where the Shifren principle was relaxed.”

At Par [50] in **Nyandeni**, the Court held:

“In terms of Shifren, it is the original contract which must be protected and enforced, not a subsequent oral one, which effectively ignores the first. To enforce the second oral contract on the basis of *Pacta Sunt Servanda* in contravention of the original one, results in circuitous reasoning and is destructive of the carefully constructed reasoning in Shifren and is offensive to all case law since 1964 following Shifren.”

The Court referred with approval to the principle in that:

“A Court has no general discretion with reference to considerations of fairness and equity to decide whether or not to enforce contractual rights. The exercise of such general discretion is contrary to the law of contract and the principle of *Pacta Sunt Servanda* and will result in the enforcement or otherwise of contractual rights and obligations depending on the personal views of the Judge on what is fair and equitable (at 16B-E). Such general discretion will result in contractual uncertainty and will undermine their Constitutional Rights to freedom to contract and choose and agree on the terms.”

[45] In this matter the Settlement Agreement between the parties was made an Order of Court.

[46] The Applicant seeks an Order declaring that the 1st Respondent is in contempt of the Court Order granted on 11 September 2020.

[47] The principles of civil contempt are well established and have formed the subject-matter of numerous judgments:²

- An Order was granted against the Respondent.
- The Respondent was served with the Order or had knowledge of it.
- The Respondent failed to comply with the Order.

[48] Once these elements have been established, wilfulness and *mala fides* are presumed, and the Respondent bears an evidentiary burden to establish reasonable doubt.

[49] The non-compliance with the Order must have been wilful and *mala fide*.

[50] Should the Respondent fail to advance evidence that establishes reasonable doubt as to whether non-compliance was wilful and *mala fide*, contempt is established beyond reasonable doubt.

Fakie N.O. v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA).

[51] A refusal to comply that is objectively unreasonable may, however, be shown to be *bona fide* which will then avoid a finding of civil contempt although unreasonableness could establish evidence of a lack of good faith.³

[52] The 1st Respondent advised the Applicant through their attorneys, of the list of properties and raised an objection about the costs associated with the Applicant's attorney registering the Mortgage Bonds.

² **Fakie NO v CCII Systems (Pty) Ltd 2006 (4) SA 326 (SCA).**
Pheko v Ekurhuleni City 2015 (5) SA 600 (CC).
Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector including Organs of State v Zuma and Others 2021 (5) SA 327 (CC).

³ **Fakie NO v CCII Systems (Pty) Ltd** *supra* at para [9].

- [53] The 1st Respondent was not willing to agree to the terms of the proposed mortgage bond and proposed that the dispute be referred for Intergovernmental Relations Framework Dispute Resolution or Mediation, as both parties are governmental institutions.
- [54] The 1st Respondent registered a mortgage bond over 69 erven as the rest of the erven is encumbered.
- [55] This shows that there was no *mala fides* or wilfulness in the conduct of the 1st Respondent.
- [56] The parties agreed on a remedy, should the 1st Respondent fail to comply with any terms of the Court Order.
- “7 Should the Municipality fail to comply with any terms of this order, Eskom shall, by delivering of written notice to the Sheriff, be entitled to appropriate the funds held in trust by the Sheriff of Bloemfontein West and proceed with further execution steps in respect of the order under case number 924/2013.” (My emphasis.)
- [57] The 1st Respondent could not register a covering bond over 139 properties as it discovered on trying to register the bond, that some of the properties is encumbered.
- [58] The Applicant agreed what its remedy will be should the 1st Respondent fail to comply with the Court Order, and further the 1st Respondent did not act wilful or *mala fide*.

ORDER

- [59] The following Order is made:
1. The Application is dismissed with cost, including the cost of two Counsel.

AP BERRY, AJ

APPEARANCES:

For the Applicant:

Adv. L T Sibeko SC

with **Adv. H N Moloto**

Instructed by:

Phatsoane Henney Attorneys

BLOEMFONTEIN

For the Defendant:

Adv. N Snellenburg SC

with **Adv. M Louw**

Instructed by:

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