



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Case Number: 3040/2023

In the matter between:

ESKOM HOLDINGS SOC LIMITED

Plaintiff/Applicant

and

MATJHABENG LOCAL MUNICIPALITY

Defendant/Respondent

HEARD ON: 30 November 2023

CORAM: JORDAAN, AJ

DELIVERED ON: 06 May 2024

INTRODUCTION

[1] This is an opposed application for summary judgment brought in terms of Rule 32 of the Uniform Rules of Court¹, as amended. The Applicant in this summary judgment application, is Eskom Holdings Soc Limited, the Plaintiff in the action instituted against the Matjhabeng Local Municipality, the Defendant,

¹ Rules regulating the conduct of proceedings of the provincial and local divisions of the Supreme Court of South Africa

who in turn is the Respondent in this application. For ease of reference, the Parties will be referred to as the Applicant and the Respondent throughout.

BACKGROUND

- [2] The Applicant is a state-owned company duly incorporated in terms of the company laws of the Republic of South Africa, which on the 16th of February 2004, entered into a written Electricity Supply Agreement² (ESA) which came into effect on the 26th of March 2000³, with the Respondent, an organ of state.

- [3] In terms of ESA the Applicant would supply bulk electricity to the Respondent who would receive the electricity and pay the Applicant for the supply of same, based on the schedule of standard prices, as amended from time to time.⁴

- [4] According to the terms of ESA, the Applicant would prepare and send accounts for all charges payable by the Respondent to the Applicant after the end of each meter reading month currently being the 20th of the month and each account will be due and payable within 10 days of receipt of the invoice, after which interest would be compounded monthly.⁵ The Applicant in paragraph 8 of its Particulars of claim referred to the a9th of February 2015 order by Daffue J directing the Respondent to make payment of all future monthly accounts for electricity supply in full on due date.

- [5] On the 15th of June 2023, the Applicant instituted action for payment of R2 505 338 496.00 together with interest thereon calculated at the prime rate levied by FNB plus 2.5% points interest, compounded monthly and calculated *a tempore morae* to date of final payment. The claim arose from a breach of ESA due to non-payment of electricity supplied by the Applicant to the Respondent. The Respondent defended the action.

- [6] Having received the Respondent's plea, the Applicant was provoked to in accordance with rule 32, file an application for summary judgment.

² Paginated Bundle: Electricity Supply Agreement (ESA) pages 45-70 Annexure "ESK1"

³ Paginated Bundle: ESA clause 6 page 47 Annexure "ESK1"

⁴ Paginated Bundle: ESA clauses 2.1; 3 and 12 on pages 45 to 46 and pages 53 to 54

⁵ Paginated Bundle: ESA clause 9.1 and 9.2 on pages 50 to 52

LEGAL PRINCIPLES FINDING APPLICATION

- [7] Summary judgment enables a plaintiff to obtain judgment against a defendant without resorting to trial when a defendant has no defence to a claim based on a liquid document, for a liquidated amount of money, for delivery of movable property, and for ejectment. The instant application for summary judgment is for delivery of movable property.
- [8] With effect from the 01st of July 2019 an application for summary judgment can only be brought after a defendant has filed its plea, and in doing so the plaintiff must not only verify the cause of action and the amount claimed but must, in addition, also identify any point of law which it relies upon and the facts upon which its claim is based, and must also briefly explain why the defence which has been pleaded by the defendant does not 'raise any issue' for trial.
- [9] The Defendant opposing summary judgment is required to set out a *bona fide* defence by affidavit disclosing fully the nature and grounds of the defence and the material facts relied upon. The Defendant need not deal exhaustively with all the facts and evidence relied on to substantiate a defence, but the essential material facts on which the defence is based must be disclosed with sufficient completeness, particularly to enable the court to decide whether or not the affidavit discloses a *bona fide* defence.⁶ However a *bona fide* defence is not scrutinised according to the strict standards of pleadings. In summary judgment it is the material and factual defence and not the Defendant which must be *bona fide*.
- [10] The rationale and requirements for the grant or refusal of summary judgment are trite and are summarised in the Supreme Court of Appeal judgment of Joob Joob Investments⁷ as follows:

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of

⁶ Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) at 426C-E

⁷ 2009 (5) 1 (SCA) at 11G-12D

her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the *Maharaj* case at 425G–426E, Corbett JA was keen to ensure, first, an examination of whether there has been sufficient disclosure by a defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of a defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor. Having regard to its purpose and its proper application, summary judgment proceedings only hold terrors and are drastic for a defendant who has no defence. Perhaps the time has come to discard these labels and to concentrate rather on the proper application of the rule, as set out with customary clarity and elegance by Corbett JA in the *Maharaj* case at 425G–426E.”

- [11] The test for the granting of a summary judgment is whether the Defendant has satisfied the Court that he has a *bona fide* defence to the action.⁸ What this entails is whether the facts put up by the Defendant raised a triable issue and a sustainable defence in law deserving of their day in court. The defense must not be bald, vague, or sketchy.

ISSUE FOR DETERMINATION

- [12] Having regard to the test for summary judgment, the issue for determination by this Court, is whether the Respondent has set out a bona fide defense to the Applicant's claim.

APPLICATION OF LEGAL PRINCIPLES

- [13] The Applicant submits that their claim is contractual in nature and based on ESA in terms of which the Respondent is indebted to the Applicant and submits that the Respondent pleaded defences are not bona fide nor do they raise an issue for trial.

⁸ Rule 32(3) of the Uniform Rules of Court

- [14] The Applicant further submitted that their end user supply of electricity exists in terms of agreements which came into existence prior to promulgation of the Municipal Systems Act, prior to the Respondent coming into existence and in terms of licence which authorises the Applicant to provide end-user electricity.
- [15] The Respondent does not deny the indebtedness, it is the extent thereof that is being questioned and the main defence of the Respondent is based on its submission that the Applicant failed to comply with the Intergovernmental Relations Framework Act 13 of 2005 before instituting court proceedings no government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless it has been declared a formal internal governmental dispute in terms of section 41.
- [16] The Applicant in their Particulars of Claim in paragraph 3 thereof, describe themselves as an organ of state as defined in section 239 of the Constitution of the Republic of South Africa Act, Act 108 of 1996, in the national sphere of government, enjoined by section 24 of the Constitution to ensure that everyone enjoys the right to an environment that's not harmful to their health and obligated by section 27 of the Constitution to ensure that everyone has the right to have access to electricity.
- [17] Section 239 of the Constitution defines an organ of state as follows:
- " 'organ of state' means-
- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution-
- (i) exercising a power or performing a function in terms of the Constitution or provincial constitution; or
- (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;"
- [18] The Applicant seems to rely on the 9th of February 2015 Court Order by Daffue J directing the Respondent to make payment of all future monthly accounts for electricity supply in full on due date, which order refers to the

Applicant then being entitled to terminate its electricity supply⁹ to show there was a dispute before there is even a court order which is being violated.

[19] I find that the 09 February 2015 order was in regard termination of electricity supply for failing to pay future amounts due timeously, while in this case a monetary payment is sought for this debt which arose in 2020.

[20] The Applicant is clearly on their own version an organ of state and as such, I find that they are indeed obligated to adhere to the prescripts of the Intergovernmental Relations Framework Act 13 of 2005 before instituting the current court proceedings, having regard to the aim of the Act in circumstances where, in the submissions of the Respondent, it was submitted that it will have an effect on the debt or the extent of the debt.

[21] In the circumstances I find that a triable issue has been raised.

[22] In the result the following order is made:

ORDER

- [23] 1. Application for summary judgment is refused;
2. Leave to defend the action is granted to Respondent;
3. Costs in the cause.



M.T. JORDAAN

ACTING JUDGE OF THE HIGH COURT, BLOEMFONTEIN

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⁹ Paginated Bundle: Annexure "ESK2"

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