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REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA**

CASE NO: 2025-026729

(1) REPORTABLE: ~~YES~~ / NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED: NO

DATE 28 AUGUST 2026

SIGNATURE

In the matter between:

TSHEPI METALLICS INVESTMENTS (PTY) LTD
(Reg No: 2018/518958/07)

1st Plaintiff

SOPHY EUNICE MPHAKE

2nd Plaintiff

And

ESKOM HOLDINGS SOC LIMITED
(REG No: 2002/015527/30)

Defendant

Heard on: 08 June 2026

Delivered on: 28 August 2026

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is electronically circulated to the parties/their legal representatives by e-mail and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be **28 August 2026**.

JUDGMENT

KEKANA AJ

Introduction

[1] Before me in this opposed civil trial is a claim by the Plaintiffs for contractual damages amounting to R437 920 00 arising out of failure by the Defendant to pay as per the agreement. The Defendant is opposing the claim, raising *exceptio non adimpleti contractus* as its defence.

Background

[2] On December 2023, the Defendant issued a tender bid under bid number O[...] for the delivery of certain goods at Tutuka Power Station, Bethal, Mpumalanga. The Plaintiff was awarded the tender and later on 21 December, Eskom issued a purchase order with number 4503374896 that mirrored the description of the goods to be delivered.

[3] The goods that needed to be delivered as per the RFQ were the following:

- 3.1 ITEM: 00010 - 0707659 CONVERTER: LSIS; I/P 380-480 VAS; MIL VSD
- 3.2 ITEM: 00020 – 0707659 CONVERTER: LSIS; I/P 380-480 VAC; MIL VSD

[4] The goods that needed to be delivered as per the purchase order were the following:

- 4.1 ITEM: 00010 - 0707659 CONVERTER: LSIS; I/P 380-480 VAS; MIL VSD
- 4.2 ITEM: 00020 – 0707659 CONVERTER: LSIS; I/P 380-480 VAC; MIL VSD

[5] The goods that were subsequently delivered by the Plaintiff were the following:

- 5.1 FRECON FR500A-4T-18G/22PH-H.

[6] The Defendant rejected the delivered goods contesting that those goods were not the ones agreed upon as per the purchase order.

The issue

[7] The crisp issue before this Court is whether the Plaintiffs has delivered as per the agreement to succeed in its claim for damages.

The Evidence

Plaintiff's witness

The testimony of Ms Sophy Eunice Mphake

[8] She testified that on the 06 December 2023, her company received a bid invitation from Eskom by mail for her to submit quotation as per the RFQ. She then submitted a bid and quotation on 12 December 2023 as deadline for submissions was 13 December 2023. According to her the description of the goods to which she quoted and submitted for the above-mentioned bid is FRECON FR500A-4T-18G/22PH-H.

[9] She went on to testify that after submitting her bid, she received an email on December 20, 2023, from Tshidi Chabedi of Eskom, who stated that she has been mandated to negotiate 8% to 15% discount as the prices are comparatively higher.

She further testified that at this point, her understanding was that Eskom had no dispute with the specifications and or the brand but the pricing.

[10] On December 21, 2023, a day after the discount negotiations, she received another email, this time a formal Purchase Order with full terms and conditions issued for her company to deliver the goods on a specified date, per the description of the specifications as stipulated therein.

[11] The Plaintiff testified that the purchase order issued, was according to her a legal document that communicated a binding agreement, its content and context created specified legal obligations expected from her company, and that was adequate for her to conclude that her FRECON technical specification passed the bid evaluation and adjudication tests as she never deviated from the specification of the goods from the date of bid submission to the date of discount negotiations.

[12] She went on to testify that on 8 January 2024, she prepared a technical data sheet which she sent to Ms Tshidi Chabedi to confirm. Same was forwarded to Mr Cedric Gumede by Ms Chabedi and Mr Gumede had no issue with specifications but disputed the brand. Ms Chabedi on the same emails exchange, questioned Mr Gumede as to why at such an advanced stage would he mention a brand as a requirement of this bid. She also testified that she then proceeded with the delivery of the goods to a specified destination as the purchase order was not revoked by the Defendant despite the internal conflict among Eskom representatives as to the description of the specification and the brand.

[13] During cross examination, and relying on the terms of the purchase order, counsel for the Defendant asked the witness if she obtained approval from Eskom to vary or to modify the terms of the agreement. The witness's response was that no approval was sought and consequently no approval was granted from Eskom to vary or modify the terms of the purchase order.

The Defendant's witnesses

The testimony of Mr Ryan Hector

[14] He testified that he is an engineer at Eskom, testified that Eskom is unable to use the FRECON goods delivered without modification and that the delivered FRECON goods were not fit for purpose. He further testified that the brand required by Eskom, is LSIS as described in both the RFQ and the purchase order. He went on to testify that LSIS is the brand and S100 is a specification. He went on say that while FRECON has the same specification of S100, for Eskom to use it, it has to be modified and that will have huge financial implications on the part of Eskom. But FRECON in its current form cannot be used unless modified.

The testimony of Cedrick Gumede

[15] He testified that he an electrical senior supervisor who is responsible for the procurement of the goods on behalf of Eskom, and he guides the buyers within the supply chain system on the description and specification of goods to be procured. According to him the said converters as described in the RFQ and the purchase order are already in use at the plant, and the buyers makes purchases using those specification. According to him FRECON goods delivered by the Plaintiffs cannot be used and he went on to corroborate the testimony of the Eskom engineer that LSIS is the brand and S100 is a specification and the two are described on the RFQ.

[16] He further testified that the buyer for Eskom, Tshidi Chabedi, has no authority or discretion to deviate from the description of the goods as requested by the relevant department.

Submissions by parties

The parties' submissions can be summarised as follow:

[17] The Plaintiff submits that since the goods to which she quoted and submitted for the above-mentioned bid was FRECON FRSOOA-4T-18G/22PH-H, Eskom should not have negotiated the discount on the pricing if they were not happy with the goods to be supplied. Additionally, Eskom issued the purchase order immediately after the negotiations regarding the price. The plaintiffs further submits

that the purchase order issued but Eskom constituted a binding agreement between Eskom and the Plaintiffs.

[18] The Defendant contends that while the Plaintiffs delivered goods to Eskom, the delivered goods were not the ones agreed upon and Eskom is therefore correct by law to reject the incorrect delivered goods. That the delivery of the wrong goods constituted positive malperformance. The Defendant further contends that there was no consensus or approval granted by Eskom to the Plaintiffs warranting deviation from the goods described in the purchase order, that the principle of *exceptio non adimpleti contractus* applies.

Legal principle and analysis.

[19] The evidence presented before this Court, is that the LSIS is a brand and S100 is a specification, this position remains uncontested. The RFQ specified LSIS as the goods to be delivered. The second plaintiff submitted and quoted FRECON brand as goods she will deliver. FRECON also has S100 as a specification.

[20] There were price negotiations between the second Plaintiff and Eskom through Ms Chabedi. After these negotiations a purchase order was issued. The purchase order specified and described the goods to be delivered and LSIS was specified as the goods to be delivered. The Plaintiffs did not get any approval from Eskom for variation nor modification of the terms of the agreement. There was no evidence before this Court to suggest that there was approval for deviation of what was described in the RFQ nor in the purchase order. Even after receiving a purchase order which had LSIS as the goods to be delivered, and not FRECON as submitted by the Plaintiffs, the second Plaintiff did not request correction of the purchase order so it can reflect FRECON. Also, before me is the evidence that Annexure 9 (the FRECON specification) was sent to the Defendant on 8 January 2024, days after the purchase order was issued.

[21] Upon perusal of the general condition of purchase, clause 4 thereof which deals with 'delivery' states that:

“delivery means delivery of goods or completion of work (if any) in compliance with the terms and conditions of the agreement...no payment shall be made if the supplier does not provide goods/services/works as stated in the agreement”¹

[22] The purchase order itself contains certain clause or terms, central to these terms is that there has to be approval from Eskom in the event of any variation or modification by the supplier.

[23] Counsel for the Plaintiffs agrees that prior to the purchase order being issued, there is no agreement. The agreement commences on the issuance of the purchase order. I agree with the posture by the Plaintiffs' counsel, where we differ is the implication of the posture. The key question is, what was in that agreement and subserviently, whether the plaintiffs delivered as per that agreement.

[24] I am of the view that it would mean that any discussion prior to the purchase order is not part of the agreement. This would include the pricing negotiation between the second Plaintiff and Ms Chabedi unless those are now included in the agreement. Additionally, the discussions between the second plaintiff and Ms Chabedi only dealt with the pricing of the goods and nothing about the description of the goods. The discussion never addressed anything about the brand or the specifications of the goods. After all it is the second plaintiff who stated that Ms Chabedi informed her that she was mandated to negotiate the pricing. Ms Chabedi did not claim any other mandate. The conclusion is strong that as regards the description of the goods the description as contained in the RFQ remains unchanged.

[25] If counsel for the Plaintiffs is correct is his argument that the issuance of the purchase order created a binding agreement, then there is no agreement prior to the purchase being issued. Any discussions are irrelevant or at least not binding on the parties. The parties are bound by the agreement 'the purchase order'. All parties must deliver as per the terms of the purchase order which is the agreement.

¹ Eskom's General conditions of purchase "Annexure 15"

[26] I am of the view that like any contract there has to be acceptance of the terms and if the argument by counsel for the Plaintiffs is correct then the supplier accepted the terms in the agreement, those terms were to deliver LSIS as the goods. Otherwise, the Plaintiffs ought to have sought a formal written amendment, often called a "Change Purchase Order" to reflect FRECON as goods to be delivered.

[27] I agree with the defendant's counsel and his reliance on the principle *exceptio non adimpleti contractus* and meaning thereof that a person cannot enforce performance from the other under that contract unless that same person has performed their obligations or at least tendered proper performance. What I will not wish to entertain is the submissions on the degree of non-performance. To me the fact that the goods delivered cannot be used in their current form is enough to render the delivery materially defective.² Evidence before me which remains unchallenged is that they will have to be modified and for that reason the Plaintiffs has not delivered the goods as per the agreement and consequently the Plaintiffs has not performed their obligations as per the agreement.

[28] The Plaintiffs has failed to show this Court that Eskom accepted the delivery of FRECON goods in fact there were issues raised by Mr Gumede prior to delivery and the second Plaintiff was aware that Eskom had an issue with the brand. Assuming the Plaintiffs send the FRECON specifications were sent to Eskom before the purchase order was issued, the issuance of the purchase order by Eskom on a later date with LSIS as the goods to be delivered will be tantamount to a rejection of what the supplier was offering to deliver.

[29] I disagree with counsel for the Plaintiffs that Eskom bore the responsibility to clearly state that no equivalent product may be delivered, in fact the purchase order is clear who bore this responsibility. According to the purchase order Eskom has to approve any deviation, variation or modification of any goods, this means that the supplier is the one who must seek approval from Eskom if he intends to deviate, vary or modify the terms of the agreement. The only time Eskom will be aware of any

² *Radiotronics (Pty) Ltd v Scott, Lindberg & Co* [1951] 1 All SA 106 (C) at p. 121

variation or modification will be only when a supplier seeks Eskom's approval otherwise Eskom will be correct to assume that the supplier will deliver as per the agreement.

Conclusion

[30] This Court concludes that the Plaintiffs did not perform as per the agreement which is the purchase order. The delivered goods were not as described in the purchase order. The goods delivered were not those agreed upon by the parties at least by Eskom. There was no approval for variation or modifications of the description of the goods to be delivered. Eskom was within their rights to reject the delivered goods.

[31] This is a classic case of 'positive malperformance' which occurs when a party to a contract does perform their obligation, but the performance is defective, improper, or contrary to the terms of the agreement. The defect is so material in that the goods cannot be used in their current form, they ought to be modified and as such it is the court's conclusion that the Plaintiffs did not carry out their obligation as per the terms of the purchase order and consequently their claim for damages is unfounded and cannot to be sustained.

Order

[32] In the circumstances, the following order is made:

1. The Plaintiffs' claim is dismissed.
2. The Plaintiffs are to pay the costs on a party and party scale, scale A.

**ND KEKANA
ACTING JUDGE OF THE HIGH COURT**

Appearances:

Counsel for the Plaintiffs: Ntsane Thoma Sefatsa

Instructed by Ntsane Sefatsa & Associates Inc

Counsel for the Defendant: Johannes Jacobus Van Der Merwe

Instructed by Haasbroek & Boezaart Inc