

SOUTH AFRICA / JUDGMENT

Du Plooy v Van Zyl (UM 197/2021) [2022] ZANWHC 2 (16 February 2022) [2022] ZANWHC 2

COURT

North West High Court, Mafikeng

BEFORE

R.D Hendricks

CASE / FILE NUMBER

UM 197/2021

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IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: UM 197/2021

In the matter between: -

CORNELIA CATHERINA DU PLOOY

1st Applicant

In her capacity as a Trustee of the KJT Trust

(Reg.No. IT000427/27/2016)

PETRUS VAN ZYL

2nd Applicant

In his capacity as a Trustee of the KJT Trust

In re:

and

ESKOM HOLDINGS SOC LIMITED

Respondent

DATE OF HEARING & ORDER GRANTED : 10 FEBRUARY 2022

REASONS

FOR ORDER/JUDGMENT : 16 FEBRUARY 2022

COUNSEL FOR APPLICANT

: ADV. P SMIT

COUNSEL FOR RESPONDENT

: ADV. NALANE SC

REASONS

FOR JUDGMENT

HENDRICKS DJP.

[1] On 10th February 2022, this Court granted an order in the following terms:

“(i) *The rule nisi in the interim order is discharged with costs.*

(ii) Reasons for this order/ judgment will follow in due course.”

An application for reasons for the order was filed with the Registrar of this Court on 11th February 2022. Here follows the reasons for the order discharging the rule nisi and thereby dismissing the said interim order with costs.

[2] On the 08th September 2021, the Applicants as trustees of the KJT Trust, approached this Court on an ex parte basis for an order in the following terms:

“1. *THAT the application be heard as an urgent application as contemplated in Uniform Rule 6 (12) and that the time limits and rules relating to notice and service be dispensed with.*

2. THAT a rule nisi be granted with return date 07 OCTOBER 2021 for the Respondent or any interested party to show cause why the following order should not be made final:

2.1 THAT the order granted by his Lordship the honourable Justice Lephadi AJ on 5 August 2020 remains to be in force and enforceable;

2.2 THAT Respondent through its functionaries is directed to immediately reconnect and restore electricity supply to all the registered electricity supply points at the property known as Farm Kareepan in the district of Bloemhof, North West Province, under the account of KJT Trust 11000427/27/2016 and as detailed in the Electricity Supply Agreement attached to the founding affidavit hereto marked Annexure FAI KJT3;

2.3 THAT in the event of Respondent's failure to comply with paragraph 2.2 above, the Sheriff of this Court for the district of Bloemhof, North West, be authorized to forthwith connect or cause to connect by appointing a qualified electrician the electricity supply for the registered points as described in paragraph in paragraph 2.2 above;

2.4 THAT Respondent through its employees and/or functionaries or anyone acting on its behalf refrain from disconnecting the electricity supply to the registered points as described in paragraph 2.2 above pending the final adjudication of the dispute lodged on 30 July 2020 with the National Energy Regulator of South Africa pertaining to the electricity supply account of KJT Trust 1T000427/27/2016 held with Respondent;

2.5 Respondent to pay the costs of this application on the scale as between attorney and client.

3. THAT this order be served on Respondent at KayserN@eskom.co.za and TitusRJ@eskom.co.za and BarnesM@eskom.co.za, which shall be deemed proper service of the order upon proof of successful transmission thereof.
4. THAT Respondent retains the right to anticipate the aforementioned return date on 48 hours' notice to Applicant's attorneys as detailed below or to apply for reconsideration of the order in terms of the Uniform

Rules of Court.

5. THAT Applicants be granted leave to supplement their papers, if need be, due to the urgency of the matter.
6. Further and/or alternative relief.”

[3] Being dissatisfied that this application should be brought on an ex parte basis without giving any notice to the Respondent, this Court removed the matter from the roll for lack of service on the Respondent. The following day, the 09th September 2021, the matter was again enrolled after service has been effected. This Court then granted an interim order in the following terms:

“1. THAT: The application be heard as an urgent application as contemplated in Uniform Rule 6 (12) and that time limits and rules relating to notice and serve be dispensed with.

2. THAT: A rule nisi be granted with return date 07th of OCTOBER 2021 for the Respondent or any interested party to show cause why the following order should not be made final:

2.1 That Respondent through its functionaries is directed to immediately reconnect and restore electricity supply to all the registered electricity supply points which was disconnected on the 02nd of September 2021, at the property known as Farm Kareepan in the district of Bloemhof, North West Province, under the account of KJT Trust IT000427/27/2016 and as detailed in the Electricity Supply Agreement attached to the founding affidavit hereto marked Annexure FA1 KJT3;

2.2 That in the event of Respondent's failure to comply with paragraph 2.1 above, the Sheriff of this Court for the district of Bloemhof, North West, be authorised to forthwith connect or cause to connect by appointing a qualified electrician the electricity supply for the registered points as described in paragraph 2.1 above;

2.3 That Respondent through its employees and/or functionaries or anyone acting on its and/or functionaries or anyone acting on its behalf refrain from disconnecting the electricity supply to the registered points as described in paragraph 2.1 above pending the final adjudication of the dispute lodged on the 30th of JULY 2020 with the National Energy Regulator of South Africa pertaining to the electricity supply account of KJT Trust IT000427/27/2016 held with Respondent;

2.4 Respondent to pay the costs of this application on the scale as between attorney and client.

3. THAT: This order and the application be served on Respondent at KayserN@eskom.co.za and TitusRJ@eskom.co.za and BarnesM@eskom.co.za, or on the attorneys of record acting on behalf of the Respondent which shall be deemed proper service of the order upon proof of successful transmission thereof.
4. THAT: Respondent retains the right to anticipate the aforementioned return date on 48 hours' notice to Applicant's attorneys as detailed below or to apply for reconsideration of the order in terms of the Uniform Rules of Court.
5. THAT: Applicants be granted leave to supplement their papers, if need be due to the urgency of the matter."

[4] On the return date of the rule nisi granted, being 07th October 2021, the matter was postponed to the opposed motion court roll of the 10th February 2022, as it became opposed. The rule nisi granted on 09th September 2021 was extended until 10th February 2022. It was further ordered that the Respondent deliver its answering affidavit within five (5) days from date of the order and the Applicants to file their replying affidavit, if any, within twenty (20) days from receipt of Respondents' answering

affidavit. The parties were to file their heads of argument in terms of the Practice Directives of this Court. The costs incidental to and occasioned by the postponement were reserved. The Respondent filed its answering affidavit but the Applicants elected not to file any replying affidavit in answer to the allegations and averments made by the Respondent in its answering affidavit. Needless to say, the matter was argued on 10th February 2022 and an order was granted as mentioned in paragraph 1, supra.

[5] The background facts can be succinctly set out as follows. The Applicants, in their capacities as trustees of the KJT Trust, purchased farms from Mrs DJ Janse van Rensburg ("Van Rensburg") and Jan Oosthuizen en Seuns BK ("Oosthuizen"). These properties are known as the Farm Kareepan in the district of Bloemhof, North West Province. The Applicants concluded an agreement

with the previous owners from whom they purchased the farms, that they would continue using the electricity account of the previous

owners as long as they pay for their electricity directly to Eskom. In other words, their account would not be transferred into the name of the Applicants. Eskom was not notified of this arrangement.

- [6] In December 2019 the Applicants opened an electricity account in the name of KJT Trust and paid a deposit. Instead of paying the deposit into the new account, they paid it into the old account which is in the name of one of the previous owner of the farm. The Applicants did not sign a supply agreement, contrary to the normal practices of Eskom which requires customers to sign supply agreements, but instead took the agreement home, promising to sign and return the original, but they failed to do so. Only when they issued, the ex parte application did the Applicants attach a copy of the supply agreement. It was only then that Eskom realised that the Applicants had not signed and returned the original agreement.
- [7] These farms have six (6) different electricity supply points. The Applicants purchased the one farm from Oosthuizen with 5 electricity points whilst the other farm from Van Rensburg only has one (1), making it six (6) points. The Applicants are in arrears in respect of all the electricity supply points. The arrears are R3, 369 808.71 on KJT Trust account; R702, 659.73 on the Oosthuizen account; and R16, 800.28 on the Van Rensburg account. The arrears are growing daily. When the Applicants opened an account in the name of KJT Trust, they undertook to settle the outstanding amounts in respect of the two accounts that they took over.
- [8] In the main, the Applicants contended in the first place that there is an order of this Court per Lephadi AJ, granted on 05th August 2020, on an ex parte basis, that is in force and effect as it was never reviewed, rescinded or set aside and that Mr. Ruben Titus, an employee of the Respondent, disconnected the supply of electricity to the farms in contravention of this Court order. Secondly, that there is a contract entered into between the Applicants and the Respondents for the supply of electricity which forms the basis of the interim interlocutory relief.
- [9] In response, the Respondent contended that there is no valid contract that came into being, seeing that the Respondent did not sign the said contract. Alternatively, if there is a contract in place, the Applicants are in breach of the terms and conditions thereof. This is so because they are in arrears with the payment of their accounts and they have tampered and vandalised the supply of electricity by by-passing the meter and are enjoying the usage of electricity free of any charge.
- [10] As far the order granted by Lephadi AJ is concerned, it was contended by the Respondent that that order was granted on an ex parte basis and the Respondent only subsequently became aware of it. In any event, so it was further submitted, was the granting of that order flawed and also overtaken by the subsequent events and the granting of this Court's interim order on 09th September 2021. Over and above that, no proper case is made out for the interdictory relief as prayed for by the applicants and the rule nisi should be discharged and the application coincidental thereto be dismissed with costs. I will now deal with these contentious issues.

[11] As a starting point, I will first deal with the issue whether or not a valid contract came into existence. It is quite apparent that the Energy Supply Agreement (contract) was not signed for or on behalf of the Respondent. This lends credence to the averment that the said contract was taken on behalf of the KJT Trust by one of the trustees and never returned to the Respondent for signature so that a valid contract be concluded. However, it does not end there. Electricity was supplied and invoices were sent to the Applicants under the name of KJT Trust. If a written contract did not come into existence on the Respondent's version because it did not sign it, then surely the Respondent's conduct of supplying electricity and even billing the applicants, (KJT Trust) ratified the contract. This much is clear. The Applicants' reliance on the existence of a valid contract is well founded. The terms and conditions of this contract should therefore be adhered to, as it is applicable.

[12] In the second instance, the Applicants rely on the order granted by Lephadi AJ on 05th August 2020, on an ex parte basis. This order reads thus:

"1. THAT: This application is heard as an urgent application and at the time limits and rules relating to service of legal documents as provided for in Rule 6 (12) of the Uniform Rules of Court be dispensed with.

2. THAT: The employees of Eskom or anybody acting on Eskom's behalf in the interim and pending adjudication of the formal dispute lodged National Energy Regulator of South Africa, ordered to restore the Applicant's power supply on the registered points of supply on the Farm Kareepan in the District of

Bloemhof under the account of KJT TRUST IT000427/27/2016 forthwith.

3. THAT: The Sheriff of this Honourable Court or the district of Bloemhof, North West ("the sheriff") is authorised to -, in the event of Eskom's failure to reconnect and/or cause the electricity supply to the points of supply to be reconnected, to appoint a qualified electrician to connect The electricity supply to the respective points of supply registered under the account of KJT TRUST IT000427/27/2016.

4. THAT: The Applicant is permitted to approach the above Honourable Court on the same papers, duly supplemented if need be, for alternative relief suitable in the circumstances in the event of Eskom's failure to adhere to an order as referred to in prayer (2) above;

5. THAT: The Applicant to serve this order on Eskom Holdings SOC Limited (Womaranstad Office) by Sheriff and per electronic mail on Zelmarie Engelbrecht on her email address: engelbz@eskom.co.za."

(emphasis added)

Paragraph 2 of this order states that it is interim pending the adjudication of the formal dispute lodged with the National Energy Regulator of South Africa (NERSA).

- [13] There is a complaint form of NERSA attached as an annexure to the founding affidavit bearing a date stamp of the South African Police Service of 07th September 2021. If this is the date on which the complaint was lodged than it means that the complaint was lodged after the interim court order was granted by Lephadi AJ. As the basis of the complaint it is stated that “after several visits to the Eskom offices at Wolmaranstad and numerous phone calls, I could not succeed in transferring the accounts from the previous owner’s name to my own. Eskom is charging me with accounts that is impossible.”
- [14] As alluded to earlier, seeing that the Applicants rely on the contract concluded, its terms and conditions finds application. In this contract, provision is made for dispute resolution in terms of Clause 21, which states inter alia in Clause 21.2 that the parties should endeavour to resolve any dispute by informal negotiation. Clause 21.3 provides that: “However, if agreement cannot be reached, ... such dispute shall be finally resolved in terms of the rules of the Arbitration Foundation of Southern Africa (AFSA) by the arbitrator formally appointed by the said foundation. Should arbitration be required in terms of this sub clause 21.3 either Party may still approach a court for interim relief.” It is quite apparent that the Applicants lodged a complaint with NERSA and did not follow the arbitration route with AFSA, as provided
- for in the specified terms and conditions of the contract. This is crucial.
- [15] Much debate was made about the interim order of Lephadi AJ which still stands until set aside or rescinded by a competent court. The following need to be highlighted in this regard. The order by Lephadi AJ was granted on an ex parte basis without prior service of it on the Respondent. It was on the version of the Applicants served thereafter. It is quite obvious that it is an interim order which is conditional. Paragraph 2 of the said order refers to the adjudication of the formal dispute by NERSA, which is clearly in contrast with the stipulations in Clause 21.3 of the contract.
- [16] It is, to say the least, quite surprising that the Applicants, instead of enforcing compliance with the order snatched from this Court per Lephadi AJ, chose to approach this Court again on an ex parte basis for the same relief on 08th September 2021. Once again, without service being effected on the Respondent. However, because of the directive and insistence of this Court that service being effected on the Respondent, the matter was removed from the court roll on that day. Service was effected on that very same day and the matter was again enrolled the following day.
- [17] The order of Lephadi AJ is flawed and as correctly submitted by Adv. Nalane SC overtaken by events, including the granting of a similar interim order by this Court on 09th September 2021. Reliance on the interim order of Lephadi AJ is therefor misplaced. This Court is entitled in the exercise of its discretion to mero moto replace the order of Lephadi AJ with an appropriate order, which it did. The fact that the electricity was reconnected based on the ex parte judgment of Lephadi AJ which was erroneously granted in the absence of the Respondent, does not assist the Applicants. Similarly, the lodging of a complaint with NERSA

cannot be construed as an automatic bar against the Respondent to disconnect the supply of electricity if there is non-payment of an account or tampering or by-passing of a meter.

[18] The Respondent rendered accounts not only in the names of the previous owners of the farms but also in the name of KJT Trust. Large amounts are due and payable in respect of these accounts. With particular emphasis on the KJT Trust accounts, it is stipulated that the supply of electricity shall be terminated in the event of non-payment. It is common cause that these accounts are in arrears, which renders the termination of the supply of electricity by the Respondent valid in terms of Section 21 (5) of the Electricity Regulation Act 2 of 2006. This is also in accordance with the terms and conditions of the contract. Even in the

absence of a written contract (which I find not to be the case) there must have been at the very least a verbal agreement to supply

electricity at a specific tariff. On either basis, the termination of the supply of the electricity is warranted due to non-performance

(non-payment) on the part of the KJT Trust.

See: Eskom Holdings SOC Limited vs Resilient Properties (Pty) Ltd and Others 2021 (3) SA 47 (SCA).

[19] It was submitted on behalf of the KJT Trust that it is willing to effect payments in respect of these accounts but their endeavour to do so is frustrated by the fact that these accounts are suspended. This is denied by the respondent. The last payment on the version of the Respondent was made during December 2020. It is illogical to say the least that an institution such as the Respondent would send out invoices for large amounts of money due and payable and then suspend the account rendering payment impossible. There is no exposé of attempts or endeavours made to effect payment of these accounts. To merely state that the accounts are suspended is not enough. Much more should and could have been done by the Applicants to effect payment. The complaint about the suspension of these account could have been escalated to higher levels and to high ranking officials within the Respondent. This was not done.

See: Rademan v Maqhaka Municipality and Others 2012 (2) SA 387 (SCA).

Mkontwana v Nelson Mandela Metropolitan Municipality and Others 2005 (1) SA 530 (CC).

[20] A further aspect that was raised by the Respondent is the fact that the meter was tampered with. This is contained in the answering affidavit and in the accompanying confirmatory affidavit filed. No replying affidavit was filed to gainsay this contention. The tampering and vandalizing of a meter in order to by-pass it is similarly a ground for the summarily termination of the supply of electricity by the Respondent, in terms of Regulation 8 (2) of the Electrical Installation Regulations 2009.

[21] In the final analysis, the Applicants did not satisfy all the requirements for the granting of final interdictory relief against the Respondent. No prima facie right was established or made out by the Applicants that entitles them for the supply of electricity under conditions of non-payment

and the tampering or by-passing of a meter and by so-doing to vandalise it. The last payment been effected during December 2020 is a clear indication that the Applicants did not perform in terms of their contractual obligations. This is after the order by Lephadi AJ on 05th August 2020. On this basis too, no prima facie right was established. In the absence of establishing at least a prima facie right to be supplied with electricity, the remainder of the other requirements to be considered, do not count for much.

[22] It is inter alia for the aforementioned reasons that I granted an order in the terms as set out in paragraph 1, supra.

R.D HENDRICKS

DEPUTY JUDGE PRESIDENT OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

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Prepared on 10 October 2026 · Esheria