

SOUTH AFRICA / JUDGMENT

Eskom Holdings SOC Limited v Nqorile CC and Another [2023] ZAGPPHC 132; 47122/2021 (28 February 2023)

[2023] ZAGPPHC 132

COURT

North Gauteng High Court, Pretoria

BEFORE

Collis

CASE / FILE NUMBER

47122/2021

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 47122/2021

REPORTABLE:

No
OF
INTEREST TO OTHER JUDGES: No
REVISED
28
February 2023
In

the matter between:

ESKOM
HOLDINGS SOC
LIMITED
Plaintiff
And
NQORILE
CC
First Defendant
MOKGOSI
SPIHIWE MALEPANE MAKHANYE PULE
Second Defendant
This

judgment is issued by the Judge whose name is reflected herein and is
submitted electronically to the parties/their legal representatives

by email. The judgment is further uploaded to the electronic file of this matter on CaseLines by the Judge or her Secretary. The date of this judgment is deemed to be 28 February 2023.

JUDGMENT

COLLIS J:

INTRODUCTION

1. On 17 September 2021,[1] the plaintiff issued summons against the first and second defendants, which summons was served on the defendants on 12 July 2021.
2. Upon service of the summons, the defendants entered an appearance to defend on 1 October 2021 and proceeded to file their plea on 11 November 2021. Thereafter the plaintiff applied for summary judgment on 1 December 2021. The application is opposed by both defendants.

BACKGROUND

3. Between the parties, the dispute arises from an agreement concluded between the first defendant and the plaintiff for the supply of electricity to the first defendant's property, located at Stand 20 Shetlands, Street, Heathcliff Manor. Both the defendants consumed electricity supplied to it by the plaintiff.
4. It is common cause amongst them that the supply of electricity is regulated in terms of Eskom's Standard Conditions of Supply for Small Suppliers with conventional metering.
5. In terms of the Standard Conditions of supply the express material terms were as follows:
 - 5.1 Accounts for all charges payable by the First Defendant shall be sent to the First Defendant as soon as possible after the end of each month and each account shall be due and payable on the date the account is received by the First Defendant, which date for the purposes of electricity supply agreement, shall be deemed to be not later than 7 (seven) days from the date of the account;
 - 5.2 Should payment not be received within a period of twenty-three (23) days from the date the account is deemed to have become due and payable in terms of the abovementioned clause, the Plaintiff may discontinue the supply to the First Defendant and terminate the electricity supply agreement after having given the First Defendant fourteen (14) days written notice. The amount outstanding shall bear interest compounded monthly from the date the account is deemed to have become due and payable in terms of sub-clause above to the due date of payment, at a rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of Southern Africa Limited plus 5% (five per centum);

5.3 Should a customer dispute an account, it shall not be entitled to reduce or set-off its debt or defer payment thereof beyond the period of grace allowed for in the abovementioned sub-clause, but such account shall as soon as possible thereafter be adjusted if necessary;

5.4 Should a customer be incorrectly charged for any amount payable in terms of the electricity supply agreement as a result of human error, the applicant shall inform the respondent of the correct amount/s payable and the reasons thereof;

5.5 In the case of a customer being over charged and having paid such over charged amount, the Plaintiff shall as soon as practicable either credit the customer's electricity account or reimburse the customer with the total amount over charged. The said amount shall include interest, compounded monthly from the date the customer has paid the over charged amount up to the date Eskom has credited the customer's electricity account or has repaid the customer, as the case may be, at a rate equal to the prevailing prime overdraft rate charged by First National Bank of Southern Africa Limited;

5.6 In the event that the customer is being undercharged, the applicant shall debit the customer's electricity account with the total amount under charged and such amount shall be payable by the customer on such terms as may be agreed to by the applicant, subject to the proviso that the customer may pay the amount over a period commensurate of the amount undercharged, but such credit shall be limited to a period of a maximum of six (6) months. The amount outstanding shall bear interest, compounded monthly, from the date the customer's account is being debited in terms of this clause to date of payment, at a rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of Southern Africa Limited;

5.7 A certificate under the signature of a duly authorised employee of Eskom setting out the amount due and payable by the customer at any time in terms of the electricity supply agreement, shall be sufficient and conclusive proof, subject to manifest arrear of the customer's debt for the purposes of insolvency and legal proceedings and obtaining of provisional sentence; and

5.8 Should a customer commit any breach of the electricity supply agreement and the applicant resorts to litigation, the customer shall be responsible for all costs and expenses incurred by Eskom as a result of such litigation including attorney.[2]

DEFENDANTS PLEADED CASE

6. It is the defendants pleaded case[3] that the plaintiff failed to send accounts for charges/ invoices each month as per the standard conditions of supply albeit that the second defendant continuously made enquiries around the invoices.
7. Secondly, that the plaintiff failed to attend the premises in question in order to check the metering. It is for this reason that the defendants alleges that the certificate issued by the plaintiff to the defendants during 2020, is based on estimates and not actual electricity consumed at the residence.[4] Pursuant to this demand made by the plaintiff as per the certificate of balance furnished to the defendants, the second defendant resorted to paying

the amount of R4500.00 and R3000.00 on 24 February 2017 and 03 May 2017 without ever receiving any invoices from the plaintiff.[5]

8. It is the defendants further pleaded case that they do not dispute their obligations for the consumption of electricity and the consequent

liability towards the plaintiff. As per the Particulars of Claim, the plaintiff sets out that it has complied with their obligations in terms of the standard conditions and that it is the defendants who have breached their obligations in terms of the said conditions. In response hereto the defendants baldly aver that it is the plaintiff who have breached the standard conditions. To this end, the defendants further aver that they entered into a Deferred Payment Agreement with the plaintiffs, in terms of which agreement the outstanding amount is in the sum of R 473 767.99.[6]

9. In their plea, the defendants averred that, at the time of delivering their plea, they had made payment in excess of R 162 000.00.[7] To this end, they attached annexure "IN 2" reflecting the said payments. The annexure shows the total payments in the sum of R 162 927.00 had been made, without reflecting the entire period over which the payments were made.

AFFIDAVIT RESISTING SUMMARY JUDGMENT.

10. In the affidavit opposing summary judgment, the defendants as mentioned again admitted the standard conditions, as well as the

plaintiff's tax invoice self-contained terms and conditions.[8] There is no dispute on the defendant's contractual obligations and liabilities herein.

11. In opposing the summary judgment application, the defendants firstly seek to oppose the summary judgment application on the

determination

of the merits as alleged in the filed affidavits and secondly, the defendants seek to obtain leave from the Court to defend the main action, in lieu of them furnishing security to the satisfaction of the Court. The respondents rely on both grounds.[9]

LEGAL PRINCIPLES APPLICABLE IN SUMMARY JUDGEMENT APPLICATIONS

12. In applications for summary judgments the decisions of *Maharaj v Barclays National Bank Ltd*[10], *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture*[11] and *Breitenbach v Fiat SA (Edms) Bpk*[12] remain of application.

13. In *Maharaj v Barclays National Bank Ltd* the Supreme Court of Appeal held that:[13]

"One of the ways in which a defendant may successfully oppose a claim for summary judgment is by satisfying the Court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one

party or the other. All that the Court enquires into is: (a) whether the defendant has “fully” disclosed the nature and grounds of his defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be.”

14. In the matter of Tumileng Trading CC v National Security and Fire (Pty) Ltd[14], the Western Cape Division of the High Court had occasion to consider these changes. In its judgment, the Court admonished the counsel appearing in the matter for not having considered the implications of the amendments on the summary judgment procedure.[15]
15. In the above matter the Court observed that subrule 32(3) which regulates what is required from a defendant in its opposing

affidavit, has been left substantively unaltered in the overhauled summary judgment procedure. The Court further held that a defendant

is not required to show that the defence is likely to prevail but that it has a legally cognisable defence on the face of it and that the defence is genuine or bona fide.[16]

16. In Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture the Supreme Court of Appeal held that[17]:

“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.”

17. In the decision Chris Hani District Municipality v HJT Transport Mining Civils (Pty) Limited the Court to be the following:

“Under the old rule, it was the defendant who was required to elaborately set out his defence in such manner that the nature of the defence is fully disclosed and the facts underpinning such a defence point to the existence of a defence. Under the new rule, the plaintiff for his part is required, since the summary judgment is filed after the defendant has filed a plea, to deal with the allegations made in the plea in his own affidavit, to which the defendant must answer. What is apparent from the new rules is that the defendant must file a plea first so that if summary judgment is sought, any affidavit filed by the defendant to resist the summary judgment is consistent with the defence set out in his plea. In my view this gives the summary judgment remedy its true value from its original and classical inception, as a remedy against a defenceless defendant who files a spurious defence just so that the proceedings are delayed at the expense of a plaintiff with a meritorious claim. What is then called for, in my view, at a minimum, is the consistency between the plea where the defendant alleges his defence and affidavit filed on the basis of which the latter resists summary judgment. A defendant who pleads a particular defence

in his plea and alleges vastly different facts in his affidavit filed to resist summary judgment can hardly be said, in the absence of a plausible explanation, to have a bona defence. What is more, were such tendency were to be countenanced, summary judgment would lose its true value and purpose.”

18. It is against these principles that the matter at hand will be considered and in this regard the following is of relevance:

18.1 It is common cause that the plaintiff has been supplying electricity to the property, in accordance with the applicants Standard Conditions of Supply for Small Suppliers with conventional metering.

18.2 Further that the plaintiffs' tax invoices/accounts to customers are printed back-to-back with self-contained terms and conditions. The material express conditions contained in the invoices/statements furnished provide, inter alia, as follows:

18.2.1 That Electricity services are supplied and this bill is rendered in terms of Eskom's conditions of contract as amended from time to time;

18.2.2 Due date means the date the electricity is deemed to be received by the customer as provided for in the electricity supply agreement;

18.2.3 Final payment date means the date by when the customers payment of the full invoice account must be reflected in Eskom's bank account, failing which interest will be charged, from the due date to the date of payment on the outstanding amount;

18.2.4 Estimated readings will be automatically adjusted after the next actual meter reading;

18.2.5 Payment may not be deferred;

18.2.6 Interest is payable on all overdue accounts;

18.2.7 Eskom is entitled to disconnect supply for non-payment;

18.2.8 In the event of a disconnection and in addition to the repayment of all outstanding amounts due, a disconnection visit fee and deposit will become payable; and

18.2.9 The customer is legally liable for all charges reflected on the account.

19. As mentioned it is the defendants pleaded case that they entered into a Deferred Payment Agreement with the plaintiff in respect of which the total amount due at the time was an amount of R473 769.99 and in reduction of this amount that it has paid an amount of just over R 162 000. Thus, on its own version at the time of concluding the Deferred Payment Agreement it owed the plaintiff R473 769.99 and from the proof provided by it, it is evident that intermittent payments have been made by the defendants in terms of this Deferred Payment Agreement and that not all which was due when the agreement was entered has been paid. There as a result remains a shortfall.

20. The defendants in their plea denied the Standard Conditions of Supply on the basis of failure to have received monthly statements, whereas in the affidavit resisting summary judgment, it admitted the Standard Conditions of Supply. This is inconsistent with the defence set out in their plea.
21. To the matter at hand as I see it, it is rather the defendants defence that as a result of the failure on the part of the plaintiff to have provided it with monthly statements pursuant of actual readings reflecting its consumptions, it has been unable to establish the exact payments due to the plaintiff and this resulted in them either making short payments on their part or at times making no payments.
22. This stance adopted by the defendants however flies in the face of the Standard Conditions agreed upon when the agreement was concluded and it will result in establishments such as the plaintiff being financially crippled simply because consumers refrain from paying after usage because no invoices or statements have been rendered or where it has been rendered it is being challenged.
23. This stance adopted by the defendants to my mind, does not disclose the nature and the grounds of its defence and the circumstances upon which it is founded in respect of which summary judgment can be refused. It thus follows that judgment must follow in favour of the plaintiff.

COSTS

24. As far as the scale of costs to be awarded in the present proceedings, it should be mentioned that a court always has a discretion in awarding the appropriate costs.
25. Considerations which will inform the courts decisions will be factors such as to whether the costs sought has been pleaded for in the summons.
26. In the present instance the plaintiff has pleaded for costs on an attorney and client scale to be awarded as this was agreed to between the parties in the event of litigation ensuing.[18]
27. The plaintiff being the successful party in these proceedings, I could find no basis of depriving the plaintiff of such costs.

ORDER:

28. In the result the following order is made:

28.1 Summary judgment is entered in favour of the Plaintiff against the Defendants for payment of the amount of R484,978.51 (FOUR HUNDRED AND EIGHT FOUR THOUSAND NINE HUNDRED AND SEVENTY EIGHT RAND AND FIFTY ONE CENTS) at a prime overdraft rate plus 5% per annum as charged by First National Bank;

28.2 Interest on the prime overdraft rate plus 5% per annum as charged by First National Bank of South Africa from 29 March 2021 until date of payment; and

28.3 Costs of the suit as between Attorney and Client scale.

COLLIS J

JUDGE OF THE HIGH COURT

GAUTENG DIVISION,

PRETORIA

APPEARANCES:

Counsel for the Plaintiff: Adv. M. MAKGATO

Attorney for the Defendant: DYASON ATTORNEYS

Counsel for the Defendants: Adv. C.I MOKWENA

Attorney for the Defendants: PULE INCORPORATED

Date of Hearing: 19 JULY 2022

Date of Judgment: 28 FEBRUARY 2023

[1] Caselines 002-1.

[2] Particulars of Claim 002-7 para 9

[3] Defendants' Plea para 12 005-5.

[4] First and Second Defendants Plea.

[5] Defendants' Plea para 12.3 005-5

[6] Annexure N2; Caselines 009-13.

[7] Defendants' Plea para 17.

[8] Caselines 009-7 para 27 – 29.

[9] Caselines 009-6 para 24.

[10] 1976

(1) SA 418 (A).

[11] 2009

(5) SA 1 (SCA).

[12] 1976

(2) SA 226 (T).

[13] See fn 10 above at 425G – 426E.

[14] 2020

(6) SA 624 (WCC).

[15] Id at para 3.

[16] See fn 21 above at para 13.

[17] See fn 11 above at para 32.

[18] Particulars of Claim para 9.23 Caselines 002-10.

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