

SOUTH AFRICA / JUDGMENT

Eskom Holdings Soc Ltd v Rechavu Trading And Projects (Pty) Ltd (50873/21) [2023] ZAGPPHC 1776 (22 September 2023) [2023] ZAGPPHC 1776

COURT

North Gauteng High Court, Pretoria

BEFORE

Burger AJ

CASE / FILE NUMBER

50873/21

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NUMBER: 50873/21

(1)

REPORTABLE: YES/NO

(2)

OF INTEREST TO OTHERS JUDGES: YES/NO

(3)

REVISED

DATE:

22/9/23

In

the matter between:

ESKOM

HOLDINGS SOC LTD APPLICANT

and

RECHAVU

TRADING AND PROJECTS (PTY) LTD RESPONDENT

IN

RE:

RECHAVU

TRADING AND PROJECTS (PTY) LTD PLAINTIFF

AND

ESKOM

HOLDINGS SOC LTD DEFENDANT

JUDGMENT

BURGER AJ

- [1] In the matter before me, the Applicant, Eskom Holdings SOC Ltd (“the Applicant”), seeks the rescission and setting aside of a default judgment granted against it under case number 50873/21, on 11 February 2022 by the Honourable Justice Mali (“Mali J”).
- [2] The Respondent, Rechavu Trading and Projects (Pty) Ltd (“the Respondent”), resists the application.

PREFERENTIAL TREATMENT

- [3] During arguments before me, the Respondent submitted that the Applicant, in the founding affidavit, made it clear that the Applicant, being a State-Owned Enterprise, which operates through public funds, should receive preferential treatment by the Courts. The Applicant denied such notion.
- [4] On conspectus of the Founding Affidavit deposed to by the Chief Legal Advisor of the Applicant, Ms Fehmidah Koor, this Court is in agreement with the Respondent.
- [5] What started as a mere reference to the “financial position” of the Applicant (Caselines: 010-9 Para 14), gradually and subtly built up throughout the affidavit (Caselines: 010-18 Paras 49,50 and 51, 010-23 Para 66 and 010-24 Para 70) until the Chief Legal Advisor states the following in paragraph 74 (Caselines: 010-25):

“74. It will be argued that Eskom should in the circumstances be accommodated considering the unavoidable public interest involved and the unavoidable duty Eskom has to the public especially in the current climate where Eskom has to function appropriately and were it functions in the context of state capture reports. Therefore, its revenue must be jealously guarded, including by courts of law.” (Emphasis added)

- [6] This Court cannot and will not treat the Parties before me in any other way than being on equal footing. To expect a “softer”

approach by our Courts by any party to proceedings, must be condemned and discouraged in the strongest terms.

- [7] In this regard I must refer with approval to the matter of MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd (CCT 77/13) [2014] ZACC 6; 2014 (5) BCLR 547 (CC); 2014 (3) SA 481 (CC) (25 March 2014) para 82 where our Apex Court remarked:

“82.

To demand this of government is not to stymie it by forcing upon it a senseless formality. It is to insist on due process, from which there is no reason to exempt government. On the contrary, there is a higher duty on the state to respect the law, to fulfil procedural requirements and to

tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's primary agent. It must do right, and it must do it properly. (Emphasis added)

BACKGROUND

[8] The judgment in default that the Applicant seeks to have rescinded, was granted by Mali J subsequent to the issuing and proper service of a Combined Summons (Caselines: 001). Service on the Applicant took place on 20 October 2021 at the Head Office of the Applicant.

[9] The Respondent sued the Applicant for payment of 3 (Three) claims to wit:

9.1 Claim 1: R 612 880-00 – Invoice 25;

9.2 Claim 2: R 198 000-00 – Invoice 26; and

9.3 Claim 3: R 1 432 213-40 – Invoice 24 (“Contractual claim 7”).

[10] Upon receipt of the Summons, on 25 October 2021, one Julie Kabasela Nkombua, a Chief Legal Advisor in the Legal and Compliance Department of the Applicant, directed a letter to the Attorney of record for the Respondent notifying the Respondent that claims 1 and 2 will be paid but, with regards to claim 3 (“Contractual claim 7”), the following was recorded (Caselines: 010-172 and 010-173):

“Payment for claim 7 due and payable for work done is subjected to your client submitting support documentation.

In absence of documentation supporting claim 7, a notice to defend will be filed.”

[11] It is common cause that the period during which the Applicant was required to file the Notice of Intention to Defend lapsed without the Applicant filing such notice. It is also common cause that the Respondent did not submit additional “supporting

documentation”, as was required by the Applicant to substantiate claim 7, during said period. Both Parties before me conceded that no amical agreement existed between the Parties to stay legal proceedings whilst deliberations continued between the Parties.

[12] The explanation proffered by the Applicant with regards to the failure to file said notice, is “characterised as both red tape normally associated with big state-owned entities such as Eskom and due to understandable oversight” (Caselines: 010-7 and 010-8 Para 11). The “red tape” referred to the procurement of external legal representation and the “understandable oversight” to the complexity of internal process of the Applicant with its 40 000 employees. The aforementioned does not constitute an acceptable explanation. I will return to this later.

[13] The matter before me is however not as simple. I will have to traverse to the onset of the relationship between the Parties to enable this Court to come to a just conclusion herein.

- [14] On 1 April 2019 the Applicant and Respondent entered into an agreement known as a NEC 3 Term Service Contract (“the Agreement”). The Respondent was tasked with cleaning and dredging of dams at the Arnot Power Station and the term of the agreement will lapse on 31 March 2020. The Applicant appointed more than one person to oversee the work done by the Respondent and the Respondent had to invoice the Applicant against set costs as contained in the Agreement.
- [15] The Agreement provided inter alia for a process of Adjudication should a Party be aggrieved with an act or omission by the other Party. The aggrieved Party must then declare a dispute and refer same to be adjudicated.
- [16] I specifically refer very cryptic to the adjudication process as the details of what exactly constitutes a dispute and the specific procedures to be followed were not placed before me by the Applicant. I pause here to highlight the fact that I invited the Applicant ad nauseam during the arguments before me to furnish me with the details of the adjudication process. The Applicant shrugged off my invitations by stating that the details are irrelevant for purposes of reaching a just decision in the matter before me. I do not agree.
- [17] At this point in time, I need to state what exactly was disclosed by the Applicant in re adjudication. In terms of the agreement between the Parties, the following was included in the Founding Affidavit:
- “W1 1 The Adjudicator - the person selected from the ICE-SA Division (or its successor body) of the South African Institution of Civil Engineering Panel of Adjudicators by the Party intending to refer a dispute to him. (see www.ice-sa.org.za). If the Parties do not agree on an Adjudicator the Adjudicator will be appointed by the Arbitration Foundation of Southern Africa (AFSA)*
- W1 2(3) The Adjudicator nominating body is – the Chairmen of ICE-SA a joint Division of the South African Institutions of Civil Engineering and the Institutions of Civil Engineers (London) (see www.ice-sa.org.za) or its successor body.”
- [18] I regard the non-disclosure of the details of the adjudication process by the Applicant as a fatal lacuna in the case for the Applicant because the Applicant submitted that the Respondent had to refer the dispute regarding contractual claim 7 back to adjudication after re-submission and due to a repeated non-payment and the Respondent submitted that it was not obliged to refer the dispute back to adjudication. From what I have in front of me, I simply cannot decide which version to accept and, in such circumstance, I am obliged to accept the submission of the Respondent i.e. that the Respondent was not barred from approaching this Court to pursue it’s claim against the Applicant.
- [19] Be that as it may, on 5 February 2020 during a meeting between the Parties, the 3 disputes referred to in paragraph 9 supra, were raised by the Respondent. This led to an adjudicator being appointed who delivered his verdict on 29 March 2021.

- [20] It is common cause that the outcome of an adjudication process would be regarded as binding on the Parties.
- [21] The adjudicator ruled in favour of the Respondent in relation to claim 1 and 2 and directed the Respondent to re-submit claim 3 (contractual claim 7), together with documentation proving that the work was indeed done, to the Applicant. The Applicant was ordered to pay claim 1 and 2 within two weeks from 29 March 2021. The Respondent re-submitted claim 3 (contractual claim 7) on 21 April 2021 (Caselines: 001-168).
- [22] The Applicant did not pay claim 1 and 2 within the time ordered by the adjudicator nor did the Applicant react to the re-submission of claim 3 (contractual claim 7).
- [23] This led to the Respondent writing a letter of demand to the Applicant on 10 June 2021 wherein the Respondent claimed payment of the 3 claims and that non-compliance with the letter of demand will be met with legal action (Caselines: 001-163 and 001-164).
- [24] The Applicant ignored the letter of demand.
- [25] It was only after service of the Combined Summons when the Applicant decided to react as was described in paragraph 10 supra.
- [26] The arrogance and ignorance displayed by the Applicant did not end here.
- [27] When the Applicant persisted in not paying contractual claim 7, and in the absence of a Notice of Intention to Defend, the Respondent lodged an application for default judgment which was granted on 11 February 2022.
- [28] A writ of execution against the Applicant was issued on 7 March 2022 and served on the Applicant on 25 March 2022. This is the date claimed by the Applicant on which the Applicant first became aware of the default judgment.
- [29] It could not have come as a surprise to the Applicant, because the Applicant was timeously warned by the Respondent as early as 21 January 2022 in a letter by the Respondent's Attorney of record directed to the deponent of the Founding Affidavit of the Applicant. In said letter (Caselines: 014-35 and 014-36) paragraph 8, the following was noted:
- "8. Considering the abovementioned, our client's position remains that ESKOM is liable for the full amount claimed in invoice 27 (contractual claim 7 – my insert). Should ESKOM make payment of R 601 601-70 per the attached stand-alone invoice, our client will proceed to request default judgment for the balance of invoice 27."*
- [30] Upon receipt of the writ of execution, the Applicant inexplicably made partial payment of the claim in question. This must be viewed against the persisted denial by the Applicant that the Respondent failed to substantiate contractual claim 7. It even came as a surprise to counsel for the Applicant during argument before me when I pointed out the peculiar behaviour of the Applicant i.e. by making a substantial partial payment in a claim where the Respondent "only submitted photographs to substantiate its claim".

[31] Only after the Respondent issued a second writ of execution for the remainder of the claim and it was served on the Applicant, the Applicant lodged the Application before me.

LAW APPLICABLE

[32] There are various options available to a litigant to rescind a judgment obtained in his/her/its absence, to wit, in terms of the common law, under Rule 31(2)(b) and Rule 42(1)(a) (Vide: Freedom Stationery (Pty) Ltd and Others v Hassam and Others (2019)

(4) SA 459 (SCA) at 465 E-F].

[33] In terms of Rule 31(2)(b) {and any default judgment granted by a Court under Rule 31(5)(d)}, a Defendant may apply to Court to set aside the judgment of a Court and the Court may, upon good cause shown, set aside the default judgment. The Courts have stated the following principles in relation to “good cause” (Vide: Grant v Plumbers (Pty) Ltd 1949 (2) SA 470 (O) at 476-477):

[33.1] The Applicant must give a reasonable explanation of his or her default. If it appears that his or her default was wilful or due to gross negligence, the Court should not come to his or her assistance;

[33.2] The application must be bona fide and not made with the intention of merely delaying the Plaintiff's claim; and

[33.3] The Applicant must show that he or she has a bona fide defence to the Plaintiff's claim. It is sufficient if he or she makes out a prima facie defence in the sense of setting out averments which, if established at the trial, would entitle him or her to the relief asked for. He or she need not deal fully with the merits of the case and produce evidence that the probabilities are in his or her favour.

[34] In relation to wilful default or gross negligence, the Courts have held:

[34.1] While a Court will decline to grant relief where the default has been wilful or due to gross negligence, the absence of wilfulness or gross negligence is not a pre-requisite to the granting of relief (Vide: Harris v ABSA Bank Ltd t/a Volkskas 2006 (4) SA 527 (T) para 6); and

[34.2] For a person to be said to be in wilful default, the test is whether the default is deliberate, i.e. when a defendant with full knowledge of the circumstances and the risks attendant on his or her default freely takes a decision to refrain from taking action. (Vide: Kouligas & Spanoudis Properties (Pty) Ltd v Boland Bank Bpk 1987

(2) SA 414 (O) at 417E-H).

[35] Although an Applicant does not need to deal fully with the merits of the case, the grounds of defence must be set forth with sufficient detail to enable the Court to conclude that he or she has a bona fide defence. (Vide: Standard Bank of SA Ltd v El-Naddaf and Another 1999 (4) SA 779 (W) at 785G-786D)

[36] A Court may rescind a judgment under Rule 42(1) where the order or judgment was erroneously sought or granted in the absence of any party affected thereby. The relevant principles applicable to Rule 42(1)(a) are the following:

[36.1] Once the Court holds that an order or judgment was erroneously sought or granted, it should without further enquiry rescind or vary the order and it is not necessary for a party to show good cause for the subrule to apply (Vide: Naidoo v Somai 2011 (1) SA 219 (KZP) paras 4 & 5. See also Bakoven (Pty) Ltd v G J Homes 1990 (2) SA 446 (E));

[36.2] Generally, a judgment is erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if aware of it, not to grant the judgment (Vide: Naidoo and Another v Matlala NO and Others 2012 (1) SA 143 (GNP)); and

[36.3] An order is also erroneously granted if there was an irregularity in the proceedings, or it was not legally competent for the Court to have made the order. (Vide: Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others 1996 (4) SA 411 (C) at 417G).

[37] In order to succeed in terms of the common law, an Applicant for rescission of a judgment taken against him or her by default must show good or sufficient cause. The test of good or sufficient cause is similar to that for Rule 31(2)(b) given above. This generally entails three elements; The applicant must (i) give a reasonable and acceptable explanation for the default; (ii) show that the application is made bona fide; and (iii) show that on the merits he or she has a bona fide defence which prima facie carries some prospect of success. (Vide: Colyn v Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA 1 (SCA) para 11)

DISCUSSION

[38] The Applicant contends that the default judgment should be rescinded in terms of Rule 42 alternatively the common law. The Respondent contends that the Applicant can only rely on Rule 31 in its endeavour to have the default judgment rescinded but that the Applicant chose the course it took to circumvent the requirements of Rule 31 as the Applicant will inter alia not be able to establish and proof good cause.

[39] I have pointed out hereinabove that the Applicant proverbially went out of its way to frustrate the Respondent in pursuing payment of contractual claim 7. The Applicant did not honour the finding of the adjudicator, ignored the re-submission of claim 7, ignored the Letter of Demand, ignored the Combined Summons, ignored the warning that default judgment will be obtained and ignored the first writ of execution. The lackadaisical attitude of the Applicant negates any notion to find that the Applicant acted bona fide throughout the ordeal with the Respondent.

[40] I am at pains to understand how the Applicant can expect this Court to find in its favour while it proverbially sets its sails as the wind blows. At the adjudication process, the Applicant's objection to payment of contractual claim 7 was because the

Respondent did not prove the quantum of work executed. Before me it was vigorously argued on behalf of the Applicant that the Respondent did not provide proof that it adhered to the provisions of NEMA (National Environment Management Act) whilst performing its duties.

[41] In contrast with the above and in its Statement of Response to the Statement of Case by the Respondent before the adjudicator, the Applicant, through one Emily Mphuti (Operating Support Services Department Manager at Arnot Power Station and one of the appointees by the Applicant to oversee the work done by the Respondent), averred:

[41.1] “We requested Rechavu to submit proof of work done which could be in the form of:

- 1 Certificate of Disposal, or
- 2 Quantities Dredged and, or
- 3 Hydrographic survey.” (Caselines: 001-148 Para 9.3)

[41.2] “There is no way of determining the payment due to the contractor without first determining how much work was actually done.” (Caselines: 001-149 Para 9.6)

[43] The above must be viewed against the re-submission of contractual claim 7 by the Respondent (Caselines: 001-168) which was received by one Simon Mahlangu as representative of Arnot Power Station. The Respondent re-submitted the following:

- 3 x Invoices
- Assessment 7
- Proof of work done report
- Trucks log sheets.

[44] The averment by the Applicant that the Respondent re-submitted only pictures (Caselines: Annexure Esk 6 pages 010-176 to 010-205) is thus devoid of any credibility and stands to be rejected. I regard the aforementioned as a deliberate attempt by the Applicant to mislead this Court.

[45] I can thus confidently find that the Respondent did adhere to the finding of the adjudicator by submitting proof of the quantum of work done by the Respondent.

[46] I also find that the Respondent, in its Combined Summons, claimed for a liquidated amount as the volume of work was established and, by merely doing simple calculations, the amount owed to the Respondent could be established. I say this because the initial agreement referred to in paragraph 14 supra, contained a specific cost structure which had to be utilized by the Respondent when the Respondent compiled its invoices.

[47] As set out above, in discussing the relevant legal principles, a judgment is regarded as being erroneously granted if there existed at the time of the granting of judgment a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge not to grant the judgment. I cannot find such a fact.

[48] The nearest the Applicant came to establish such a fact, was by submitting that Mali J was unaware of the fact that the Respondent

did not adhere to the requirements of NEMA and as such the Applicant was not obliged to pay the invoice. I do not agree. The turn-about by the Applicant by first objecting that the Respondent did not prove the quantum of work and later that it did not adhere to NEMA, is fatal for the argument of the Applicant. This must be viewed against the fact that the Applicant made a substantial partial payment of contractual claim 7 despite its so-called objections.

[49] In order to succeed for rescission under this sub-rule, the Applicant bears the onus of establishing that the judgment was erroneously granted (*Bakoven Ltd v GJ Howes (Pty) Ltd* 1990 (2) SA 446 at page 469B).

[50] A default judgment will be regarded as being erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the Court to have made the Order, I am satisfied that there was no irregularity, and that it was indeed legally competent for Mali J to have granted the Default Judgment Order.

[51] I now turn to the Applicant's reliance on the common law to have the judgment rescinded.

[52] The applicant must give a reasonable and acceptable explanation for the default. I already found that the Applicant could not provide such explanation.

[53] The Applicant must show that the Application is made bona fide and show that, on the merits, it has a bona fide defence which prima facie carries some prospect of success. I already found that the Applicant did not show any bona fides in its dealings with the Defendant throughout the whole process. In addition, I find that the Applicant acted the way it did only to frustrate the Defendant and that its "partial defence" does not carry any prospects of success. An examination of the common cause facts, together with those that cannot be seriously disputed, demonstrates that the Applicant has not advanced a bona fide defence to the Respondent's action.

[53] In the circumstances, the Applicant is not entitled to a rescission of the Default Judgment under the common law.

[54] This leaves us with rescission under Rule 31(2)(b).

[55] It is common cause that the Applicant became aware of the Default Judgment on 25 March 2022 when the writ of execution was served on the Applicant.

[56] The Applicant did not apply for rescission of said judgment, instead it made a substantial payment of the claimed amount i.e. more than 48% of contractual claim 7, despite its vigorous opposition to payment of said claim all along. I am still in the dark with regards to this turn-about as counsel for the Applicant could not provide any explanation.

[57] The Application before me was only launched after the second writ of execution, for the remainder of contractual claim 7 (issued on 7 June 2022), was served on the Applicant and then only on 29 June 2022, some 4 months and 4 days after having become aware of the Default

Judgment.

[58] I have no Application under Rule 27(3) for condonation of the Applicants' failure to bring its application for rescission within

the period of 20 days referred to in Rule 31(2)(b), before me. This, in itself, spells doom for the Application for Rescission. The Applicant chose, unwisely so, to circumvent Rule 31(2)(b) by relying on Rule 42(1)(a) alternatively the common law, to have the Judgment rescinded. This deliberate and unacceptable course of action by the Applicant should be frowned upon.

[59] I further find that the Applicant did not show good cause for rescission of the Default Judgment. The Applicant merely frustrated

the Respondent in pursuing its claim against the Applicant and the mere fact that the one employee does not know what the other is doing – so to say - in rendering their services to the Applicant, can hardly be regarded as good cause. Such ineffective and incompetent behaviour by employees of the Applicant can never serve as an excuse.

[60] In conclusion, I find that the Applicant failed dismally in establishing a case for rescission of the judgment of Mali J and the Application should therefor fail.

COSTS

[61] It is trite that an Applicant must make out his/her/its case in the founding affidavit. The phrase “An applicant must stand or fall by his/her founding affidavit” is often referred to in judgments of the various Courts. (Vide: *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) at 635H-636C. See also *Ramosebudi v Mercedes Benz Financial Services South Africa (Pty) Ltd* (51196/2017) [2019] ZAGPPHC (20 March

2019) at paragraph [11].)

[62] In its Founding Affidavit, the Chief Legal Advisor with the Applicant states as follow:

“44. Eskom became aware of the default judgment on or about the 25th March 2022 when the warrant of execution was served by the sheriff. Pursuant to the service of the warrant of execution Eskom initiated the procurement process to engage the services of the instructing attorney and at the end of the procurement process, it immediately engaged its current attorneys to deal with the matter and various discussions took place between the attorneys up to a point where a second writ of execution was issued and served on Eskom through Eskom's attorneys of record.” (My emphasis) (Caselines: 010-16 para 44)

[63] The above insinuates that the Applicant “suffers” from a long and complicated procurement process to appoint external legal representatives. Such contention is devoid of any truth or credibility. The Respondent debunked the aforementioned by demonstrating that the Attorneys of Record for the Applicant were not only serving on the panel of external legal representatives at the Applicant, they were also engaged in High Court litigation on behalf of the Applicant even prior to the Respondent starting its operations

at Arnot Power Station.

[64] The following matters bear reference:

[64.1] Pioneer Foods (Pty) Ltd v Eskom Holdings SOC (Ltd) – a matter heard by Opperman J in the High Court in Johannesburg – heard on 27 February 2019 and 1 March 2019 and judgment delivered on 5 March 2019 – instructing attorneys – Ngeno & Mteto Inc;

[64.2] Pioneer Foods (Pty) Ltd v Eskom Holdings SOC (Ltd) – above matter heard in the Supreme Court of Appeal – heard on 8 November 2022 and judgment delivered on 1 December 2022 - instructing attorneys – Ngeno & Mteto Inc;

[64.3] Tavrida Electric Africa (Pty) Ltd v Eskom Holdings SOC (Ltd) – a matter heard by Vuma AJ in the High Court in Pretoria – heard on 10 August 2021 and judgment delivered on 9 November 2021 - instructing attorneys – Ngeno & Mteto Inc; and

[64.4] Eskom Holdings SOC Limited v Sabie Chamber of Commerce and Tourism and Others - a matter heard by Barit AJ in the High Court in Pretoria – judgment delivered on 28 December 2022 - instructing attorneys – Ngeno & Mteto Inc.

[65] The Applicant chose not to play open cards with this Court. Such behaviour should be discouraged and condemned in the strongest terms. I can see no better way of accomplishing just that than to consider a punitive cost order against the Applicant. The Respondent

specifically sought such cost order against the Applicant in its arguments before me.

[66] Litigating or, in the matter at hand, causing litigation to be instituted, instead of investigating, settling and paying without

unnecessary protracted litigation, must result in enormous amounts of money – from public funds - in legal fees incurred by the Applicant annually. The conduct by the Applicant herein is not corresponding with the pitiable submission by the Applicant that the Applicant is in a process of recovery “in the current climate where Eskom has to function appropriately and (where it) functions in the context of state capture reports”. (Caselines: 010-25 and 010-26) The Applicant was paying mere lip service to its own submissions.

[67] The Constitutional Court in the matter of *Biowatch Trust v Registrar, Genetic Resources and Others* 2009 (6) SA 232 CC dealt with the question of punitive cost orders albeit in a matter concerning a constitutional issue. At paras 20 and 24 the following

were stated:

“[20] It bears repeating that what matters is not the nature of the parties or the causes they advance but the character of the litigation and their conduct in pursuit of it. This means paying due regard whether it has been undertaken to assert constitutional rights and whether there has been impropriety in the manner in which the litigation has been undertaken...”

[24] The general approach of this court to costs in litigation between private parties and the state, is not unqualified. If an application is frivolous or vexatious or in any other way manifestly inappropriate, the applicant should not expect that the worthiness of its cause will immune it against an adverse costs award”. (My emphasis)

[68] It was ‘manifestly inappropriate’ of the Applicant to:

- ignore the award of the Adjudicator;
- ignore the re-submission of contractual claim 7 and not to properly investigate the claim;
- ignore the Letter of Demand by the Respondent;
- ignore the Combined Summons and not to serve a Notice of Intention to Defend when the “proof” of claim 7 was not forthcoming;
- ignore the warning that default judgment will be obtained should the Applicant not pay claim 7 in full;
- ignore the first writ of execution in the sense that the Applicant inexplicably paid more than 48% of claim 7 and ignored the warning that the Respondent will pursue the remainder of claim 7 by issuing a further writ of execution;
- blame the complexity of the organisation and procurement procedures for the inaction by the Applicant;
- misuse the legal process to frustrate the Respondent in its endeavours to pursue its claim against the Applicant; and to
- expect preferential treatment from this Court.

- [69] Taking everything into consideration, I find that a punitive cost order against the Applicant should be appropriate.
- [70] The value of the Applicant in South Africa, in general terms, cannot be overstated. We are currently enduring daily power outages and our economy suffers immensely as a result. The Applicant seems oblivious of the fact that it is operating through public funds and causes fruitless expenditure by engaging in vexatious litigation.
- [71] Taking in consideration the history of this matter, the incompetent and negligent behaviour of employees of the Applicant prior to litigation and the inappropriate behaviour of employees of the Applicant during litigation, the Minister of Electricity and Chief Executive Officer of the Applicant have an interest in the findings made in this judgment. This judgment should therefore be brought to the attention of the Minister and the CEO of the Applicant. The Applicant should avoid any legal proceedings against it and, in the matter at hand, such proceeding could have been avoided if the Applicant did not take up a bullyish attitude but engaged pro-actively and constructively with the Respondent.
- [72] Consequently and having considered all the factors stated hereinabove, I make the following order:
- [72.1] The Application is dismissed;
- [72.2] The Applicant is ordered to pay costs of the Respondent on an attorney and client scale.
- [72.3] The Registrar of this Court is ordered to bring this judgment to the attention of the Minister of Electricity and the CEO of the Applicant.

ACTING JUDGE OF THE HIGH COURT

FOR THE APPLICANT: ADV

MR MAPHUTHA

INSTRUCTED BY: NGENO

& MTETO INC

FOR THE RESPONDENT: ADV E VAN AS

INSTRUCTED BY: JJ

JACOBS ATTORNEYS INC

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