

SOUTH AFRICA / JUDGMENT

Eskom Holdings v Imab Engineering (Pty) Ltd and Another (2019/39240) [2020] ZAGPJHC 59 (27 February 2020) [2020] ZAGPJHC 59

COURT

South Gauteng High Court, Johannesburg

BEFORE

T P Mudau

CASE / FILE NUMBER

2019/39240

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/39240

In the matter between:

ESKOM HOLDINGS SOC LTD

APPLICANT

and

IMAB ENGINEERING (PTY) LTD

1ST RESPONDENT

JYOTI STRUCTURES AFRICA

2ND RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] Applicant launched an urgent application in this court in which it sought certain interdictory relief against the respondent. The notice of motion was subsequently amended over and above the question of urgency for the following relief:

“2. Declaring that the applicant is the owner of the structural steel manufactured, sold and delivered by the first respondent, to the second respondent at the Ariadne Eros Transmission Line 2 132/400kv Multi Circuit Line (Section A) site camps (including the site camps at Cato Ridge on Sub 43 (of 11) of the farm Honingkrantz No. 945 and Stoneleigh Farm in Umzinto (“the site camps”).

3. Interdicting and restraining the first respondent from removing, or causing to be removed, any structural steel or other materials from the site camps.
4. Directing the first respondent to deliver all structural steel removed from the site camp located at Stoneleigh Farm in Umzinto to an appropriate farm to be nominated by the applicant.
5. In the alternative:

5.1. interdicting and restraining the first respondent from removing or causing to be removed, any structural steel or other materials from the site camps pending the final adjudication of an action to be instituted within 20 (twenty) days of the date of this Court Order for a final order in respect of the ownership of the structural steel”.

[2] On 27 November 2019 the matter served before Nel AJ. Nel AJ made an order as agreed between the parties with costs reserved that, “until final disposal of the application, which application will be enrolled for hearing in the special motion court, the first respondent shall not sell, destroy or encumber the steel that was and still is stored on the Umzinto Land and that forms the subject matter of the application”.

[3] This application concerns the ownership of sophisticated steel components that were manufactured by the first respondent (“IMAB”)

destined to be used in the construction of specialised transmission towers for the applicant. On 24 April 2016, the applicant (“Eskom”)

and the second respondent (“Jyoti”) concluded a written contract for the procurement of the Ariadne Eros Transmission Line 2 1324/400 KV Multi Circuit Line (“the works”). The works consisted of the construction of 105km multi circuit transmission line from the Ariadne substation to Oribi substation. The works was intended to bring electricity to areas previously not electrified as well as general improvement of the integrity of the Eskom grid in KwaZulu-Natal.

[4] The works to be delivered by Jyoti included the manufacture, transportation and erection of specialised transmission line towers.

The structural steel that is the subject of this application consisted of steel components delivered to Jyoti by IMAB to be used

in the assembly and erection of the towers. The process entailed the delivery of the steel to camps or what is called, lay down areas. Upon delivery a detailed inventory of all stock received at the working area is compiled. From the camps or lay- down areas,

depending on the tower type required, the steel is dispatched to the various tower positions. One of these camps is the Umzinto camp, situated on a farm called Stoneleigh.

- [5] The IMAB sold and delivered the structural steel to Jyoti. Eskom alleges that it paid Jyoti for the structural steel including delivery costs. It is Eskom's case that the delivery of the structural steel to Jyoti's site camps, in this case Umzinto camp, meant that the ownership title in the structural steel transferred from IMAB to Eskom. Eskom avers the site camps and lay-down areas constituted the Working Areas as defined by clause 70.1 as well as 70.2 of the contract.
- [6] Eskom further avers that, Jyoti held the structural steel on its behalf for purposes of executing the works. On 30 October 2019, so it is alleged by the Eskom, IMAB unlawfully deprived Eskom of possession of a portion of the structural steel by removing it from Jyoti's Umzinto site camp. Prior to the spoliation, Jyoti and Eskom were allegedly in peaceful and undisturbed possession of the structural steel. The removal of the structural steel is likely to delay the completion of the works under construction.
- [7] In opposing this application, IMAB, avers that it reserved ownership of the structural steel that it had sold to Jyoti, until such time as Jyoti had paid the purchase price in full as per a written contract. The material terms of the written contract between IMAB and Jyoti made provision for IMAB to manufacture the structural steel as per the detailed drawings provided for by Jyoti. Jyoti would make payment of the invoiced amount to IMAB within 30 days from the last day of the month in which the structural steel is sold and delivered to Jyoti.
- [8] In the event of Jyoti failing to make payment of any amount on due date, IMAB at its own option and without prejudice to any of its rights in law, would be entitled to retake possession of the structural steel sold and delivered or collected by Jyoti, in respect of which payment has not been made. Jyoti failed to make payment of the full purchase price of the structural steel and, as a result, Jyoti never became the owner of at least R17,386 153.58 worth of steel which remained unpaid, excluding on IMAB's version, nearly R6.1 million of interest that accrued on the arrear amounts owing by Jyoti.
- [9] Jyoti, despite IMAB performing fully in terms of their contract, regularly failed and or neglected to pay IMAB for the structural steel timeously. Attempts to make Eskom pay directly to IMAB for the structural steel fell through. On 18 October 2019, Eskom terminated

the contract it had with Jyoti. The termination certificate was signed by Ms. Lisa Brown (who deposed to the founding affidavit) on behalf of Eskom. It is significant that no reference is made to this aspect by Eskom in the founding papers in this regard.

- [10] In order to meet its contractual obligations with Eskom, Jyoti entered into two other contracts: firstly, with a Mr Payn trading as Stoneleigh Estate for the lease of a portion of land situated on Lot, 385, Umzinto (the first lease agreement); and secondly, a partly written and partly oral agreement with IMAB for the manufacturing and delivery of the structural

steel. Jyoti leased the Umzinto land as an off-site storage for the offloading and safekeeping of the structural steel. It did so pursuant to clause 4.7 of its contract with Eskom which provided that Jyoti must provide “on safe storage for materials and plant”.

- [11] IMAB contends that, the Umzinto land does not fall within the boundaries of any of the various servitudes registered in favour of Eskom on which the transmission lines were to be erected. Eskom was not a party to the first lease agreement and consequently, obtained no rights flowing from the contract of lease between Jyoti and Stoneleigh Estate.
- [12] After the Eskom contract was cancelled, Jyoti surrendered the unpaid structural steel to the value of R17, 386 153.58 it could not pay for to IMAB, as well as additional structural steel valued at approximately R20 million that Eskom allegedly failed to pay Jyoti for that steel. Consequently, possession of all the structural steel that Jyoti stored at Umzinto was surrendered to IMAB. Ownership of the structural steel that Jyoti owned was transferred to IMAB to defray the interest and damages that IMAB stood to suffer as a result of Jyoti’s breach of its contract with IMAB. IMAB embarked on a process to remove some of the steel to its site in Nigel. On 29 October 2019, IMAB concluded a second lease agreement with Mr Payn in respect of the Umzinto land on terms that were materially the same as the terms of the first lease agreement with Jyoti after the first lease agreement was cancelled.
- [13] On IMAB’s version, Eskom failed to identify which structural steel on the Umzinto land belonged to it. Importantly, Eskom failed to keep an inventory of the structural steel that supposedly belonged to it that was stored at the Umzinto land. IMAB contends that, the Umzinto land does not conform to the description of “working areas” as defined in the in the contract with Jyoti. According to clause 11.2(18) Part C1.2 of the relevant contract “working areas” are defined as “the Site and Ariadne Eros 2, 132/400kv Multi Circuit Line Section A”. In addition, “The boundaries of the Site” is in turn defined in clause 11.2(16) OF Part C1.1 of the contract as “the boundaries of the various servitudes on which the transmission lines will be erected, per the terms of the agreed servitudes”, which exclude Umzinto Land.
- [14] The first issue that stands to be determined is the question of urgency. The grounds upon which Eskom relies on in arguing for urgency are set out in paragraph 37 of the founding affidavit. Eskom contends, inter alia, that the structural steel has been removed from the working areas by IMAB without providing records of the components that have been removed. As a result, Eskom’s own inventory in that regard does not reflect the material at the working area. Furthermore, that the removal of the structural steel is likely to delay the completion of the works, which have at that point already been significantly delayed. Eskom also contends that it will suffer patrimonial damages consequent upon procuring the same structural steel components that it has already paid for.

- [15] Clause 70.2 of the contract between Eskom and Jyoti read thus: “Whatever title [Jyoti] has to Plant and Materials passes to [Eskom] if it has been brought within the Working Areas. The title to Plant and Materials passes back to [Jyoti] if it is removed from the Working Areas with the Project Manager’s permission”. However, in argument before this court, counsel for Eskom made a crucial concession. This is to the effect that the Umzinto land was not the working area as contemplated in the contract with Jyoti.
- [16] Another crucial concession made by Eskom was that there were suitable relief open to Eskom if the application was heard in the ordinary course. This to my mind was, in effect, the death knell on the question of urgency. As at the time that the interim relief was granted by Nel AJ, the proverbial horse has already bolted.
- [17] Significantly, on its own version, Eskom had cancelled its contract with Jyoti and thus disrupted the works being undertaken. It is accordingly clear that the absence of a contractor to complete the works is the cause of the delay and not the conduct by IMAB. There is accordingly no basis for this application to have been enrolled on an urgent basis with the time periods for delivering affidavits truncated to the extent detailed in the notice of motion.
- [18] It remains to deal with whether Eskom is entitled to the relief it seeks on the merits regarding ownership of the structural steel. Counsel for Eskom contended that if Eskom is the owner, IMAB is in unlawful possession of the steel which ought to be returned. The flipside being that if Eskom is not the owner or has no legitimate defence to IMAB’s claim for ownership, Eskom’s application for either final or interim relief must therefore fail.
- [19] As to the merits, Eskom seeks a declaratory order that it is the owner of the steel. Accordingly, not only must Eskom make this allegation that it is the owner of the steel, it is obliged to prove it by way of acceptable evidence. Eskom could only acquire ownership from Jyoti, if Jyoti was the owner or had the right to transfer ownership of the steel.
- [20] Relevant in this regard is clause 71.1 of the contract Between Eskom and Jyoti which reads as follows: “71.1 The Supervisor marks Equipment, Plant and Materials which are outside the working areas if (a) this contract identifies them for payment and (b) the contractor has prepared them for marking as the works information requires”. In this case, Eskom failed to demonstrate that the structural steel kept at Umzinto land was marked by the supervisor as required for identification purposes. The Umzinto land was used as a storage base but not for the construction and erection of the towers.
- [21] In our law, it is a well-established principle that no one can transfer more rights than he/she has.[1] Applied to this case it means that Jyoti had no rights to ownership of the unpaid steel property and, in the absence of the owner’s

authority, in this case IMAB, Jyoti could not have transferred ownership to Eskom[2]. This to my mind disposes of this issue in favour of IMAB.

[22] The remedy sought by Eskom is a final interdict in its nature and not a claim for damages. The requirements for a final interdict are usually stated as (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy[3]. In order to succeed in obtaining the remedy of an interdict against a third party, in this case IMAB, Eskom therefore has to show:

- (a) that the contractual right it obtained from Jyoti protects an interest that is also enforceable against a third party outside the contract;
- (b) that the third party, IMAB, unlawfully infringed or threatened to infringe that right; and (c) that there was no adequate alternative remedy.

[23] In the instant case, there is no doubt that there is a material dispute of fact regarding ownership of the structural steel. In *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*[4], Holmes JA held: 'Our law jealousy protects the right of ownership and the correlative right of the owner in regard to his

property, unless, of course, the possessor has some enforceable right against the owner'. In this case, Eskom's major hurdle to overcome is proof of its ownership of the steel material which was in the possession of Jyoti. IMAB has demonstrated that its rights over the steel property were expressly reserved until Jyoti fulfils its payment obligations. Eskom has further failed to establish that it did receive delivery of the steel material. That being the case, the owners of property are free to do with it what they wish as they have done by removing some of it to Nigel.

[24] As regards estoppel by conduct, in *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*[5] it was held that: 'Our law is that a person may be bound by a representation constituted by conduct if the representor should

reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so Nevertheless if a representation by conduct is plainly ambiguous, the representee would not be acting reasonably if he chose to rely on one of the possible meanings without making further enquiries to clarify the position.'

[25] In *Concor* (above), a wholesaler sold paving stones to a builder which was intended for the paving of the homeowner's home. The wholesaler

had included in the contract with the builder a reservation of ownership clause, until payment. Initially, counsel for Eskom sought

to rely on this case as authority in estopping IMAB from asserting ownership over the steel as it was meant for Eskom. This was not strenuously argued before me and appears to have been abandoned. In any event, reliance on *Concor* is, in my view, misplaced as the facts are clearly distinguishable regarding the nature of the merchandise sold.

[26] In any event, our courts have stated repeatedly that an applicant who seeks final relief on notice of motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers[6]. In *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* [7] at paragraph 13 Heher JA stated:

"A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed".

[27] In the instant case, I am satisfied that, IMAB has in its affidavit seriously and unambiguously addressed the question of ownership of the steel property in very clear terms. Eskom should have anticipated this. Consequently, Eskom failed to prove that ownership of the steel was transferred to it or that it acquired ownership of any of the steel. It also failed to allege or prove that it has any right of access to store any steel property on the Umzinto land as the lease agreement is between IMAB and the property owner. The application was clearly ill-conceived as it is without merit and stands to be dismissed. I was urged in argument to consider the question of costs, on a punitive scale. I do not think that such a consideration is warranted by the merits of the case.

[28] Order

The application is dismissed with costs including those costs previously reserved.

T P MUDAU

[Judge of the High Court,

Gauteng Local Division,

Johannesburg]

Date of Hearing: 3 February 2020

Date of Judgment: 27 February 2020

APPEARANCES

For the Appellant: Adv. A Govender

Instructed by: Gildenhuys Malatji Inc

012 428 8673

For the Respondent: Adv. J Vorster

Instructed by: Van Schalkwyk Attorneys

011 998 7000

- [1] This is the common law principle also known as “nemo dat qui non habet”, which has been described as the “golden rule” of the law of property. See e.g. Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman's the Law of Property 73.
- [2] See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* (2011 (2) SA 508 (SCA); [2011] 3 All SA 173 (SCA) at para 26).
- [3] See *Setlogelo v Setlogelo* 1914 AD 221 at 227.
- [4] 1976
- (1) SA 441 (A) at 452A.
- [5] 2004
- (6) SA 491 (SCA) at 495A-C and 496D-E.
- [6] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634E – 635C.
- [7]
- [2008] ZASCA 6; 2008
- (3) SA 371 (SCA).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAGPJHC/2020/59.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/eskom-holdings-v-imab-engineering-pty-ltd-and-others-unknown-topic-agpjhc-2020>

Prepared on 10 October 2026 · Esheria