

SOUTH AFRICA / JUDGMENT

Hazyview Associated Wholesalers CC and Another v Twin City Development (Pty) Ltd (18951/01) [2005] ZAGPHC 51 (10 May 2005)

[2005] ZAGPHC 51

COURT
High Courts - Gauteng

BEFORE
W L Seriti

CASE / FILE NUMBER
18951/01

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

Source record

/BBIN THE HIGH COURT OF SOUTH AFRICA (TRANSVAAL PROVINCIAL DIVISION) DATE 10 JUNE 2005 CASE NO: 18951/2001 IN THE MATTER BETWEEN: HAZYVIEW ASSOCIATED WHOLESALERS CC FIRST PLAINTIFF IZAK FREDERIK JACOBUS DU PLESSIS SECOND PLAINTIFF AND TWIN CITY DEVELOPMENT (PTY) LTD DEFENDANT JUDGMENT SERITI, J The plaintiffs issued summons against the defendant claiming payment of certain amount of money and rendering of a full account for the period of duration of the lease agreement. According to the particulars of claim on or about 1 October 1999, the plaintiffs and defendant entered into a lease agreement relating to certain premises situated at Hazyview, which premises the defendant leased to the first plaintiff. First plaintiff was represented by the second plaintiff during the entering of the lease agreement and the defendant was represented by Mr. Arnold Pistorius. The first plaintiff was running and or conducting supermarket business in the leased premises. The defendant used to send certain accounts, including an electricity account to the first plaintiff which accounts were paid by the first plaintiff. A dispute arose between the parties relating to the electricity account as a result of which plaintiffs issued summons against the defendant alleging that they were overcharged by the defendant. During a pre-trial conference held herein, the parties agreed that: 1. Eskom was the supplier of electricity to the defendant; who in turn supplied its tenants with the said electricity; 2. Regulation 11(2) issued in terms of the Electricity Act 41 of 1987 is applicable to the provision of electricity by defendant to the plaintiff. 3. Each party will make calculations as to what is due to the plaintiff based on its standpoint or viewpoint, and the issue of the correct approach to make the necessary calculations will be determined by the court. 4. The plaintiff's claims for other overpayments for services rendered to the plaintiff by the defendant do not form part of the

dispute to be resolved by the court in these proceedings. The parties further agreed that the following issues are in dispute: 1. The question of whether the defendant is entitled to recover from the plaintiff as part of the use of electricity the capital costs, in particular the costs of a transformer which the defendant bought from Eskom. 2. If the defendant is entitled to recover the said capital costs from the plaintiff what capital costs is the defendant entitled to recover? 3. The questions whether the defendant in the calculations of rental tariff per square metre which defendant send to the plaintiff, the capital costs of the transformer defendant bought from Eskom was taken into account or not, and if not, can the defendant recover such costs from the plaintiff. 4. The meaning of the contract in regard to the costs for the provision or supply of electricity use the defendant is entitled to recover from the plaintiff. 5. The amount, if any, the defendant owes the plaintiff relating to the use of electricity. In the opening address, counsel for the plaintiff advised the court, inter alia, that as far as the use of electricity is concerned, the defendant's view was that it is entitled to use the tariff of the Local Transitional Council, which tariff was used by the defendant, to charge the plaintiff for electricity use. The plaintiffs have, at all relevant times alleged that the correct tariff to be utilised for electricity charges is Eskom's tariff and not the Local Transitional Council's one. At a later stage, the defendant abandoned its view and conceded that the correct tariff to be utilised is Eskom's tariff. Plaintiff alleged in the pleadings that defendant added above the costs of use of electricity, other costs to the account that the defendant was sending to the plaintiffs. This allegations was initially denied by the defendant, but later, in an amended plea, the said denial was abandoned, but defendant relied on clause 7 of the Lease Agreement to charge the plaintiff the said additional costs. In the said amended plea, the defendant added that it was an implied term of the lease agreement that costs relating to the capital costs must be recovered by the defendant and that it was a trade usage that such costs must be recovered above the costs of the electricity actually utilized by the defendant and that the recovery of the said capital costs is not in contravention of the Electricity Act 41 of 1987 and regulations promulgated thereunder. The additional costs charged by the defendant are for recovery of the capital costs paid by the defendant to Eskom for the supply of electricity to the plaintiff. For the purpose of this judgment, it is not necessary to state all the areas of dispute between the parties. Apparently, the defendant has paid an amount of R1 262 419-00 to Eskom in order for Eskom to supply electricity to the shopping complex owned by the defendant, at which shopping complex the plaintiff had leased premises. During the periods November 1999 to April 2003, the first plaintiff paid an amount of R2 171 012-13 to the defendant for the use of electricity. Plaintiffs allege that their lease agreement started in October 1999 and the amount they paid for electricity for the said month should be taken into account. The first witness to testify is Mr. Du Plessis, the second plaintiff in this matter. He testified that he represented the first plaintiff when the lease agreement was

entered into and he signed the said agreement for and on behalf of the lessee, the first plaintiff. The premises that the first plaintiff leased from the defendant were used to conduct a retail supermarket business trading as Spar supermarket. Before starting the business of the first plaintiff he was employed by Spar Lowveld, which was distributing products to all Spar stores in that area. He was the Managing Director and on many occasions he concluded lease contracts for Spar Group or their franchisees. As the Managing Director distribution centre, if any of the Spar stores have problems they use to come to him for assistance. The plaintiff occupied the leased premises of the defendant from 1 October 1999. They had a problem with electricity accounts they received from the defendant and he immediately discussed the said problem with the defendant. The premises that plaintiff occupied, were occupied prior to plaintiff occupying same, by a franchisee of Spar Group, who had similar problems with the electricity accounts the said franchisee was receiving from the defendant. As Managing Director, distributions of Spar, he attempted to resolve the said problem with the defendant without success. At that time, he spoke to Mr Pistorius who informed him (the witness) that it is not his business and the franchisee should sort out his problems. Eskom was sending electricity accounts to the defendant, who was Eskom's customer. On 25 July 2000 he wrote a letter to the defendant making certain enquiries about the electricity account plaintiff was receiving from the defendant. On 3 August 2000 he had a meeting with representatives of the defendant where several issues were discussed, including the electricity account. On 10 August 2000 he wrote the defendant a letter wherein the discussions of 3 August 2000 were recorded. As far as the electricity account is concerned, the following was recorded: "3) Electricity Account You will provide us with detailed account for electricity charged from July 1999, reflecting exactly how it is calculated and at what rate. I put it on record that we are of the opinion that our electricity accounts are substantially overstated and that if proven so, Hazyview Associated Retailers CC will expect a credit, with interest, effective from first day of trading." In its reply dated 14 August 2000, when dealing with the problem of the electricity account, the defendant said: "3. Elektriesiteitsrekening Ons neem kennis van u opinie aangaande die oorverhaling van elektriesiteitsverbruik op u rekening. Ons aanvaar u regstellingsvoorwaarde indien u stelling korrek is. Ons behou egter die reg voor dat indien ons sedert 1/5/1995 elektriesiteit van u onderverhaal het, u die bedrag met rente aan ons sal vergoed." On 26 February 2001 attorney acting for the first plaintiff wrote a letter to the defendant requesting, inter alia, detailed electricity accounts. In a letter dated 9 March 2001 the defendant sent to plaintiff's attorneys details of the electricity account, and stated that their tariffs are based on a formula utilised by the Local Transitional Council. The witness further testified that the allegations that the defendant is entitled to recoup the capital costs relating to the provisions of electricity incurred by the defendant, he heard same for the first time during the pre-trial conference. The witness referred to an account, which was in the bundle of documents, dated 15 October 1999 and said that the said account makes no mention of the fact that defendant is charging the plaintiff for any capital expenditures. In fact, the said account, as far as electricity is concerned, refers only to electricity consumptions. The witness referred to clauses 4 and 7 of the Lease Agreement, and the said clauses

read as follows:“4(a)(12)

In addition to the rental referred to above the Tenant shall pay to the landlord

a rental in respect of the air conditioning installed by the landlord at its costs as follows: for the period 1 October 1999 to 30 April 2000 R7076,00 pm.7.LOCAL AUTHORITY AND OTHER

CHARGES:7.1The Tenant shall pay for all electricity and water consumed by it in the premises in accordance with separate meters. The Tenant shall

be liable for the charge levied in the rending of such metres, if any.7.2The Tenant shall pay for all charges for rubbish removal, sanitary and any other services required or obtained by it for the premises”and said that at time of signing of the said Lease Agreement he was not told about paying

foranycapital expenditure, except for the installation of air conditioning mentioned in paragraph 4(a)(12) above.If he was told, he would not have signed the said agreement, because in practice,

capital expenditure is recovered through rentals and not through inflating the electricity accounts.”If the question of capital expenditure relating to the supply of electricity was discussed with him, he would have opted to pay same

over a period of 25 years and not 5 years as suggested by the defendant.Furthermore, the development in question was erected during 1995. If the defendant was entitled to recoup the capital costs relating

to the provision of electricity over a 5 year period, the defendant would have been entitled to send out or charge tenants inflated

electricity accounts only up to the year 2000, and the plaintiff would have been charged the inflated electricity account only for

1 year, that is from October 1999 up to October 2000 and not from October 1999 up to April 2003.Under cross-examination, he testified that his first involvement with the premises of the defendant was during July 1999.At the premises of the defendant in question, each store had its own metre and the

said metres were read every month for purposes of compiling accounts for different tenants.He queried the first plaintiff’s electricity account the very first month they received the said account.He was referred to Regulations 11 promulgated in terms of the Electricity Act and

he said that Eskom was the provider of electricity and not the local authority and consequently, thedefendantcannot make a profit on the re-sale of electricity provided by Eskom.Regulations 11(1) and (2) referred to above, reads as follows:(1)Any person who resells electricity supplied to him by an undertaker shall, in respect of every purchaser, cause such electricity to

be measured by a sub metre of a type which has been approved by the South African Bureau of Standards;(2)The rate at which and the conditions of sale under which electricity is thuscharged, shall not be less favourable to the purchaser than those that would have been payable and applicable had the purchaser been supplied

directly with electricity by the undertaker who is supplying the seller with electricity and every seller shall, at the request of any such purchaser furnish him with such information as may be necessary to enable him to determine whether the electricity accounts

received by him are correct.”He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with

lease agreements for about 20 years and capital expenditure, including network expenditure is recovered through rentals.An offer of R71 497,82 was made to the plaintiffs and the witness

received by him are correct.”He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with

lease agreements for about 20 years and capital expenditure, including network expenditure is recovered through rentals.An offer of R71 497,82 was made to the plaintiffs and the witness

received by him are correct.”He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with

lease agreements for about 20 years and capital expenditure, including network expenditure is recovered through rentals.An offer of R71 497,82 was made to the plaintiffs and the witness

received by him are correct.”He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with

lease agreements for about 20 years and capital expenditure, including network expenditure is recovered through rentals.An offer of R71 497,82 was made to the plaintiffs and the witness

received by him are correct.”He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with

received by him are correct.”He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with

rejected the said offer. He testified that the plaintiff will accept an amount which is the difference between what they paid for electricity charges and an amount calculated on the Eskom's tariff. Under re-examinations the witness said that he has seen various calculations emanating from the defendant over a period of time, and the one containing the offer made by the defendant during his cross-examinations, he saw same for the first time in the morning before he testified. He is prepared to accept an amount of R724 416,00, plus an amount due to the plaintiff for the October 1999 period plus interest. The next witness to testify is Mr. C M Pienaar. He testified that he obtained a BSc Engineering degree from Pretoria University. He became a registered professional Electrical Engineer after he has completed his 3 year internship. After he qualified, he worked for three years with professional engineers and presently, he is running his own businesses. He has a business that deals with reading of electricity metres in commercial buildings, calculate consumption of electricity, produce accounts for tenants, send out the said accounts and collect money from the said tenants. His second business is a consulting Engineering business. He designs electrical installations for commercial buildings and townships and produce documents for contractors to tender. He further testified that when designing electrical installations, they take into account where the electricity will be obtained and negotiate with the said suppliers of electricity and calculate the costs of the supply of electricity. Witness further said that he has been involved in the metre reading of commercial buildings and compiling accounts for tenants. He further said when you compile the said accounts you do not add, to the electricity account, any capital costs. Capital expenditure is recovered through rentals. He has never included, in an electricity account, any capital expenditure. He met Mr Pistorius about three years ago. Mr Pistorius phoned him and asked him how does one prepare or which tariff should one use when preparing an electricity account. Mr De Kock, was his former partner based at their Polokwane office. The approach of Mr De Kock on how to charge for electricity consumption was the same as his approach. Later Mr De Kock, who was appointed by defendant as an expert witness told him that he is no longer involved in the case. He further testified that defendant's calculations relating to how much defendant over-charged plaintiff with changed several times during exchange of pleadings up until the commencement of the trial. According to his knowledge, repayment of capital expenditure to Eskom is calculated on a cycle of five years period. Plaintiff, the business which he was conducting at the premises of the defendant could not obtain electricity directly from Eskom. Method adopted by the defendant to compile the electricity account of the plaintiff is incorrect. Normally, the repayment period of capital expenditure to Eskom is 25 years. Eskom, normally recovers capital expenditure by way of monthly rentals, which they charge over a certain period. The transformers, which Eskom supplies have a life-span of 15-20 years. The capital cost which relates to the plaintiff incurred by defendant involves transformer construction costs, costs relating to power line, etc. In this case, the defendant obtained electrical installations from Eskom and there is no reason why defendant should not have repaid the said capital expenditure

over a period of 25 years. The "Lease Agreement" between plaintiff and defendant refers only to energy consumption and there is no reference to capital expenditure relating to installations of electrical equipment. Under cross-examination he was referred to the accounts that defendant send to plaintiff relating to electricity. The said account, at relevant portions reads as follows: Electricity Consumption
KWH
21 333,56KVA
22 304,68R43 638,24 and the witness said that he expected to see the metre reading and the tariff utilised. He further testified that the tariff used by the defendant is the Local Transitional Council's tariff and not Eskom's tariff. The tariff that should have been utilised by the defendant is the Eskom's tariff. He was handed certain calculations made by Mr De Kock, the former defendant's expert and he agreed with the said calculations. He was later given a second set of calculations about two weeks ago and he disagreed with the said calculations. The initial calculations made by Mr De Kock he agreed with indicated that defendant overcharged the plaintiff with an amount of R724 416,34. The later calculations, which he disagreed with, included the charges by defendant for the recovery of capital expenditure over a period of five years. Plaintiff would not have been able to obtain electricity directly from Eskom. If he was able to obtain such electricity, he would have incurred the capital expenditure relating to the installations of network and related charges charged by Eskom for such installations. Witness further testified he has been involved in the reading of metres in other commercial buildings where electricity was supplied directly by Eskom. When preparing the electricity accounts, they were using the Eskom tariffs. Not all Local Authority charges for the recovery of capital expenditure in their electricity accounts. Eskom has different categories of tariffs and different areas have also different categories of tariffs. As Eskom has different tariffs, a customer who obtains electricity directly from Eskom can negotiate a tariff to be applied. Under re-examination, witness further testified about a bill of quantities which is prepared before the commencement of a building project so that a developer should know in advance, the capital expenditure required. Same applies to all electrical components. Plaintiffs closed their case. The first witness to testify on behalf of the defendant is Mr. Pistorius. He testified that he is the Managing Director of the defendant and he has occupied the said position from 1984. The core business of the defendant is to develop shopping centres in rural areas particularly in Mpumalanga areas. They have presently developed about 10 shopping complexes. Their shopping complexes have different tenants who occupy different sizes of space in the said complexes. In other complexes, they supply electricity to their tenants. The shopping complex in question in this matter was developed in 1995 and at the beginning, they were supplying their tenants with water sewerage systems and electricity. At the moment, they are still supplying their tenants with electricity. They have about 150 tenants at the said complex and the first plaintiff was their anchor tenant. He believes that when the town grows, the local authority will take over the responsibility

of supplying electricity to the tenants. The electricity that they supply to their tenants, defendant obtains same directly from Eskom. Prior to the plaintiff occupying shop space in their building, there was another tenant who occupied the said shop space. Defendant later discovered that they were under claiming for electricity from the said previous tenant. He spoke to several experts about the correct tariff to be utilised when compiling electricity accounts for their tenants. He later received tariffs from Eskom which he could understand, and he then decided that they should utilise the Local Authority tariffs when compiling electricity accounts. At all their complexes, they have a person who reads metres, which readings they utilise for compiling electricity accounts. At some stage, Mr Du Plessis, the previous plaintiff's witness, approached him, before the plaintiff occupies the space in their building, on behalf of the previous occupier of shop space occupied by the first plaintiff, complaining that the landlords at other buildings were over-charging for electricity consumption and the defendant is not over-charging. After the said discussion, he then decided to utilise the tariff of the Local Transitional Council when preparing electricity accounts. He came to know about Regulations 11 of the Regulations promulgated in terms of the Electricity Act mentioned above only at the beginning of this trial. They bought the necessary hardware, like transformers, metres, switches, etc. to enable Eskom to supply electricity to the shopping complex in question, although they had an option of renting the said hardware from Eskom. Eskom does not charge them monthly rental for equipment as they bought all their electrical installation and network equipment. Under cross-examination, he said he adopted the stance that capital expenditure relating to the installation of electrical equipment should be included in the electricity when he was so advised. When they send electricity accounts, at the beginning, the question of recovery of electrical equipment capital expenditure never crossed his mind. He represented the defendant when the Lease Agreement was signed with the first plaintiff. At time of signing the said Lease Agreement, he did not have in mind the capital expenditure. Questions of including, in the electricity account, recovery of capital expenditure was brought to his attention at a later stage. At some stage, there was calculations which suggested that the amount owed to the first plaintiff as a result of over-charging was in the vicinity of R500 000,00. Later, Mr Visagie made other calculations which suggested a much lower figure. The Lease Agreement was prepared by the defendant. At some stage he told his staff to utilise the tariff of the Local Transitional Authority because they were not certain which tariff should be utilised. They changed the tariff they were using because they thought they were under-recovering their capital expenditure. At the beginning, they utilised the Eskom tariff to compile electricity accounts and they suffered a loss and in order to avoid suffering the said loss, they utilised the tariff of the Local Transitional Council. The bill of quantities that they prepared before the development was build, contained

the prices of the electrical equipment, and at any stage, the Local Authority expropriates the electrical hardware in order to supply electricity to the tenants, the defendant will be compensated for the said capital expenditure. They recover their capital expenditure and make profit by charging the tenants rental for space that a tenant occupies in the shopping complex. The witness further testified that he gave instructions to their project manager to compile a list of costs of the infrastructure equipment which is necessary to supply electricity to the complex which would normally be supplied by Eskom for which they paid cash. The said costs came to a figure of R1 262 419,00. The reason for requiring the above mentioned information was that, in case the Local Authority takes over the said equipment and supply tenants with electricity, defendant should know how much compensation the defendant should receive from the Local Authority. He further said that the list compiled by their Project manager contains items they did not buy from Eskom. They bought the said items from other supplies. Items they obtained from Eskom came to a total figure of R176 500,00. He further testified that the defendant's case is that they should deduct from the amount that is due to the plaintiff the total capital expenditure relating to supply of electricity that plaintiff would have incurred if plaintiff was obtaining electricity directly from Eskom. He instructed their Project Manager to compile a list and costs of their capital expenditure items necessary to obtain electricity from Eskom after Mr. Visagie, their expert witness requested the said information. He conceded that at the time they were using the Local Authority's tariff they were over-charging their tenants and they have not repaid the said tenants. From the year 2003 they started using the Eskom's tariffs which they are still utilising to date. At some stage, before the involvement of Mr Visagie, he was told by one expert that defendant has over-charged the plaintiff with an amount of R5000 000,00. He also consulted another expert, Mr Van der Westhuizen who gave defendant certain advice, and defendant rejected the said advice. Defendant also consulted another expert, Mr De Kock, before Mr Visagie was involved in the matter. The said Mr De Kock advised the defendant that defendant has over-charged the plaintiff with an amount of about R700 000,00 and the defendant rejected the said advice, as Mr De Kock used a wrong tariff. When he changed from Eskom's tariffs to Local Authority's tariff, he did not seek any advice. On a question of the Court, he said that the life-span of the electrical equipment necessary for the provision of electricity that defendant obtains from Eskom is 10-15 years. Under re-examination he said that defendant had to replace, at its costs, one of the transformers which was faulty after 7-8 years. The next witness to testify is Mr Francois Visagie. He testified that he is a professional technologist registered by the Engineering Council of SA. He has obtained a Master's Diploma in Technology from the former Vaal Technicon which qualification he obtained in 1989. After qualifying he was employed by Eskom until May 2001 when he left Eskom to be a director of a company called Enercon (Pty) Ltd. The latter company is registered by Eskom as energy service company. Primary functions of the said company are to assist electricity consumers in the application and management of electricity usage. Service entails all aspects of energy usage,

e.g. design, maintenance and energy efficiency. Whilst employment by Eskom, at some stage he was appointed Regional Sales and Marketing Manager, from 1997 – 2001. There were several departments falling under him, namely sales, pricing, marketing and advertising. At the complex of the defendant in question, Eskom was supplying electricity up to boundary of the shopping complex. Tariff utilised by Eskom was the Night Save Tariff. Eskom's policy from 1995 to date is that it does not supply electricity to tenants and they do not have tariff for tenants. At the relevant time, defendant was making a loss and to him it means that defendant was applying the tariff incorrectly. The Lease Agreement between first plaintiff and defendant does not state which tariff should be utilised. He further testified that tariffs of local authorities enable them to recover all costs, including capital expenditure, maintenance, depreciation, bad debts and subsidies to other departments. Consumers of electricity repay the capital costs of a local authority. In his view, the method to be applied, to resolve the dispute in this case is what will plaintiff would have paid had plaintiff obtained electricity from Eskom? Accounts received by defendant from Eskom consist of all necessary components except rental for transformers as same was paid for in cash by defendant upfront. The plaintiff's expert alleges that charges that defendant can raise against the first plaintiff is rates, which is only one component of a tariff. Principle adopted by the plaintiffs in this case is to single out, from Eskom's account demand charge and energy charge and they ignored other components of the Eskom's tariffs. In calculating the plaintiff's account one needs to take into account all costs incurred in delivering electricity to the first plaintiff. After listening to the evidence that was tendered in court, he made other calculations and he came to certain conclusion, the results of which is that defendant over-charged the first plaintiff with an amount of R71 497-82, and said that the method he used to do calculations for energy consumption is well known in the industry. First plaintiff must contribute to the costs of the electricity network, and the said costs must be taken into account. He further testified that at some point he approached National Electricity Regulator for guidance because the parties herein were adopting different approaches. Under cross-examination he said mandate he received from defendant was to evaluate the situation and determine if first plaintiff was over-charged and if so, by how much. He was given a lot of documents but he was not given reports or opinions of previous experts utilised by defendant. He does not understand the stance of the plaintiff's in this case as same changes as the case progresses. He further testified that he was never told to take stance of the plaintiffs in this case into account nor given any figures. He further testified that if the landlord decides to extend the complex and that requires upgrading of network, existing tenants must finance the said upgrading as they were going to enjoy the benefits of an upgraded network. Prior to his giving advice to the defendant, he was aware that an offer of R500 000,00 was made by the defendant to the plaintiff, although he did not investigate how the said figure was arrived at. Initially, he thought that the plaintiff's case was that Eskom's tariff should be applied, but later plaintiff changed their stance and said that only Eskom's rates should be applied. His view is

that Eskom's tariffs should be applied. He further testified that he wrote a letter to National Electricity Regulator ("NER") because Mr Pistorius, the Managing Director of the defendant had received different opinions from different experts relating to the dispute between plaintiff and defendant. At the time he wrote letter to NER, he had already adopted a certain stance and he wanted to check his stance with the NER. He has done other calculations which assumed that the electricity network capital expenditure will be repaid to the defendant over 25 years and the results thereof is that defendant is being owed over R1 million. Plaintiffs' case is that when compiling electricity accounts, defendant should use Eskom's rates, and defendant's position is that you should utilise Eskom's tariffs, which tariff includes all other components as detailed in Eskom's tariffs. At the beginning, the defendant utilised Eskom's tariffs. He was referred to certain calculations which are in the bundle of documents. The said calculations were prepared by Mr Van der Westhuizen, the first expert to be utilised by the defendant. Said calculations were based, on, inter alia, Eskom's 25 years factor of 1,276% per month and the additions of new shops to the complex made in October 2000 were taken into account. Witness said that he saw the said calculations for the first time recently and he does not know why a factor of 25 years was utilised. The next witness to testify on behalf of the defendant is Mr Peter Buys. He testified that he is a Senior Customer Education Officer at National Electricity Regulator. He testified that NER received a letter of enquiry from the defendant. Enquiry related to the current dispute between plaintiffs and the defendant. NER wrote an opinion relating to the dispute between the parties after NER held a meeting with Mr Visagie. At the meeting with Mr Visagie, they requested more information from Mr Visagie. Defendant closed its case. In the Heads of Arguments before court, the defendants counsel referred the court to the plaintiff's Particulars of Claim. The submission by the defendant's Counsel was that in the Particulars of Claim, plaintiffs alleged that the defendant with respect to the costs pertaining to the plaintiff's electricity consumption, defendant added additional costs over and above the metered consumption of the said electricity and the plaintiffs have failed to adduce evidence sustaining the above allegation. The above-mentioned submission by the defendant's counsel cannot be sustained. The dispute between the parties and the question to be determined by the court are clearly set out in the pre-trial minute portion of which is set out at the beginning of this judgment. The two witnesses, namely Messrs Du Plessis and Pienaar, who testified on behalf of the plaintiffs, I found them to be good witnesses. They gave their evidence in clear and satisfactory manner. They answered, without hesitation all questions put to them and they did not contradict themselves or each other. On the other hand, the same cannot be said about the first two defendant's witnesses. They were both very hesitant when answering questions and at times answers they gave to questions were not logical. Mr Visagie, the defendant's expert witness, gave his evidence in a most unsatisfactory

manner e.g. he first testified that, when given instructions by the defendant, he received a single document by means of an electronic transmission and later said that he in fact received documents and not a single document. He further testified that plaintiffs' keeps on changing their stance as far as the dispute is concerned, and the stance adopted by plaintiffs in court he heard same for the first time when the trial began. After lengthy cross-examination it turned out he all along understood the plaintiffs' stance and same has never changed. He also tried to change his version as the cross-examinations continues, e.g. about whether he had had a meeting with Mr Pienaar or not. He initially said that such a meeting did not take place, and he later conceded that he has held discussions with Mr Pienaar but said that same cannot be called a meeting because the said discussions did not yield any fruits. Mr. Visagie, further said that if any of assumptions he made to do his calculations was incorrect, the results of his calculations will still be correct, which answer can obviously not be correct. Lastly, on the question of purpose of the meeting he held with members of NER, his evidence was contradicted by Mr Buys, who was called by the defendant as an independent and uninterested witness. As stated earlier the pre-trial minutes articulated the dispute between the parties which dispute requires determination by the court. The said dispute which the court should adjudicate is formulated in the pre-trial minute as follows: "Die volgende aspekte bly in dispuut en staan bereg te word: 6. Die vraag of die verweerder geregtig is om sogenaamde kapitaalkostes (meer in besonder die kostes van 'n transformator wat die verweerder vanaf Eskom aangekoop het vanaf die eiser te verhaal as deel van sy rekening vir kraggebruik? 7. Indien die verweerder wel geregtig is om die voormelde kapitaalkostes van die eiser te verhaal, wat die bedrag daarvan moet wees?" As stated earlier, the parties herein entered into a Lease Agreement on 1 October 1999. Paragraph 4(a)(11) thereof, deals with rental payable by the first plaintiff to the defendant and paragraph 4(a)(12) thereof deals with rental payable by the first plaintiff for the air conditioning. The said Lease Agreement was prepared by the defendant or its representatives. The above-mentioned Lease Agreement made specific reference to the question of first plaintiff paying rental for the air conditioning separately from rental of shop space and the plaintiff was made aware of the said fact when the Lease Agreement was signed. In general, a landlord or developer like the defendant, charges tenants rentals in order to recover capital expenditure. If a tenant is expected to pay any rental for the recovery of another specific capital expenditure specific provision will be provided for in the Lease Agreement as it appears in paragraph 4(a)(12) of the Lease Agreement under consideration. Paragraph 7.1 of the Lease Agreement quoted above makes provisions for first plaintiff to pay for electricity consumed by first plaintiff on the leased premises. Same makes no provision for the defendant to recover capital costs relating to the network and equipment necessary for the defendant to supply first plaintiff with electricity when compiling an account for electricity, but only electricity consumed by the tenant should be considered. Mr Pistorius, the managing Director of the defendant testified that when the Lease Agreement was entered into, the question of recovery of the capital costs relating to the provision of electricity to the first plaintiff never crossed his mind. Besides that, the provisions of the said paragraph 7.1 of the Lease Agreement are clear and

unambiguous and same could not have been misinterpreted by any of the parties at the time the agreement was entered into. In the said paragraph 7.1 of the Lease Agreement there is no mention of the defendant recovering capital expenditure relating to the provision of electricity to the plaintiff. The next question is after the determination of electricity consumed by the first plaintiff, how was the defendant supposed to bill the first plaintiff. It is common cause that the provider of electricity in this case was Eskom. In order to determine the amount payable by the first plaintiff for electricity consumed, a particular rate will have to be utilised. Regulation 11(ii) of Regulations promulgated in terms of the Electricity Act quoted above provides that the rate to be utilised in such a case, should not be more onerous than the rate utilised by the provider of electricity, in this case, Eskom. Eskom's tariffs have various components. When applying clause 7.1 of the Lease Agreement the component which comes into play is the rate and not other components of the said tariffs. In fact, there is evidence in this case to the effect that after the completion of the development or shopping complex in question, the defendant utilised the Eskom rates to compile electricity accounts for its tenants, which procedure or method, in my view, was the correct procedure. Eskom was the provider of electricity at its rates had to be utilised. There is evidence also to the effect that after the defendant has realised that it is making losses as far as the provisions of electricity is concerned, defendant changed its procedures of compiling electricity account. Defendant abandoned the Eskom rates and started using the Local Transitional Councils' tariff. Mr Visagie testified that the Local Transitional Councils' tariff, makes provision inter alia for subsidising other departments, subsidising bad debts and social responsibility programmes. The said considerations cannot apply in the case of a developer and its tenants. Furthermore, a local Transitional Council, has no other way of recovering its capital expenditure relating to the provision of electricity, other than making provision for same in the tariff. This is so because consumers of its electricity are not its tenants from whom they can recover their capital expenditure through rentals. The defendant, by utilising the Local Transitional Councils' tariff was over charging the tenants from whom it was also recovering capital expenditure through rentals. Capital expenditure, generally must be recovered through rentals, or through a specific clause in the Lease Agreement, subject to the applicable legislation and regulations. The defendant was not entitled to recover its capital costs relating to the network and equipment for the provisions of electricity to the first plaintiff by including the recovery thereof in the electricity account nor utilising the Local Transitional Council's tariff. In my view, the plaintiffs have succeeded to prove their case against the defendant. The court therefore, makes the following order: Defendant is ordered to pay the plaintiffs: (1) An amount of R724 416,34; (2) Interest on each overpayment, from date of the said overpayment at the rate of 15,5%; (3) Costs of suite, which costs will include costs of preparations for and attendance of the pre-trial conference.

W L SERITI
JUDGE OF THE HIGH COURT
FOR THE APPLICANT: ADV TALL
POTGIETER
INSTRUCTED BY: VAN ZYL, LE ROUX & HURTER
FOR THE RESPONDENT: ADV JLM

SNIJMAN SCINSTRUCTED BY:E Y STUART INCDATE OF JUDGMENT:10 MAY 2005HEARD ON:14
APRIL 2005

/BB

IN THE HIGH COURT OF
SOUTH AFRICA

(
TRANSCVAAL
PROVINCIAL DIVISION)DATE
10 JUNE 2005
CASE NO:18951/2001

CASE NO: 18951/2001
IN THE MATTER BETWEEN:HAZYVIEW ASSOCIATEDWHOLESALEERS CCFIRST
PLAINTIFFIZAK FREDERIK JACOBUS DU PLESSISSECOND
PLAINTIFFANDTWINCITYDEVELOPMENT (PTY) LTDDEFENDANT

IN THE MATTER
BETWEEN: HAZYVIEW ASSOCIATEDWHOLESALEERS CC
FIRST PLAINTIFF
IZAK FREDERIK JACOBUS DU PLESSIS
SECOND PLAINTIFF
AND
TWIN
CITY
DEVELOPMENT (PTY) LTD
DEFENDANT

JUDGMENT

SERITI,JThe plaintiffs issued summons against the defendant claiming payment of certain amount of money and rendering of a full account for the period of duration of the lease agreement.According to the particulars of claim on or about1 October 1999, the plaintiffs and defendant entered into a lease agreement relating to certain premises situated at Hazyview, which premises the defendant leased to the first plaintiff.First plaintiff wasrepresented by the second plaintiff during the entering of the lease agreement and the defendant wasrepresented by Mr. Arnold Pistorius.The first plaintiff was running and or conducting supermarket business in the leased premises.The defendant use to send certain accounts, including an electricity account to the first plaintiff which accounts were paid by the first plaintiff.A dispute arose between the parties relating to the electricity account as a result of which plaintiffs issued summons against the defendant alleging that they were overcharged by the defendant.

SERITI

,

J

The plaintiffs issued summons against the defendant claiming payment of certain amount of money and rendering of a full account for the period of duration of the lease agreement. According to the particulars of claim on or about

1 October 1999

, the plaintiffs and defendant entered into a lease agreement relating to certain premises situated at Hazyvie

w, which premises the defendant leased to the first plaintiff.

First plaintiff w

as

represented by the second plaintiff during the entering of the lease agreement and the defendant w

represented by Mr. Arnold Pistorius.

The first plaintiff was running and or conducting supermarket business in the leased premises.

The defendant use to send certain accounts, including an electricity account to the first plaintiff which accounts were paid by the first plaintiff. A dispute arose between the parties relating to the electricity account as a result of which plaintiffs issued summons against the defendant alleging that they were overcharged by the defendant.

During a pre-trial conference held herein, the parties agreed that:

1. Eskom was the supplier of electricity to the defendant; who in turn supplied its tenants with the said electricity;
1. Eskom was the supplier of electricity to the defendant
; who in turn supplied its tenants with the said electricity;
2. Regulation 11(2) issued in terms of the Electricity Act 41 of 1987 is applicable to the provision of electricity by defendant to the plaintiff. 3. Each party will make calculations as to what is due to the plaintiff based on its standpoint or viewpoint, and the issue of the correct approach to make the necessary calculations will be determined by the court. 4. The plaintiff's claims for other overpayments for services rendered to the plaintiff by the defendant do not form part of the dispute to be resolved by the court in these proceedings. The parties further agreed that the following issues are in dispute: 1.
2. Regulation 11(2) issued in terms of the Electricity Act 41 of 1987 is applicable to the provision of electricity by defendant to the plaintiff.

3. Each party will make calculations as to what is due to the plaintiff based on its standpoint or viewpoint, and the issue of the correct approach to make the necessary calculations will be determined by the court.

4.

The plaintiff's claims for other overpayments for services rendered to the plaintiff by the defendant do not form part of the dispute to be resolved by the court in these

proceedings.

The parties further agreed that the following issues are in dispute:

1.

The question of whether the defendant is entitled to recover from the plaintiff as part of the use of electricity the capital costs, in particular the costs of a transformer which the defendant bought from Eskom.

2.

If the defendant is entitled to recover the said capital costs from the plaintiff what capital costs is the defendant entitled to recover?

3.

The questions whether the defendant in the calculations of rental tariff per square metre which defendant send to the plaintiff, the capital costs of the transformer defendant bought from Eskom was taken into account or not, and if not, can the defendant recover such costs from the plaintiff.

The meaning of the contract in regard to the costs for the provision or supply of electricity use the defendant is entitled to recover from the plaintiff.

5.

The amount, if any, the defendant owes the plaintiff relating to the use of electricity.

In the opening address, counsel for the plaintiff advised the court, inter alia, that as far as the use of electricity is concerned, the defendant's view was that it is entitled to use the tariff of the Local Transitional Council, which tariff was used by the defendant, to charge the plaintiff for electricity use. The plaintiffs have, at all relevant times alleged that the correct tariff to be utilised for electricity charges is Eskom's tariff and not the Local Transitional Council's one. At a later stage, the defendant abandoned its view and conceded that the correct tariff to be utilised is Eskom's tariff. Plaintiff alleged in the pleadings that defendant added above the costs of use of electricity, other costs to the account that the defendant was sending to the plaintiffs. This allegations was initially denied by the defendant, but later, in an amended plea, the said denial was abandoned, but defendant relied on clause 7 of the Lease Agreement to charge the plaintiff the said additional

costs. In the said amended plea, the defendant added that it was an implied term of the lease agreement that costs relating to the capital costs must be recovered by the defendant and that it was a trade usage that such costs must be recovered above the costs of the electricity actually utilized by the defendant and that the recovery of the said capital costs is not in contravention of the Electricity Act 41 of 1987 and regulations promulgated thereunder. The additional costs charged by the defendant are for recovery of the capital costs paid by the defendant to Eskom for the supply of electricity to the plaintiff. For the purpose of this judgment, it is not necessary to state all the areas of dispute between the parties. Apparently, the defendant has paid an amount of R1 262 419-00 to Eskom in order for Eskom to supply electricity to the shopping complex owned by the defendant, at which shopping complex the plaintiff had leased premises. During the periods November 1999 to April 2003, the first plaintiff paid an amount of R2 171 012-13 to the defendant for the use of electricity. Plaintiffs allege that their lease agreement started in October 1999 and the amount they paid for electricity for the said month should be taken into account. The first witness to testify is Mr. Du Plessis, the second plaintiff in this matter. He testified that he represented the first plaintiff when the lease agreement was entered into and he signed the said agreement for and on behalf of the lessee, the first plaintiff. The premises that the first plaintiff leased from the defendant were used to conduct a retail supermarket business trading as Spar supermarket. Before starting the business of the first plaintiff he was employed by Spar Lowveld, which was distributing products to all Spar stores in that area. He was the Managing Director and on many occasions he concluded lease contracts for Spar Group or their franchisees. As the Managing Director distribution centre, if any of the Spar stores have problems they use to come to him for assistance. The plaintiff occupied the leased premises of the defendant from 1 October 1999. They had a problem with electricity accounts they received from the defendant and he immediately discussed the said problem with the defendant. The premises that plaintiff occupied, were occupied prior to plaintiff occupying same, by a franchisee of Spar Group, who had similar problems with the electricity accounts the said franchisee was receiving from the defendant. As Managing Director, distributions of Spar, he attempted to resolve the said problem with the defendant without success. At that time, he spoke to Mr Pistorius who informed him (the witness) that it is not his business and the franchisee should sort out his problems. Eskom was sending electricity accounts to the defendant, who was Eskom's customer. On 25 July 2000 he wrote a letter to the defendant making certain enquiries about the electricity account plaintiff was receiving from the defendant. On 3 August 2000 he had a meeting with representatives of the defendant where several issues were discussed, including the electricity account. On 10 August 2000 he wrote the defendant a letter wherein the discussions of 3 August 2000 were recorded. As far as the electricity account is concerned, the following was recorded: "3) Electricity Account

In the opening address, counsel for the plaintiff advised the court,

inter alia,

that as far as the use of electricity is concerned, the defendant's view was that it is entitled to use the tariff of the Local Transitional Coun

ci

l, which tariff was used by the defendant, to charge the plaintiff for electricity use. The plaintiffs have, at all relevant times alleged that the correct tariff to be utilised for electricity charges is Eskom's tariff and not the Local Transitional Coun

l's one. At a later stage, the defendant abandoned its view and conceded that the correct tariff to be

utilised is Eskom's tariff. Plaintiff alleged in the pleadings that defendant added above the costs of use of electricity, other costs to the account

that the

defendant was sending to the plaintiffs. This allegations was initially denied by the defendant, but later, i

n

an amended plea, the said denial was abandoned, but defendant relied on clause 7 of the Lease Agreement to charge the plaintiff the said additional costs. In the said amended plea, the defendant added that it was an implied term of the lease agreement that costs relating to the

capital

costs

must be recovered by the defendant and that it was a trade

usage

that such costs must be recovered above the costs of the electricity actually utilized by the defendant and that the recovery of the

said

capital costs is not in contravention of the Electricity Act 41 of 1987 and regulations promulgated thereunder. The additional costs charged by the defendant

are

for recovery of the capital costs paid by the defendant to Eskom for the supply of electricity to the plaintiff. For the purpose of this judgment, it is not necessary to state all the areas of dispute between the parties. Apparently, the defendant has paid an amount of R1 262 419-00 to Eskom in order for Eskom to supply electricity to the shopping complex owned by the defendant, at which shopping complex the plaintiff had leased premises. During the periods November 1999 to April 2003, the first plaintiff paid an amount of R2 171 012-13 to the defendant for the use of electricity. Plaintiffs allege

that their lease agreement sta

rt

ed in October 1999 and the amount they paid for electricity for the said month should be taken into account. The first witness to testify is Mr. Du Plessis, the second plaintiff in this matter. He testified that he represented the first plaintiff when the lease agreement was entered into and he signed the said agreement for and on behalf of the lessee, the first plaintiff. The premises that the first plaintiff leased from the defendant were used to conduct a retail supermarket business trading as Spar supermarket. Before starting the business of the first plaintiff he was employed by Spar

a

r Lowveld, which was distributing products to all Spar stores in that area. He was the Managing Director and on many occasions he concluded lease contracts for Spar Group or their franchisees. As the Managing Director distribution centre, if any of the Spar stores have problems they use to come to him for assistance. The plaintiff occupied the leased premises of the defendant from

. They had a problem with electricity account

s

they received from the

defendant

and he immediately discussed the said problem with the

. The premises that plaintiff occupied, were occupied prior to plaintiff occupying same, by a franchisee of Spar Group, who had similar problem

m

s with the electricity accounts the said franchisee was receiving from the defendant. As Managing Director, distributions of Spar, he attempted to resolve the said problem with the

without success. At that time, he spoke to Mr P

is

torius who informed him (the witness) that it is not his business and the franchisee should sort out his problems.

Eskom was sending electricity accounts to the defendant, who was Eskom's customer. On

25 July 2000

he wrote a letter to the defendant making certain enquiries about the electricity account plaintiff was receiving from the defendant. On

3 August 2000

he had a meeting with representatives of the defendant where several issues were discussed, including the electricity account. On

10

A

August 2000

he wrote the defendant a letter wherein the discussions of

were recorded. As far as the electricity account is concerned, the following was recorded: “3)

Electricity Account

You will provide us with detailed account for electricity charged from July 1999, reflecting exactly how it is calculated and at what rate. I put it on record that we are of the opinion that our electricity accounts are substantially overstated and that if proven so, Hazyview Associated Retailers CC will expect a credit, with interest, effective from first day of trading.”

You will provide us with detailed account for electricity charged from July 1999, reflecting exactly how it is calculated and at what rate. I put it on record that we are of the opinion that our electricity accounts

substantially overstated and that if proven so, Hazyview Associated Retailers CC will expect a credit, with interest, effective from first day of trading.”

In its reply dated 14 August 2000, when dealing with the problem of the electricity account, the defendant said: “3. Elektriesiteitsrekening

In its reply dated

14 August 2000

, when dealing with the problem of the electricity account, the defendant said: “3.

Elektriesiteitsrekening

Ons neem kennis van u opinie aangaande die oorverhaling van elektriesiteitsverbruik op u rekening. Ons aanvaar u regstellingsvoorwaarde indien u stelling korrek is. Ons behou egter die reg voor dat indien ons sedert 1/5/1995 elektriesiteit van u onderverhaal het, u die bedrag met rente aan ons sal vergoed.”

Ons neem kennis van u opinie aangaande die oorverhaling van elektriesiteit

verbruik op u rekening. Ons aanvaar u regstellingsvoorwaarde indien u stelling korrek is. Ons behou egter die reg voor dat indien ons sedert 1/5/1995 elektriesiteit van u onderverhaal het, u die bedrag met rente aan ons sal vergoed.”

On 26 February 2001 attorney acting for the first plaintiff wrote a letter to the defendant requesting, inter alia, detailed electricity accounts. In a letter dated 9 March 2001 the defendant sent to plaintiff's attorneys details of the electricity account, and stated that their tariffs are based on a formula utilised by the Local Transitional Council. The witness further testified that the allegations that the defendant is entitled to recoup the capital costs relating to the provisions of electricity incurred by the defendant, he heard same for the first time during the pre-trial conference. The witness referred to an account, which was in the bundle of documents, dated 15 October 1999 and said that the said account makes no mention of the fact that defendant is charging the plaintiff for any capital expenditures. In fact, the said account, as far as electricity is concerned, refers only to electricity consumptions. The witness referred to clauses 4 and 7 of the Lease Agreement, and the said clauses read as follows:

On

26 February 2001

attorney acting for the first plaintiff

wrote a letter

to the defendant requesting,

inter alia

, detailed electricity accounts. In a letter dated 9 March 2001 the defendant sent to plaintiff's attorneys details of the electricity account, and stated that their tariffs are based on a formula utilised by the

L

ocal Transitional Council. The witness further testified that the allegations that the defendant is entitled to recoup the capital costs relating to the provisions of electricity incurred by the defendant, he heard same for the first time during the pre-trial conference. The witness referred to an account, which was in the bundle of documents, dated 15 October 1999 and said that the said account makes no mention of the fact that defendant is charging the plaintiff for any capital expenditures. In fact, the said account, as far as electricity is concerned, refers only to electricity consumptions. The witness referred to clauses 4 and 7 of the Lease Agreement, and the said clauses read as follows:

"4(a)(12) In addition to the rental referred to above the Tenant shall pay to the landlord a rental in respect of the air conditioning installed by the landlord at its costs as follows: for the period 1 October 1999 to 30 April 2000 R7076,00 pm.7.

"4(

)(12) In addition to the rental referred to above the Tenant shall pay to the landlord a rental in respect of the air conditioning installed by the landlord at i

t

s costs as follows: for the period 1 October 1999 to 30 April 2000 R7076,00 pm.

7.

LOCAL AUTHORITY AND OTHER CHARGES:

7.1

The Tenant shall pay for all electricity and water consumed by it in the premises in accordance with separate meters. The Tenant shall be liable for the charge levied in the rending of such metres, if any.

7.2

The Tenant shall pay for all charges for rubbish removal, sanitary and any other services required or obtained by it for the premises”

and said that at time of signing of the said Lease Agreement he was not told about paying for any capital expenditure, except for the installation of air conditioning mentioned in paragraph 4(a)(12) above. If he was told, he would not have signed the said agreement, because in practice, capital expenditure is recovered through rentals and not through inflating the electricity accounts.”

and said that at time of signing of the said Lease Agreement he was not told about paying for any

capital expenditure

, except for the installation of air conditioning mentioned in paragraph 4() (12) above.

If he was told, he would not have signed the said agreement, because in practice, capital expenditure is recovered through rentals and not through inflating the electricity accounts.”

If the question of capital expenditure relating to the supply of electricity was discussed with him, he would have opted to pay same over a period of 25 years and not 5 years as suggested by the defendant.

Furthermore, the development in question was erected during 1995. If the defendant was entitled to recoup the capital costs relating to the provision of electricity over a 5 year period, the defendant would have been entitled to send out or charge tenants inflated electricity accounts only up to the year 2000, and the plaintiff would have been charged the inflated electricity account only for 1 year, that is from October 1999 up to October 2000 and not from October 1999 up to April 2003.

Under cross-examination, he testified that his first involvement with the premises of the defendant was during July 1999. At the premises of the defendant in question, each store had its own metre and the said metres were read every month for purposes of compiling accounts for different tenants. He queried the first plaintiff's electricity account the very first month they received the said account. He was referred to Regulations 11 promulgated in terms of the Electricity Act and he said that Eskom was the provider of electricity and not the local authority and consequently, the defendant cannot make a profit on the re-sale of electricity provided by Eskom. Regulations 11(1) and (2) referred to above, reads as follows: (1)

Under cross-examination, he testified that his first involvement with the premises of the defendant was during July 1999. At the premises of the defendant in question, each store had its own metre and the said metres were read every month for purposes of compiling accounts for different tenants. He queried the first plaintiff's electricity account the very first month they received the said account. He was referred to Regulations 11 promulgated in terms of the Electricity Act and he said that Eskom was the provider of electricity and not the local authority and consequently, the

cannot make a profit on the re-sale of electricity provided by Eskom. Regulations 11(1) and (2) referred to above, reads as follows:

(1)

Any person who resells electricity supplied to him by an undertaker shall, in respect of every purchaser, cause such electricity to be measured by a sub metre of a type which has been approved by the South African Bureau of Standards; (2) The rate at which and the conditions of sale under which electricity is thus charged, shall not be less favourable to the purchaser than those that would have been payable and applicable had the purchaser been supplied directly with electricity by the undertaker who is supplying the seller with electricity and every seller shall, at the request of any such purchaser furnish him with such information as may be necessary to enable him to determine whether the electricity accounts received by him are correct."

Any person who resells electricity supplied to him by an undertaker shall, in respect of every purchaser, cause such electricity to be measured by a sub metre of a type which has been approved by the South African Bureau of Standards;

(2)

The rate at which and the conditions of sale under which electricity is thus charged

, shall not be less favourable to the purchaser than those that would have been payable and applicable had the purchaser been supplied directly with electricity by the undertaker who is supplying the seller with electricity and every seller shall, at the request of any such purchaser furnish him with such information as may be necessary to enable him to determine whether the electricity accounts received by him are correct."

He conceded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with lease agreements for about 20 years and capital expenditure, including network expenditure is recovered through rentals. An offer of R71 497,82 was made to the plaintiffs and the witness rejected the said offer. He testified that the plaintiff will accept an amount which is the difference between what they paid for electricity charges and an amount calculated on the Eskom's tariff. Under re-examinations the witness said that he has seen various calculations emanating from the defendant over a period of time, and the one containing the offer made by the defendant during his cross-examinations, he saw same for the first time in the morning before he testified. He is prepared to accept an amount of R724 416,00, plus an amount due to the plaintiff for the October 1999 period plus interest. The next witness to testify is Mr. C M Pienaar. He testified that he obtained a BSc Engineering degree from Pretoria University. He became a registered professional Electrical Engineer after he has completed his 3 year internship. After he qualified, he worked for three years with professional engineers and presently, he is running his own businesses. He has a business that deals with reading of electricity metres in commercial buildings, calculate consumption of electricity, produce accounts for tenants, send out the said accounts and collect money from the said tenants. His second business is a consulting Engineering business. He designs electrical installations for commercial buildings and townships and produce documents for contractors to tender. He further testified that when designing electrical installations, they take into account where the electricity will be obtained and negotiate with the said suppliers of electricity and calculate the costs of the supply of electricity. Witness further said that he has been involved in the metre reading of commercial buildings and compiling accounts for tenants. He further said when you compile the said accounts you do not add, to the electricity account, any capital costs. Capital expenditure is recovered through rentals. He has never included, in an electricity account, any capital expenditure. He met Mr Pistorius about three years ago. Mr Pistorius phoned him and asked him how does one prepare or which tariff should one use when preparing an electricity account. Mr De Kock, was his former partner based at their Polokwane office. The approach of Mr De Kock on how to charge for electricity consumption was the same as his approach. Later Mr De Kock, who was appointed by defendant as an expert witness told him that he is no longer involved in the case. He further testified that defendant's calculations relating to how much defendant over-charged plaintiff with changed several times during exchange of pleadings up until the commencement of the trial. According to his knowledge, repayment of capital expenditure to Eskom is calculated on a cycle of five years period. Plaintiff, the business which he was conducting at the premises of the defendant could not obtain electricity directly from Eskom. Method adopted by the defendant to compile the electricity account of the plaintiff is incorrect. Normally, the repayment period of capital expenditure to Eskom is 25 years. Eskom, normally recovers capital expenditure by way of monthly rentals, which they charge over a certain period. The transformers, which Eskom supplies have a life-span of 15-20 years. The capital cost which relates to the plaintiff incurred by defendant involves transformer construction costs, costs relating to power line, etc. In this case, the defendant obtained electrical installations from Eskom and there is no reason why defendant should not have repaid the said capital expenditure over a period of 25 years. The "Lease Agreement" between plaintiff and defendant

refers only to energy consumption and there is no reference to capital expenditure relating to installations of electrical equipment. Under cross-examination he was referred to the accounts that defendant send to plaintiff relating to electricity. The said account, at relevant portions reads as follows: Electricity Consumption KWH 21 333,56

He conc

e

ded that if plaintiff was supplied electricity by Eskom, first plaintiff would have required a transformer. He has been dealing with lease agreements for about 20 years and capital expenditure, including network expenditure is recovered through rentals. An offer of R71 497,82 was made to the plaintiffs and the witness rejected

the said offer.

He testified that the plaintiff will accept an amount which is the difference between what they paid for electricity charges and an amount calculated on the Eskom's tariff. Under re-examinations the witness said that he has seen various calculations emanating from the defendant over a period of time, and the one containing the offer made by the defendant during his cross-examinations, he saw same for the first time in the morning before he testified. He is prepared to accept an amount of R724 416,00, plus an amount due to the plaintiff for the October 1999 period plus interest. The next witness to testify is Mr. C M Pienaar. He testified that he obtained

B

S

e Engineering degree from

Pretoria

University

. He

became

a registered professional Electrical Engineer after he has completed his 3 year internship. After he qualified, he worked for three years with professional engineers and presently, he is running his own businesses. He has a business that deals with reading of electric

ity

metres in commercial buildings, calculate consumption of electricity, produce accounts for tenants, send out the said accounts and collect money from the said tenants. His second business is a consulting Engineering business. He designs electrical installations for commercial buildings and townships and produce documents for contractors to tender. He further testified that when designing electrical installations, they take into account where the electricity will be obtained and negotiate with the said suppliers of electricity and calculate the costs of the supply

y

of electricity. Witness further said that he has been involved in the metre reading of commercial buildings and compiling accounts for tenants.

He further said when

you compile the said accounts you do not add, to the electricity account, any capital costs. Capital expenditure is recovered through rentals. He has never included, in an electricity account, any capital

expenditure. He met Mr Pistorius about three years ago. Mr Pistorius phoned him and asked him how does one prepare or which tariff should one use when preparing an electricity account. Mr De Kock, was his former partner based at their Polokwane office. The approach of Mr De Kock on how to charge for electricity consumption was the same as his approach. Later Mr De Kock, who was appointed by defendant as an expert witness told him that he is no longer involved in the case. He further testified that defendant's calculations relating to how much defendant over-charged plaintiff with cha

ged several times during exchange of pleadings up until the commencement of the trial. According to his knowledge, repayment of capital expenditure to Eskom is calculated on a cycle of five years period. Plaintiff

i

ff,

the

business which he was conducting at the premises of the defendant could not obtain electricity directly from Eskom. Method adopted by the

to compile the electricity account of the plaintiff is incorrect. Normally, the repayment period of capital expenditure to Eskom is 25 years. Eskom, normally recovers capital expenditure by way of monthly rentals,

which they charge

over a certain period. The transformers, which

Eskom supplies

have a life-span of 15-20 years. The capital

cost

which relates to the plaintiff incurred by defendant involves transformer construction costs, costs relating to power line, etc. In this case, the defendant

o

obtained electrical installations from Eskom and there is no reason why defendant should not have repaid the said capital expenditure over a period of 25 years. The

“

Lease Agreement

”

between plaintiff and defendant refers only to energy consumption and there is no reference to capital expenditure relating to installations of electrical equipment. Under cross-examination he was referred to the accounts that defendant send to plaintiff relating to electricity. The said account, at relevant portions reads as follows: Electricity Consumption KWH 21 333,56

KVA 22 304,68

R43 638,24 and the witness said that he expected to see the metre reading and the tariff utilised. He further testified that the tariff used by the defendant is the Local Transitional Council's tariff and not Eskom's tariff. The tariff that should have been utilised by the defendant is the Eskom's tariff. He was handed certain calculations made by Mr De Kock, the former defendant's expert and he agreed with the said calculations. He was later given a second set of calculations about two weeks ago and he disagreed with the said calculations. The initial calculations made by Mr De Kock he agreed with indicated that defendant overcharged the plaintiff with an amount of R724 416,34. The later calculations, which he disagreed with, included the charges by defendant for the recovery of capital expenditure over a period of five years. Plaintiff would not have been able to obtain electricity directly from Eskom. If he was able to obtain such electricity, he would have incurred the capital expenditure relating to the installations of network and related charges charged by Eskom for such installations. Witness further testified he has been involved in the reading of metres in other commercial buildings where electricity was supplied directly by Eskom. When preparing the electricity accounts, they were using the Eskom tariffs. Not all Local Authority charges for the recovery of capital expenditure in their electricity accounts. Eskom has different categories of tariffs and different areas have also different categories of tariffs. As Eskom has different tariffs, a customer who obtains electricity directly from Eskom can negotiate a tariff to be applied.

R43 638,24

and the witness said that he expected to see the metre reading and the tariff utilised. He further testified that the tariff used by the defendant is the Local

Transitional

Council's

tariff and not Eskom's tariff. The tariff that should have been utilised

by the defendant is the Eskom's tariff. He was handed certain calculations made by Mr De Kock, the former defendant's expert and he agreed with the said calculations. He was later given a second set of calculations about two weeks ago and he disagreed with the said calculations. The initial calculations made by Mr De Kock he agr

ed with indicated that defendant overcharged the plaintiff with an amount of R724 416,34. The later calculations, which he disagreed with, included the charges by defendant for the recovery of capital expenditure over a period of five years. Plaintiff would not have been able to obtain electricity directly from Eskom. If he was able to obtain such electricity, he would have incurred the capital expenditure relating to the installations of network and related charges charged by Eskom for such installations. Witness further testified he has been involved in the reading of metres in other commercial buildings where electricity was supplied directly by Eskom. When preparing the electricity accounts, they were using the Eskom tariffs. Not all Local Authority charges for the recovery of capital expenditure in their electricity accounts. Eskom has different categories of tariffs and different areas have also different categories of tariffs. As Eskom has different tariffs, a customer who obtains electricity directly from Eskom can negotiate a tariff to be applied.

Under re-examination, witness further testified about a bill of quantities which is prepared before the commencement of a building project so that a developer should know in advance, the capital expenditure required. Same applied to all electrical components. Plaintiffs closed their case.

Under re-examination, witness further testified about a bill of quantities which is prepared before the commencement of a building project so that a developer should know in advance, the capital expenditure required. Same applied

to all electrical components.

Plaintiffs closed their case.

The first witness to testify on behalf of the defendant is Mr. Pistorius. He testified that he is the Managing Director of the defendant and he has occupied the said position from 1984. The core business of the defendant is to develop shopping centres in rural areas particularly in Mpumalanga areas. They have presently developed about 10 shopping complexes. Their shopping complexes have different tenants who occupy different sizes of space in the said

complexes. In other complexes, they supply electricity to their tenants. The shopping complex in question in this matter was developed in 1995 and at the beginning, they were supplying their tenants with water sewerage systems and electricity. At the moment, they are still supplying their tenants with electricity. They have about 150 tenants at the said complex and the first plaintiff was their anchor tenant. He believes that when the town grows, the local authority will take over the responsibility of supplying electricity to the tenants. The electricity that they supply to their tenants, defendant obtains same directly from Eskom. Prior to the plaintiff occupying shop space in their building, there was another tenant who occupied the said shop space. Defendant later discovered that they were under claiming for electricity from the said previous tenant. He spoke to several experts about the correct tariff to be utilised when compiling electricity accounts for their tenants. He later received tariffs from Eskom which he could understand, and he then decided that they should utilise the Local Authority tariffs when compiling electricity accounts. At all their complexes, they have a person who reads metres, which readings they utilise for compiling electricity accounts. At some stage, Mr Du Plessis, the previous plaintiff's witness, approached him, before the plaintiff occupies the space in their building, on behalf of the previous occupier of shop space occupied by the first plaintiff, complaining that the landlords at other buildings were over-charging for electricity consumption and the defendant is not over-charging. After the said discussion, he then decided to utilise the tariff of the Local Transitional Council when preparing electricity accounts. He came to know about Regulations 11 of the Regulations promulgated in terms of the Electricity Act mentioned above only at the beginning of this trial. They bought the necessary hardware, like transformers, metres, switches, etc. to enable Eskom to supply electricity to the shopping complex in question, although they had an option of renting the said hardware from Eskom. Eskom does not charge them monthly rental for equipment as they bought all their electrical installation and network equipment. Under cross-examination, he said he adopted the stance that capital expenditure relating to the installation of electrical equipment should be included in the electricity when he was so advised. When they send electricity accounts, at the beginning, the question of recovery of electrical equipment capital expenditure never crossed his mind. He represented the defendant when the Lease Agreement was signed with the first plaintiff. At time of signing the said Lease Agreement, he did not have in mind the capital expenditure. Questions of including, in the electricity account, recovery of capital expenditure was brought to his attention at a later stage. At some stage, there was calculations which suggested that the amount owed to the first plaintiff as a result of over-charging was in the vicinity of R500 000,00. Later, Mr Visagie made other calculations which suggested a much lower figure. The Lease Agreement was prepared by the defendant. At some stage he told his staff to utilise the tariff of the Local Transitional Authority because they were not certain which tariff should be utilised. They changed the tariff they were using because they thought they were under-recovering their capital expenditure. At the beginning, they utilised the Eskom tariff to compile electricity accounts and they suffered a loss and in order to avoid suffering the said loss, they utilised the tariff of the Local Transitional Council. The bill of quantities that they prepared before the development was build, contained the prices of the electrical equipment, and if at any stage, the Local Authority expropriates the electrical hardware in order to supply electricity to the tenants, the defendant will be compensated for the said capital

expenditure. They recover their capital expenditure and make profit by charging the tenants rental for space that a tenant occupies in the shopping complex. The witness further testified that he gave instructions to their project manager to compile a list of costs of the infrastructure equipment which is necessary to supply electricity to the complex which would normally be supplied by Eskom for which they paid cash. The said costs came to a figure of R1 262 419,00. The reason for requiring the above mentioned information was that, in case the Local Authority takes over the said equipment and supply tenants with electricity, defendant should know how much compensation the defendant should receive from the Local Authority. He further said that the list compiled by their Project manager contains items they did not buy from Eskom. They bought the said items from other supplies. Items they obtained from Eskom came to a total figure of R176 500,00.

The first witness to testify on behalf of the defendant

is Mr. Pistorius

.He testified that he is the Managing Director of the defendant and he has occupied the said position from 1984. The core business of the defendant is to develop shopping centres in rural areas particularly in

Mpumalanga

areas. They have presently developed about 10 shopping complexes. Their shopping complexes have different tenants who occupy different sizes of space in the said complexes. In other complexes, they supply electricity to their tenants. The shopping complex in question in this matter was developed in 1995 and at the beginning, they were supplying their tenants with water sewerage systems and electricity. At the moment, they are still supplying their tenants with electricity. They have about 150 tenants at the said complex and the first plaintiff was their anchor tenant. He believes that when the town grows, the local authority will take over the responsibility of supplying electricity to the tenants. The electricity that they supply to their tenants, defendant obtains same directly from Eskom. Prior to the plaintiff occupying shop space in their building, there was another tenant who occupied the said shop space.

Defendant

later discovered that they were under claiming for electricity from the said previous tenant. He spoke to several experts about the correct tariff to be utilised when compiling electricity accounts for their tenants. He later received tariffs from Eskom which he could understand, and he then decided that they should utilise the Local Authority tariffs when compiling electricity accounts. At all their complexes, they have a person who reads metres, which readings they utilise for compiling electricity accounts. At some stage, Mr Du Plessis, the previous plaintiff's witness, approached him, before the plaintiff occupies the space in their building, on behalf of the previous occupier of shop space occupied by the first plaintiff, complaining that the landlords at other buildings were over-charging for electricity consumption and the defendant is not over-charging. After the said discussion, he then decided to utilise the tariff of the Local Transitional

Council when preparing electricity accounts. He came to know about Regulations 11 of the Regulations promulgated in terms of the Electricity Act mentioned above only at the beginning of this trial. They bought the necessary hardware, like transformers, metres, switches, etc. to enable Eskom to supply electricity to the shopping complex in question, although they had an option of renting the said hardware from Eskom. Eskom does not charge them monthly rental for equipment as they bought all their electrical installation and network equipment. Under cross-examination, he said he adopted the stance that capital expenditure relating to the installation of electrical equipment should be included in the electricity when he was so advised. When they send electricity accounts, at the beginning, the question of recovery of electrical equipment capital expenditure never crossed his mind. He represented the defendant when the Lease Agreement was signed with the first plaintiff. At time of signing the said Lease Agreement, he did not have in mind the capital expenditure. Questions of including, in the electricity account, recovery of capital expenditure was brought to his attention at a later stage. At some stage, there was calculations which suggested that the amount owed to the first plaintiff as a result of over-charging

was

in the vicinity of R500 000,00. Later, Mr Visagie made other calculations which suggested a much lower figure. The Lease Agreement was prepared by the defendant. At some stage he told his staff to utilise the tariff of the Local Transitional Authority because they were not certain which tariff should be utilised. They cha

ged the tariff they were using because they thought they were under-recovering their capital expenditure. At the beginning, they utilised the Eskom tariff to compile electricity accounts and they suffered a loss and in order to avoid suffering the

loss, they

the tariff of the Local Transitional Council. The bill of quantities that they prepared before the development was build, contained the prices of the electrical equipment,

and

if

at any stage, the Local Authority expropriates the electrical hardware in order to supply electricity to the tenants, the defendant will be compensated for the said capital expenditure. The

recover their capital expenditure and make profit by charging the tenants

rental for space that a tenant occupies in the shopping complex

. The witness further testified that he gave instructions to their project manager to compile a list of costs of the infrastructure equipment which is necessary to supply electricity to the complex which would normally be supplied by Eskom for which they paid cash. The said costs came to

figure of R1 262 419,00. The reason for requiring the above mentioned information was that, in case the Local Authority takes over the said equipment and supply tenants with electricity, defendant should know how much compensation the defendant should receive from the Local Authority. He further said that the list compiled by their Project manager contains items they did not buy from Eskom. They bought the said items from other supplies. Items they obtained from Eskom came to a total figure of R176 500,00.

He further testified that the defendant's case is that they should deduct from the amount that is due to the plaintiff the total capital expenditure relating to supply of electricity that plaintiff would have incurred if plaintiff was obtaining electricity directly from Eskom.

He instructed their Project Manager to compile a list and costs of their capital expenditure items necessary to obtain electricity from Eskom after Mr. Visagie, their expert witness requested the said information. He conceded that at the time they were using the Local Authority's tariff they were over-charging their tenants and they have not repaid the said tenants. From the year 2003 they started using the Eskom's tariffs which they are still utilising to date. At some stage, before the involvement of Mr Visagie, he was told by one expert that defendant has over-charged the plaintiff with an amount of R5000 000,00. He also consulted another expert, Mr Van der Westhuizen who gave defendant certain advice, and defendant rejected the said advice. Defendant also consulted another expert, Mr De Kock, before Mr Visagie was involved in the matter. The said Mr De Kock advised the defendant that defendant has over-charged the plaintiff with an amount of about R700 000,00 and the defendant rejected the said advice, as Mr De Kock used a wrong tariff. When he changed from Eskom's tariffs to Local Authority's tariff, he did not seek any advice. On a question of the Court, he said that the life-span of the electrical equipment necessary for the provision of electricity that defendant obtains from Eskom is 10-15 years. Under re-examination he said that defendant had to replace, at its costs, one of the transformers which was faulty after 7-8 years. The next witness to testify is Mr Francois Visagie. He testified that he is a professional technologist registered by the Engineering Council of SA. He has obtained a Master's Diploma in Technology from the former Vaal Technicon which qualification he obtained in 1989. After qualifying he was employed by Eskom until May 2001 when he left Eskom to be a director of a company called Enercon (Pty) Ltd. The latter company is registered by Eskom as energy service company. Primary functions of the said company are to assist electricity consumers in the application and management of electricity usage. Service entails all aspects of energy usage, e.g. design, maintenance and energy efficiency. Whilst employment by Eskom, at some stage he was appointed Regional Sales and Marketing Manager, from 1997 – 2001. There were several departments falling under him, namely sales, pricing, marketing and advertising. At the complex of the defendant in question, Eskom was supplying electricity up to boundary of the shopping complex. Tariff utilised by Eskom was the Night Save Tariff. Eskom's policy from 1995 to date is that it does not supply electricity to tenants and they do not have tariff for tenants. At the relevant time, defendant was making a loss and to him it means that defendant was applying the tariff incorrectly. The Lease Agreement between first plaintiff and defendant does not state which tariff should be utilised. He further testified that tariffs of local authorities enable them to recover all costs, including capital expenditure, maintenance, depreciation, bad debts and subsidies to

other departments. Consumers of electricity repay the capital costs of a local authority. In his view, the method to be applied, to resolve the dispute in this case is what the plaintiff would have paid had the plaintiff obtained electricity from Eskom. Accounts received by the defendant from Eskom consist of all necessary components except rental for transformers as same was paid for in cash by the defendant upfront. The plaintiff's expert alleges that the charges that the defendant can raise against the first plaintiff is rates, which is only one component of a tariff. Principle adopted by the plaintiffs in this case is to single out, from Eskom's account demand charge and energy charge and they ignored other components of the Eskom's tariffs. In calculating the plaintiff's account one needs to take into account all costs incurred in delivering electricity to the first plaintiff. After listening to the evidence that was tendered in court, he made other calculations and he came to a certain conclusion, the results of which is that the defendant over-charged the first plaintiff with an amount of R71 497-82, and said that the method he used to do calculations for energy consumption is well known in the industry. First plaintiff must contribute to the costs of the electricity network, and the said costs must be taken into account. He further testified that at some point he approached the National Electricity Regulator for guidance because the parties herein were adopting different approaches. Under cross-examination he said the mandate he received from the defendant was to evaluate the situation and determine if the first plaintiff was over-charged and if so, by how much. He was given a lot of documents but he was not given reports or opinions of previous experts utilised by the defendant. He does not understand the stance of the plaintiff's in this case as same changes as the case progresses. He further testified that he was never told the stance of the plaintiffs in this case nor given any figures. He further testified that if the landlord decides to extend the complex and that requires upgrading of network, existing tenants must finance the said upgrading as they were going to enjoy the benefits of an upgraded network. Prior to his giving advice to the defendant, he was aware that an offer of R500 000,00 was made by the defendant to the plaintiff, although he did not investigate how the said figure was arrived at. Initially, he thought that the plaintiff's case was that Eskom's tariff should be applied, but later the plaintiff changed their stance and said that only Eskom's rates should be applied. His view is that Eskom's tariffs should be applied. He further testified that he wrote a letter to the National Electricity Regulator ("NER") because Mr Pistorius, the Managing Director of the defendant had received different opinions from different experts relating to the dispute between plaintiff and defendant. At the time he wrote letter to NER, he had already adopted a certain stance and he wanted to check his stance with the NER. He has done other calculations which assumed that the electricity network capital expenditure will be repaid to the defendant over 25 years and the results thereof is that the defendant is being owed over R1 million. Plaintiffs' case is that when compiling electricity accounts, the defendant should use Eskom's rates, and the defendant's position is that you should utilise Eskom's tariffs, which tariff includes all other components as detailed in Eskom's tariffs.

He instructed their Project Manager to compile a list and costs of their capital expenditure items necessary to obtain electricity from Eskom after Mr. Visagie, their expert witness requested the said information. He conceded that at the time they were using the Local Authority

's tariff they were over-charging their tenants and they have not repaid the said tenants. From the year 2003 they started using the Eskom's tariff

f

s which they are still utilising to date. At some stage, before the involvement of Mr Visagie, he was told by one expert that defendant has over-charged the plaintiff with an amount of R5000 000,00. He also consulted another expert, Mr Van der Westhuizen who gave defendant certain advice, and defendant rejected the said advice. Defendant also consulted another expert, Mr De Kock, before Mr Visagie was involved in the matter. The said Mr De Kock advised the defendant that defendant has over-charged the plaintiff with an amount of about R700 000,00 and

the defendant rejected the said advice, as

M

r De Kock used a wrong tariff.

When he cha

ged from Eskom's tariffs to Local Authorit

's tariff, he did not seek any advice. On a question of the Court, he said that the life-span of the electrical equipment necessary for the provision of

lectricity that defendant obtains from Eskom is 10-15 years. Under re-examination he said that defendant had to replace, at its costs, one of the transformers which

faulty after 7-8 years. The next witness to testify is

r Francois Visagie. He testified that he is a professional technologist registered by the Engineering Council of SA. He has obtained a Master's Diploma in Technology from the former Vaal Technicon which qualification he obtained in 1989. After qualifying he was employed by Eskom until May 2001 when he left Eskom to be a director of a company called Enercon (Pty)

td. The latter company is registered by Eskom as energy service company.

Primary functions of the said company are

to assist electricity consumers in the application and management of electricity usage. Service entails all aspects of energy usage, e.g. design, maintenance and energy efficiency. Whilst employment by Eskom, at some stage he was appointed Regional Sales and Marketing Manager, from 1997 – 2001. There were several departments

alling under him, namely sales, pricing, marketing and advertising. At the complex of the defendant in question, Eskom was supplying electricity up to boundary of the shopping complex. Tariff utilised by Eskom was the

N

ight Save Tariff. Eskom's policy from 1995 to date is that it does not supply electricity to tenants and they do not have tariff for tenants. At the relevant time, defendant was making a loss and to him it means that defendant was applying the tariff incorrectly. The Lease Agreement between first plaintiff and defendant does not state which tariff should be utilised.

He further testified

that

tariffs of local authorities enable

them to recover all costs, including capital expenditure, maintenance, depreciation, bad debts and subsidies to other departments.

Consumers of electricity repay

the capital costs of a local authority. In his view, the

method

to be applied, to resolve the dispute in this case is what will plaintiff would have paid had plaintiff obtained electricity from Eskom?

Accounts received by defendant from Eskom consist

of all necessary components except rental for transformers as same was paid for in cash by defendant upfront. The plaintiff's expert alleges that charges that defendant can

r

ise

against the first plaintiff is rates, which is only one component of a tariff. Principle adopted by the plaintiffs in this case is to single out, from Eskom's account demand charge and energy charge and they ignored other components of the Eskom's

ariffs. In calculating the plaintiff's account one needs to take into account all costs incurred in delivering electricity to the first plaintiff. After listening to the evidence that was tendered in court, he made other calculations and he came to

certain

conclusion, the results of which is that defendant over-charged the first plaintiff with an amount of R71 497-82, and said that the method he used to do calculations for energy consumption is well known in the industry. First plaintiff must contribute to the costs of the electricity network, and the said costs must be taken into account. He further testified that at some point he approached National Electricity Regulator for guidance because the parties herein were adopting different approaches. Under cross-examination he said mandate he received from defendan

t was to evaluate the situation

and determine if first plaintiff was over-charged and if so, by how much. He was given a lot of documents but he was not given reports or opinions of previous experts utilised by defendant. He does not understand the stance of the

plaintiff's

in this case as same cha

ges as the case pr

gresses. He further testified that he was never told to

take

stance of the plaintiffs in this case

into account

nor given any figures. He further testified that if the landlord decides to extend the complex and that requires upgrading of network, existing tenants must finance the said upgrading as they were going to enjoy the benefits of an upgraded network. Prior to his giving advise to the defendant, he was aware that an offer of R500 000,00 was made by the defendant to the plaintiff, although he did not investigate how the said figure was arrived at. Initially, he thought that the plaintiff's case was that Eskom's tariff should be applied, but later plaintiff changed their stance and said that only Eskom's rates should be applied. His view is that Eskom's tarif

s should be applied. He further testified that he wrote a letter to National Electricity Regulator ("NER") because Mr Pistorius, the Managing Director of the defendant had received different opinions from different experts relating to the dispute between plaintiff and defendant. At the time he wrote letter to NER, he had already adopted a certain stance and he wanted to check his stance with the NER. He has done other calculations which assumed that the electricity network capital expenditure will be repaid to the defendant over 25 years and the results thereof is that defendant is being owed over R1 million. Plaintiffs' case is that when compiling electricity accounts, defendant should use Eskom's rates, and defendant's position is that you should utilise Eskom's tariffs, which tariff includes all other components as detailed in Eskom's tariffs.

At the beginning, the defendant utilised Eskom's tariffs. He was referred to certain calculations which are in the bundle of documents. The said calculations were prepared by Mr Van der Westhuizen, the first expert to be utilised by the defendant. Said calculations were based, on, inter alia, Eskom's 25 years factor of 1,276% per month and the additions of new shops to the complex made in October 2000 were taken into account. Witness said that he saw the said calculations for the first time recently and he does not know why a factor of 25 years was utilised.

At the beginning, the defendant utilised Eskom's tariffs. He was referred to certain calculations which are in the bundle of documents. The said calculations were pre

p

ared by Mr Van der West

h

uizen, the first expert to be utilised by the defendant. Said calculations were based, on,

, Eskom's 25 years factor of 1,276% per month and the additions of new shops to the complex made in October 2000 were taken into account. Witness said that he saw the said calculations for the first time recently and he does not know why a factor of 25 years was utilised.

The next witness to testify on behalf of the defendant is Mr Peter Buys. He testified that he is a Senior Customer Education Officer at National Electricity Regulator. He testified that NER received a letter of enquiry from the defendant. Enquiry related to the current dispute between plaintiffs and the defendant. NER wrote an opinion relating to the dispute between the parties after NER held a meeting with Mr Visagie. At the meeting with Mr Visagie, they requested more information from Mr Visagie. Defendant closed its case. In the Heads of Arguments before court, the defendants counsel referred the court to the plaintiff's Particulars of Claim. The submission by the defendant's Counsel was that in the Particulars of Claim, plaintiffs alleged that the defendant with respect to the costs pertaining to the plaintiff's electricity consumption, defendant added additional costs over and above the metered consumption of the said electricity and the plaintiffs have failed to adduce evidence sustaining the above allegation. The above-mentioned submission by the defendant's counsel cannot be sustained. The dispute between the parties and the question to be determined by the court are clearly set out in the pre-trial minute portion of which is set out at the beginning of this judgment. The two witnesses, namely Messrs Du Plessis and Pienaar, who testified on behalf of the plaintiffs, I found them to be good witnesses. They gave their evidence in clear and satisfactory manner. They answered, without hesitation all questions put to them and they did not contradict themselves or each other. On the other hand, the same cannot be said about the first two defendant's witnesses. They were both very hesitant when answering questions and at times answers they gave to questions were not logical. Mr Visagie, the defendant's expert witness, gave his evidence in a most unsatisfactory manner e.g. he first testified that, when given instructions by the defendant, he received a single document by means of an electronic transmission and later said that he in fact received documents and not a single document. He further testified that plaintiffs' keeps on changing their stance as far as the dispute is concerned, and the stance adopted by plaintiffs in court he heard same for the first time when the trial began. After lengthy cross-examination it turned out he all along understood the plaintiffs' stance and same has never changed. He also tried to change his version as the cross-examinations continues, e.g. about whether he had had a meeting with Mr Pienaar or not. He initially said that such a meeting did not take place, and he later conceded that he has held discussions with Mr Pienaar but said that same cannot be called a meeting because the said discussions did not yield any fruits. Mr. Visagie, further said that if any of assumptions he made to do his calculations was incorrect, the results of his calculations will still be correct, which answer can obviously not be correct. Lastly, on the question of purpose of the meeting he held with members of NER, his evidence was contradicted by Mr Buys, who was called by the defendant as an independent and uninterested witness. As stated earlier the pre-trial minutes articulated the

dispute between the parties which disputerequiresdeterminationby the court. The said dispute which the court should adjudicateisformulated in the pre-trial minute as follows:“Die volgende aspekte bly in dispuut en staan bereg te word:6.

The next witness to testify on behalf of the defendant is Mr Peter Buys. He testified that he is a Senior Customer Education Officer at National Electricit

Regulator.He testified that NER received a letter of enquiry from the defendant. Enquiry related to the current dispute between plaintiffs and the defendant. NER wrote an opinion relating to the dispute between the parties after NER held a meeting with Mr Visagie. At the meeting with Mr Visagie, they requested more information from Mr Visagie. Defendant closed its case.In the Heads of Arguments before court, the defendants counsel referred the court to the plaintiff's Particulars of Claim.The submission by the defendant's Counsel was that

in the Particulars of Claim, plaintiffs alleged that

the defendant with respect to the costs pertaining to the plaintiff's electricity consumption, defendant added additional costs over and above the metered consumption of the said electricity and the plaintiffs have failed to adduce evidence sustaining the above allegation.The above-mentioned submission by the defend

nt's counsel cannot be sustained. The dispute between the parties and the question to be determined by the court are clearly set out in the pre-trial minute portion of which is set out at the beginning of this judgment.The two witnesses, namely Messrs Du Plessis and Pienaar who testified on behalf of the plaintiffs

I found them to be good witnesses. They gave their evidence in clear and satisfactory manner. They answered, without hesitation all questions put to them and they did not contradict themselves or each other. On the other hand, the same cannot be said about the first two defendant's witnesses. They were both very hesitant when answering questions and at times answers they gave to questions were not logical.Mr Visagie, the defendant's expert witness, gave his evidence in a most unsatisfactory manner e.g. he first testified that, when given instructions by the defendant, he received a single document by means of an electronic transmission and later said that he in fact received documents and not a single document. He f

urther testified that plaintiff

,

keeps on changing their stance as far as the dispute is concerned

and the stance adopted by plaintiffs in court he heard same for the first time when the trial began. After lengthy cross-examination it turned out he all along understood the plaintiffs' stance and same

as never change

d

. He also tried to change his version as the cross-examinations continues, e.g. about whether he ha

d had

a meeting with Mr Pienaar or not. He initially said that such a meeting did not take place, and he later conceded that he has held discussions with Mr Pienaar but said that same cannot be called a meeting because the said discussions did not yield any fruits.

Mr. Visagie, further said that if any of assumptions he made to do his calculations was incorrect, the results of his calculations will still be correct, which answer can obviously not be correct.

Lastly, on the question of purpose of the m

eeting he held with members of

NER, his evidence was contradicted by Mr Buys, who was called by the defendant as an independent and uninterested witness. As stated

earlier

the pre-trial minutes articulate

the dispute between the parties which dispute

requires

determination

by the court. The said dispute which the court should adjudicate

formulated in the pre-trial minute as follows:

“Die volgende aspekte bly in dispuut en staan bereg te word:

6.

Die vraag of die verweerder geregtig is om sogenaamde kapitaalkostes (meer in besonder die kostes van ’n transformator wat die verweerder vanaf Eskom aangekoop het vanaf die eiser te verhaal as deel van sy rekening vir kraggebruik)? 7. Indien die verweerder wel geregtig is om die voormelde kapitaalkostes van die eiser te verhaal, wat die bedrag daarvan moet wees?”

Die vraag of

die

verweerder geregtig is om sogenaamde kapitaal

kostes (meer in besonder die kostes van

'n

transformator wat die verweerder vanaf Eskom aangekoop

het vanaf die eiser te verhaal as deel van sy rekening vir krag

gebruik?

Indien die verweerder wel geregtig is om die voormelde kapitaal

kostes van die eiser te verhaal, wat die bedrag daarvan moet wees?"

As stated earlier, the parties herein entered into a Lease Agreement on 1 October 1999. Paragraph 4(a)(11) thereof, deals with rental payable by the first plaintiff to the defendant and paragraph 4(a)(12) thereof deals with rental payable by the first plaintiff for the air conditioning. The said Lease Agreement was prepared by the defendant or its representatives. The above-mentioned Lease Agreement made specific reference to the question of first plaintiff paying rental for the air conditioning separately from rental of shop space and the plaintiff was made aware of the said fact when the Lease Agreement was signed. In general, a landlord or developer like the defendant, charges tenants rentals in order to recover capital expenditure. If a tenant is expected to pay any rental for the recovery of another specific capital expenditure specific provision will be provided for in the Lease Agreement as it appears in paragraph 4(a)(12) of the Lease Agreement under consideration. Paragraph 7.1 of the Lease Agreement quoted above makes provisions for first plaintiff to pay for electricity consumed by first plaintiff on the leased premises. Same makes no provision for the defendant to recover capital costs relating to the network and equipment necessary for the defendant to supply first plaintiff with electricity when compiling an account for electricity, but only electricity consumed by the tenant should be considered. Mr Pistorius, the managing Director of the defendant testified that when the Lease Agreement was entered into, the question of recovery of the capital costs relating to the provision of electricity to the first plaintiff never crossed his mind. Besides that, the provisions of the said paragraph 7.1 of the Lease Agreement are clear and unambiguous and same could not have been misinterpreted by any of the parties at the time the agreement was entered into. In the said paragraph 7.1 of the Lease Agreement there is no mention of the defendant recovering capital expenditure relating to the provision of electricity to the plaintiff. The next question is after the determination of electricity consumed by the first plaintiff, how was the defendant supposed to bill the first plaintiff. It is common cause that the provider of electricity in this case was Eskom. In order to determine the amount payable by the first plaintiff for electricity consumed, a particular rate will have to be utilised. Regulation 11(ii) of Regulations promulgated in terms of the Electricity Act quoted above provides that the rate to be utilised in such a case, should not be more onerous than the rate utilised by the provider of electricity, in this case, Eskom. Eskom's tariffs have various components. When applying clause 7.1 of the Lease Agreement the component which comes into play is the rate and not other components of the said tariffs. In fact, there is evidence in this case to the effect that after the completion of the development or shopping complex in question, the defendant utilised the Eskom rates to compile electricity accounts for its tenants, which procedure or method, in my view, was the correct procedure.

Eskom was the provider of electricity at its rates had to be utilised. There is evidence also to the effect that after the defendant has realised that it is making losses as far as the provisions of electricity is concerned, defendant changed its procedures of compiling electricity account. Defendant abandoned the Eskom rates and started using the Local Transitional Councils' tariff. Mr Visagie testified that the Local Transitional Councils' tariff, makes provision inter alia for subsidising other departments, subsidising bad debts and social responsibility programmes. The said considerations cannot apply in the case of a developer and its tenants. Furthermore, a local Transitional Council, has no other way of recovering its capital expenditure relating to the provision of electricity, other than making provision for same in the tariff. This is so because consumers of its electricity are not its tenants from whom they can recover their capital expenditure through rentals. The defendant, by utilising the Local Transitional Councils' tariff was over charging the tenants from whom it was also recovering capital expenditure through rentals. Capital expenditure, generally must be recovered through rentals, or through a specific clause in the Lease Agreement, subject to the applicable legislation and regulations. The defendant was not entitled to recover its capital costs relating to the network and equipment for the provisions of electricity to the first plaintiff by including the recovery thereof in the electricity account nor utilising the Local Transitional Council's tariff. In my view, the plaintiffs have succeeded to prove their case against the defendant. The court therefore, makes the following order: Defendant is ordered to pay the plaintiffs:

As stated earlier, the parties herein entered into a Lease Agreement on

. Paragraph 4(

)(11) thereof, deals with rental payable by the first plaintiff to the defendant and paragraph 4

)

(12) thereof

deals

with rental payable

by the first plaintiff

for the air conditioning. The said Lease Agreement was prepared by the defendant or its representatives. The above-mentioned Lease Agreement made specific reference to the question of first plaintiff

paying rental for the air conditioning separately from rental of shop space and the plaintiff

was made aware of the said fact when the Lease Agreement was signed. In general, a landlord or developer like the defendant, charges tenants

rentals

in order to recover capital expenditure. If a tenant is expected to pay any rental for the recovery of another specific capital expenditure specific provision will be provided for i

the Lease Agreement as it appears in paragraph 4

(12) of the Lease Agreement under consideration. Paragraph 7.1 of the Lease Agreement quoted above makes provisions for first plaintiff to

pa

y for electricity consumed by first plaintiff on the leased premises. Same makes no provision for the defendant to recover capital costs relating to the network and equipment necessary for the defendant to supply first plaintiff with electricity when compiling an account for electricity,

but

only electricity consumed by the tenant should be considered. Mr Pistorius, the managing Director of the defendant testified that when the Lease Agreement was entered into, the question of recovery of the capital costs relating to the provision of electricity to the first plaintiff never crossed his mind. Besides that, the provisions of the said paragraph 7.1 of the Lease Agreement are clear and unambiguous and same could not have been misinterpreted by any of the parties at the time the agreement was entered into.

In the said paragraph 7.1 of the Lease Agreement there is no mention of the defendant recovering capital expenditure relating to the provision of electricity to the plaintiff.

The next question

after the determination of electricity consumed by the first plaintiff, how was the defendant suppose

to bill the first plaintiff. It is common cause that the provider of electricity in this case was Eskom. In order to determine the amount payable by the first plaintiff for electricity consumed, a particular r

ate

will have to be utilised. Regulation 11(ii) of Regulations promulgated in terms of the Electricity Act quoted above provides that the rate to be utilised in such a case, should not be more onerous than the rate utilised by the provider of electricity, in this case, Eskom. Eskom's tariffs have various components. When applying clause 7.1 of the Lease Agreement the component which comes into play is the rate and not other components of the said tariffs. In fact, there is evidence in this case to the effect that after the completion of the development or shopping complex in question, the defendant utilised the Eskom rates to compile electricity accounts for its tenants, which procedure or method, in my view, was the correct procedure. Eskom was the provider of electricity at its rates had to be utilised. There is evidence

also

to the effect that after the defendant has realised that it is making losses as far as the provisions of electricity is concerned, defendant changed its procedures of compiling electricity account. Defendant abandoned the Eskom rates and started using the Local Transitional Councils' tariff. Mr Visagie testified that the Local Transitional Councils' tariff, makes provision

for subsidising other departments, subsidising bad debts and social responsibility programmes. The said considerations cannot apply in the case of a developer and its tenants. Furthermore, a local Transitional Council, has no other way of recovering its capital expenditure relating to the provision of electricity, other than making provision for same in the tariff. This is so because consumers of its electricity are not its tenants from whom they can recover their capital expenditure through rentals. The defendant, by utilising the Local Transitional Councils' tariff was over charging the tenants from whom it was also recovering capital expenditure through rentals. Capital expenditure, generally must be recovered through rentals, or through a specific clause in the Lease Agreement, subject

to

the applicable legislation and regulations. The defendant was not entitled to recover its capital costs relating to the network and equipment for the provisions of electricity to the first plaintiff

by including the recovery thereof in the electricity account nor utilising the Local Transitional Council's tariff

. In my view, the plaintiffs have succeeded to prove their case against the defendant. The court therefore, makes the following order: Defendant is ordered to pay the plaintiffs:

An amount of R724 416,34;

Interest on each overpayment, from date of the said overpayment at the rate of 15,5%;

(3)

Costs of suite, which costs will include costs of preparations for and attendance of the pre-trial conference.

W L SERITI

JUDGE OF THE HIGH COURT

FOR THE APPLICANT: ADV TALL POTGIETER INSTRUCTED BY: VAN ZYL, LE ROUX &
HURTER FOR THE RESPONDENT: ADV JLM SNIJMAN SC INSTRUCTED BY: E Y STUART INC
DATE OF JUDGMENT: 10 MAY 2005 HEARD ON: 14 APRIL 2005

FOR THE APPLICANT:

DV

TALL POTGIETER

INSTRUCTED BY:

VAN ZYL, LE ROUX & HURTER

FOR THE RESPONDENT: ADV

JLM SNIJMAN SC

INSTRUCTED BY

:

E Y STUART INC

DATE OF JUDGMENT:

10 MAY 2005

HEARD ON:

14 APRIL 2005

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/ZAGPHC/2005/51.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/hazyview-associated-wholesalers-cc-and-another-v-twin-unknown-topic-agphc-2005>

Prepared on 12 October 2026 · Esheria