

SOUTH AFRICA / JUDGMENT

Maluti-a-Phofung Municipality v Eskom Holdings SOC Limited and Others (2719/2020) [2020] ZAFSHC 213 (9 October 2020)

[2020] ZAFSHC 213

COURT

Free State High Court, Bloemfontein

BEFORE

Mhlambi

CASE / FILE NUMBER

2719/2020

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IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Case number: 2719/2020

In the matter between:

MALUTI-A-PHOFUNG MUNICIPALITY Applicant

and

ESKOM HOLDINGS SOC LIMITED 1st Respondent

THE SHERIFF, BLOEMFONTEIN-WEST 2nd Respondent

FIRST NATIONAL BANK 3rd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: 17 SEPTEMBER 2020

DELIVERED ON: 09 OCTOBER 2020

MHLAMBI, J

- [1] Shylock, the character and creditor in Shakespeare's play, the Merchant of Venice, insisted on his bond and fulfilment of the contract by the debtor (or the surety on behalf of Antonio), Bassanio, who promised a pound of his flesh to secure the bond. Shylock was stopped in his tracks when he was awakened to the fact that the bond, allowed him a pound of flesh but did not allow him any drop of blood.

[2] The applicant (hereinafter called MAP) approached the court on an urgent basis on 24 July 2020 for a rule nisi to be issued, calling upon the respondents to show cause why the following orders should not be made final:

2.1 that the attachment in execution by the first respondent of the applicant's funds in its current bank account with the third respondent, account number: 620 2615 3221, be immediately uplifted;

2.2 the third respondent be authorised to release the funds of the applicant held by it on account number 62026153221;

2.3 the first respondent (hereinafter called Eskom) be prohibited, pending the outcome of the intergovernmental relations framework

dispute resolution under the provisions of the Intergovernmental Relations Framework Act, from executing the judgment against the

applicant under case number 4723/2014;

2.4 that Eskom pay the costs of the application, alternatively that the costs of the application be paid jointly and severally by those respondents who oppose it.

[3] The orders contained in paragraphs 2.1 and 2.2 above should operate as an interim interdict with immediate effect, pending the

finalization of the application

[4] An order was granted by agreement as follows:

"1. The application is postponed to the 17th of September 2020;

2. The second- and third respondent is ordered to release and make available with immediate effect, the sum of NINETY MILLION RAND (90 000 000-00) only, to the Applicant:

3. The remainder of the monies attached by the Second Respondent in terms of a writ of execution issued by the First Respondent against the Applicant under case 4723/2014 and 5523/2018 in this Court held in the bank account of Applicant with the Third Respondent, to be transferred to a interest bearing holding account and remain under attachment not to be paid out to any third party, including Applicant and First Respondent up and until finalisation of the present application, either by settlement and/or final adjudication of the present matter by this Court and only to be paid out as mutually agreed between the Applicant and First Respondent,

alternatively and in the absence of such agreement between Applicant and First Respondent, as ordered by this Court;

4. The Applicant and the First Respondent to meet on/or before 7th of August 2020 in order to negotiate a possible settlement of the present application/dispute;

5. Should the Applicant and the First Respondent be unable to reach a settlement of the present dispute/application on or before close of business on the 7th of August 2020, then;
- 5.1 the Applicant will serve and file its founding affidavit with annexures on or before 13 August 2020;
- 5.2 the First Respondent will file its Answering Affidavit with annexures (including any counter application) on or before 21 August 2020;
- 5.3 The Applicant to file its Replying Affidavit (with any further answering affidavit in the case of a counter application), on or before 28th of August 2020;
- 5.4 The First Respondent to file its Replying affidavit (if any) on or before the 3rd September 2020;
- 5.5 Heads of Arguments are to be filed in accordance with the rules of the practice.
6. Costs of to be reserved for later adjudication.
- [5] The parties failed to reach a settlement and the requisite papers were filed as per the court order. The first respondent also filed a counter application.
- [7] The salient facts are that on 16 December 2017, Eskom, under case number 4723/2014 obtained, by agreement, judgment against the applicant for payment of an amount of R 2 422 573 425.00. The amount became owing to Eskom in relation to its account for the bulk supply of electricity to the applicant. The payment would be payable in terms of a repayment plan to be agreed upon between the parties by no later than 30 January 2018, failing which Eskom would be entitled to take any lawful steps for the recovery of the debt.
- [8] Should the parties fail to conclude such a repayment plan on or before 30 January 2018, alternatively, should the applicant fail to make payment of any amount in accordance with the terms of such a repayment plan, including payment of the current electricity charges when they fell due, Eskom would be entitled to take any lawful steps for the recovery of such amount.
- [9] On 31 January 2019, at the instance of Eskom, default judgment was granted against the applicant under case number 5523/2018 for the payment of the sum of R 1 046 443 902.10 for bulk electricity which Eskom had supplied to the applicant and for which the applicant had not paid in full or at all. On 2 October 2018, Eskom issued a writ in execution of the R2.4 billion judgment and caused the Sheriff to attach and remove the applicant's movable assets on 13 March 2019[1].
- [10] Subsequent to the judicial attachment, an agreement was concluded and signed on 30 April 2019 by and between the Department of Public Enterprises, the Department of Co-operative Affairs Governance and Traditional affairs, Eskom and the applicant. The express terms of the said agreement were the following[2]:

1. Eskom would release the assets attached and removed by the sheriff immediately subject to compliance with clause 2 below. The released assets would remain under attachment in terms of the court order obtained until the debt had been fully extinguished.
 2. The municipality should effect payment of R15 million into Eskom bank account not later than 10 May 2019.
 3. The municipality should pay 20% of all monies collected from the sales of electricity to their customers as of 1 June 2019 and thereafter on the 10th day of every month until the debt was fully extinguished.
 4. The municipality should furnish Eskom with a letter from Cogta and the National Treasury supporting the settlement agreement by no later than 30 May 2019.
 5. The discussion and funding relating to the installation of pre-paid meters to the applicant would be executed within and aligned to the framework of the IMTT resolutions.
- [11] On 16 July 2020, the respondent caused a writ of execution to be issued under case number 4723/2014 attaching the available funds in the applicant's bank account held with the third respondent. The attachment took place on 17 July 2020. Similarly, another writ of execution was issued under case number 5523/18 against the applicant's same bank account and the funds were duly attached on 22 July 2020.
- [12] The applicant contended that this application stemmed from the judgment of the R2 422 573 425.00 judgment obtained by Eskom and the subsequent agreement concluded at Intergovernmental level which constituted a bar against Eskom levying execution against the applicant's assets provided that it complied with the terms and conditions. Pending the outcome of the Intergovernmental Relations Framework Dispute Resolution under the provisions of the Intergovernmental Relations Framework Act, Eskom be prohibited from executing the judgment against the applicant under case number 4723/2014.
- [13] Eskom contended that the relief sought in prayer 2.3 of the notice of motion, was consistent with its contention that the settlement

agreement was concluded only in relation to the R2.4 billion order, and had no bearing on the R1 billion order which was obtained by default and which was not known by the applicant when the settlement agreement was concluded and therefore could not have formed the basis of that agreement. The applicant's relief and pleaded cause of action were grounded only in respect of the attachment in execution of the R2.4 billion order and had no effect on the attachment in terms of the R1 billion order.

- [14] It contended furthermore that the settlement agreement was not part of or an outcome of the consultative process that had already been mandated by the October 2018 court order to develop a recovery plan for the applicant. The terms of the settlement agreement did not support the applicant's contention that any dispute arising from the settlement agreement should be referred to the dispute resolution mechanism contemplated by the provisions of

the Intergovernmental Relations Framework Act 13, 2005. The settlement agreement, it contended, was subject to a condition precedent that has since not been fulfilled, with the result that the settlement agreement ceased to exist, alternatively, was unenforceable, inclusive of the breach of its terms.

[15] On the perusal of the papers, it would appear on face value that Eskom's argument has merit as both the notice of motion and the settlement agreement are solely concerned with the R2.4 billion order or claim. Nowhere in the settlement agreement is reference made to a dispute resolution mechanism. The settlement agreement was therefore concerned with the resolution of the circumstances surrounding the R2.4 billion debt and the reference and direction of the funding relating to the installation of pre-paid meters. It is also correct that the R1 billion debt was not the subject matter of the discussion that led to or was included in the agreement of 30 April 2019, nor was it mentioned in the notice of motion. The order of 16 December 2017 under case number 4723/2014 made provision that, in the event of a default of payment, Eskom was entitled to the recovery of payments that were due.

[16] The question that arises is whether, in the given circumstances, MAP is entitled to the order as sought in prayers 2.1-2.4 of the notice of motion. MAP contended that the effect of the attachment of the funds held in its account with the third respondent, literally brought to a standstill the affairs of the municipality, inter alia, it was unable to pay salaries of its nine hundred-odd employees. At the time the settlement agreement was concluded, MAP was already

unable to pay the full amount of the current account for the supply of bulk electricity to it by Eskom. Even though it failed from time to time to effect timeous payments, it was, as at 13 August 2020, up to date with its payments. The payment of R72 908 612.38 on 16 July 2020 had the effect that its obligations towards Eskom were paid in advance.[3]

[17] The attachment of the funds by Eskom had, as consequence, MAP's inability to execute its constitutional functions relating to the citizens' fundamental rights such as the provision of water, health and sanitation. Legal action had been instituted against the municipality for the spillage of raw sewerage by the residents of Harrismith under Free State High Court case no: 2867/2020. The attached funds in the bank comprised primarily the equitable share which was paid to MAP in terms of the Division of Revenue Act and the Municipal Infrastructure Grants to fund services provided to indigents and infrastructure projects. These funds are paid in three tranches annually and are published in the Government Gazette. The recovery of service delivery amounts had declined over the past three to four months due to the Covid -19 Regulations, Directions and Restrictions[4].

[18] Eskom held the view that MAP's assertion of the rights of the public must be construed against its proper context of it being insolvent, mismanaged and no steps being taken by both the Provincial Government and MAP itself to implement the mandatory intervention by either the provincial or national government.[5] The applicant was solely responsible for its predicament as it had not demonstrated what steps it had taken to invoke the provisions

of section 139(5) of the Constitution, read with section 135 of the MFMA.[6]This remedy, whose basis and trigger was already laid out in terms of the October 2018 court order, remained available to the applicant[7]. The real dispute in the present proceedings was concerned with the validity of the agreement to implement the terms of the court order, not the implementation of a statutory power or function. MAP's reliance on the provisions of IRFA was misplaced.[8]

[19] This attack by Eskom appears to be misplaced. The order granted on 22 October 2018 was by a full bench of this Division when the settlement agreement between the parties was made an order of the court. The settlement agreement under that order had its genesis from the application by various businesses within MAP's area of jurisdiction against Eskom as the first respondent and the applicant as third respondent. The other respondents included the President of South Africa, Ministers of Energy, Finance, Public Enterprises and Co-operative Governance and Traditional Affairs, the Premier of the Free State, MEC's for the Free State Department of Co-operative Governance and Traditional Affairs and the Department of the Provincial Treasury, National Energy Regulator of South Africa and the South African Local Government Association. The order having been granted the application was adjourned sine die.

[20] For the sake of convenience and propriety, the following paragraphs[9] of that settlement agreement are quoted:

"The parties agree as follows":

"1. The Municipality and the Administrator hereby acknowledge and admit that:

1.1 as a result of a crisis in the financial affairs of the Municipality, the Municipality is :

1.1.1 in serious and persistent breach of its obligations;

1.1.1.2 to provide basic services;

1.1.1.2 to meet its financial commitments; and

1.1.2 unable to meet its obligations;

1,2 All the jurisdictional facts for a mandatory intervention in terms of section 139(5) of the Constitution of the Republic of South Africa, 1996 (the Constitution) and section 139 of the Local Government: Municipal Finance Management Act 56 of 2003 (The MFMA") are present;

1.3 The Provincial Respondents must therefore act in accordance with section 139(1) and (2) of the MFMA.

[21] Eskom was fully aware as at the time of that settlement agreement and court order that MAP was in dire straits, and that all the twelve respondents were directed to attempt to resolve the matter in compliance with the requirements of co-operative governance in section 41 of the constitution[10]. During the implementation of prayer 8, that is the cooperative governance process envisaged in section 41 of the Constitution, Eskom should not seek to

terminate, interrupt or suspend the supply of electricity to the Municipality. Should the section 41 process prove to be unsuccessful in resolving the electricity supply issues to the Municipality in the timeframes provided, Eskom might re-enrol the application on reasonable notice to the other parties. The mandatory intervention in terms of section 139(5) of the Constitution and section 139(1) of the MFMA was suspended subject to clause 4 of the agreement[11]. Clause 4 of the agreement established the consultative committee which consisted of two representatives each of the Municipal Finance Recovery Services, Free State Provincial Government, National Government (nominated by the Minister of COGTA), Eskom, Nersa, the Municipality and five representatives by the applicants. Even though the application had its genesis from the interruption of the electricity supplied by Eskom, the order and the settlement agreement targeted the crisis of the financial affairs of the municipality.

[22] The two meetings of the Intergovernmental Consultative Committee held on 29 November 2018 and 6 February 2019 showed the applicant's

lack of necessary human resources and skills in the areas of technical, billing, budgeting, cash flow and revenue management. Political instability arising from the dismissal of councillors led to the council's inability to hold proper meetings as

councillors were engaged in protracted litigation which resulted in the municipality's lack of a sound administration[12].

[23] The October 2018 court order created an atmosphere and the parameters within which the parties, especially Eskom and MAP, were to operate within the spirit and provisions of section 41 of the constitution to map a recovery plan for the municipality[13]. When Eskom took default judgment in the amount of R1 billion and proceeded with the writ in execution for the R2.4 billion, the

consultative committee had just started with its work which was not yet completed. It is common cause that the writ in execution, issued on 2 October 2018 under case number 4723/2014, attached the applicant's movable goods on 13 March 2019, leading to the settlement agreement of 30 April 2019. Eskom contended that the 30 April 2019 agreement was not contemplated by nor did it emanate from the Intergovernmental relations framework mechanism contemplated by the 22 October 2018 order, which mandated that an overall recovery plan be devised for MAP.

[24] It is significant that, while the court order of 22 October 2018 was being implemented and the consultative commission commenced with its tasks, Eskom initiated a parallel process of taking default judgment under case number 5523/2018 and executed against the municipality's bank account. It is significant that all the court orders obtained were by consensus either in an endeavour to assist MAP with the resolution of its financial woes or to comply with the provisions of section 41 of the constitution. Contrary to this approach, Eskom maintained, without substantiation that the work of the intergovernmental consultative commission was a total failure and had yielded no results[14]. Save for this terse statement, nowhere in its papers did Eskom state what the outcome or the final result of the

committee's work was, nor in which manner did the commission fail in its work. It is common cause that as at 21 May 2019, the committee was busy with its work and that Eskom had not raised any complaint or dissatisfaction with its work. What it highlighted in its papers, were the shortcomings of MAP, which were common cause and were well-known to Eskom at all times. It is in the light of this background that the settlement agreement of 30 April 2019 should be viewed.

[25] Eskom, by failing to hold back the writ of execution issued on 2 October 2018 despite the court order of 22 October 2018, was not bona fide. The Intergovernmental Consultative Committee commenced with its duties during November 2018. The judicial attachment took place

during March 2019 and the settlement agreement was concluded and signed on 30 April 2019[15]. The aim of the agreement was to ensure that the movable assets were returned to the Municipality. It is obvious therefore, that the agreement came about to address an ad hoc situation which was brought about by Eskom when it executed against the movable property in respect of the R 2.4 billion claim, soon after the court order of 22 October 2018. Eskom failed to appreciate or refused to accept that it was directed, as per that court, together with the other respondents, to resolve the matter relating to the dispute with MAP and make every reasonable effort to settle the dispute as suggested in that court order[16].

Section 41 of the Constitution reads as follows:

“(1) All spheres of government and all organs of state within each sphere must-

- (a) preserve the peace, national unity and the indivisibility of the Republic;
- (b) secure the well-being of the people of the Republic;
- (c) provide effective, transparent, accountable and coherent government for the Republic as a whole;
- (d) be loyal to the Constitution, the Republic and its people;
- (e) respect the constitutional status, institutions, powers and functions of government in the other spheres;
- (f) not assume any power or function except those conferred on them in terms of the Constitution;
- (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and
- (h) co-operate with one another in mutual trust and good faith by-
- (i) fostering friendly relations;

- (ii) assisting and supporting one another;
 - (iii) informing one another of, and consulting one another on, matters of common interest;
 - (iv) co-ordinating their actions and legislation with one another;
 - (v) adhering to agreed procedures; and
 - (vi) avoiding legal proceedings against one another.
- (2) An Act of Parliament must-
- (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
 - (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.
- (3) An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.
- (4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.”
- [26] Eskom’s attitude as to its engagement with the other parties is succinctly captured in answering affidavit[17] when it submitted that the absence of the letters of support, in addition to bringing the agreement to an end on 30 May 2019, also signified that COGTA and National Treasury never intended to be bound by, or to support the agreement. The agreement must have fallen away to MAP’s knowledge when it failed to provide the letters of support and failed to pay the 20% of electricity to Eskom sold in June, July and August 2020 and the ongoing electricity supplied to it. Contrary to MAP’s assertions, there was no other party that Eskom would have to communicate with, except the Minister of Public Enterprises.
- [27] Organs of state must co-operate with each other in mutual trust and good faith and secure the well-being of the people of the Republic. Executing against MAP’s property when the consultative process was not complete was premature in the given circumstances. Eskom’s argument that the R1 billion order is independent of the R2.4 billion order is partially correct. It is indeed so that it constituted a separate claim which was not accommodated in the 30 April 2019 agreement, but it definitely forms part of what was envisaged in the order of 2018. Eskom’s argument that Map was oblivious of this claim is without merit. Summons was served on MAP, as pointed out to counsel during argument, to enable Eskom to obtain default judgment. Surely such service should have come to the attention of MAP and the debt subsumed by the regime created by the October 2018 court order.

[28] The quick successive service of the writs of execution during July 2020, demonstrate that Eskom demanded its pound of flesh by hook or by crook. I was referred by Eskom's counsel to the decision of Letsemeng Local Municipality vs. Eskom Holding Soc Limited and others[18] and in particular to the following paragraph:

"[16] This brings me to the third requirement of the Applicant having to satisfy the court that the balance of convenience favours the Applicant and the people in its jurisdiction. I have no doubt that this is indeed the case. Eskom is obviously entitled to be paid for the service it provides, and it should indeed be paid. Should this temporary order be granted, however, it would certainly not leave Eskom without any redress. Eskom can then still proceed to obtain judgment against the Applicant or to exhaust other legal remedies to obtain payment. On the other hand, should the interim order not be granted, it would have disastrous consequences for the people of the area. The balance of convenience therefore clearly favours the Applicant."

[29] My brother, Loubser, J, went further and said the following:

"[17] The argument raised by Eskom that any disastrous consequences for the community should not be laid before its door, but that the Applicant must carry the blame for the consequences, has no merit. Eskom relied on this proposition to contend that the Applicant should not be allowed to benefit from its own wrong-doing. In view of the fact that the community stands to suffer immensely should the electricity supply be interrupted, it does not matter who is to be blamed in the end for such a situation." I agree with these views.

[30] When a final order is sought, the applicant has to satisfy the following requirements:

"(a) A clear right on the part of the applicant.

(b) An injury actually committed or reasonably apprehended.

(c) The absence of any other satisfactory remedy available to the applicant.[19]"

I am satisfied, having considered the factual matrix above, that this application has met the above requirements.

[31] Eskom is not without remedy as indicated above. Besides, it has at its disposal the attachment of the movables as indicated in the court order or to take this matter up with MAP's principals in the event of its dissatisfaction with the progress made by the consultative committee. The fact that Eskom participated in the agreement of 30 April 2019 with such principals confirms its acceptance of MAP's incapacity to meet its obligations and that MAP's problems could only be addressed through its principals. It was incumbent on Eskom to return to MAP's principals in the event of the latter's default of payment or in the event of its dissatisfaction with the progress made by the intergovernmental consultative committee.

[32] In the counter application filed by Eskom, the following relief is sought:

“1. Declaring that the agreement dated 30 April 2020, a copy of which is annexure “FA1” to the founding affidavit, is invalid and of no force and effect for non-fulfilment by the First Respondent of its obligations to provide Eskom by not later than 30 May 2019, or at all, with letters from the National Department of Cooperative Governance and Traditional Affairs and National Treasury supporting its terms;

2. Directing the First Respondent, and any other Respondent opposing this application to pay the costs of this application, jointly and severally; such costs to include the costs of senior and junior counsel;
3. Granting the Applicant such further or alternative relief as this court may deem fit.”

[33] In its heads of argument, under the heading “Non-fulfilment of a condition precedent”, Eskom referred to paragraph 4 of the settlement agreement of 30 May 2019 and submitted that the settlement agreement was concluded subject to a condition precedent as MAP was obliged to furnish Eskom with the letters by a certain date, failing which the settlement agreement would cease to exist[20]. I was referred in this regard to two cases: *Palm Fifteen (Pty) Ltd v Cotton Tail Homes (Pty) Ltd*[21] and *Mia v Verimark Holdings (Pty) Ltd*[22].

[34] In these two cases, the courts dealt with the principles relating to suspensive conditions. In the former case I was referred to the paragraph which stipulated that the court will not feel itself bound to accept the designation given by the parties to the contract as a whole and give effect to what it regards as the true import thereof[23]. In the latter case it was stated that the eligible content of the contract is suspended pending fulfilment of the suspensive condition. On fulfilment of the condition, the contract becomes of full force and effect and enforceable by the parties in accordance with its terms. No action lies to compel a party to fulfill a suspensive condition.

[35] Eskom submitted that the settlement agreement ceased to exist on 30 May 2019 as the letters of support were not submitted on that day when they fell due. It was contended furthermore that the contract was unenforceable as the parties had mutual obligations that were intended to be performed reciprocally. MAP failed to provide the letters and, in the alternative, it was not in a position to pay all amounts due to Eskom for the electricity sold. MAP could therefore not seek to hold Eskom to the terms of the contract whose condition it had itself not fulfilled, at least since 30 May 2019.

[36] The difference between a suspensive condition (sometimes referred to as a condition precedent) and a resolute condition (sometimes

referred to as a condition subsequent), is that the former suspends the operation of all or some of the obligations flowing from the contract until the occurrence of a future uncertain event, whereas a resolute condition terminates all or some of the obligations

flowing from the contract upon the occurrence of a future uncertain event.[24] The suspensive condition is normally indicated by words such as “subject to”. A party claiming a contract to be subject to a suspensive condition must plead and prove the condition and its fulfillment.[25]

[37] It is clear that paragraph 4 of the settlement agreement of 30 May 2019 contains neither a suspensive nor a resolutive condition. Even if it did, a contract containing such conditions is not per se unenforceable but may be inchoate in the case of a suspensive condition and fully operative in the case of a resolutive condition. In *R vs. Katz*[26] it was stated that a true suspensive or resolutive condition has a limited meaning as it renders the operation and consequences of the whole contract dependent upon an uncertain event. Provisions which are not true conditions bind the parties as to their

fulfillment and on breach give rise to ordinary contractual remedies of a compensatory nature. A term of a contract imposes a contractual

obligation on a party to act, or to refrain from acting in a particular manner. A contractual obligation flowing from a term of a contract can be enforced, but no action will lie to compel the performance of a condition.[27]

[38] The agreement dated 30 April 2020 can neither be declared invalid nor unenforceable in the light of the above. Paragraph 4 of the said agreement cannot be viewed in isolation of the other terms of that agreement. At most it can be regarded as a modal clause which does not affect the validity of the agreement and should be treated as a term of the contract, the breach of which the ordinary consequences of breach of contract follow.[28] It therefore follows that the counter application should fail.

[39] It is trite that a successful party is entitled to an award of costs. The respondent was entitled to defending this action by virtue of the manner in which the notice of motion and the application was drafted. As indicated, the counter application was without merit and costs should normally be awarded to the opposing party. The parties in this application are both organs of state with a long history of litigation between them. In these circumstances I am reluctant to grant a costs order against the parties. I deem it both prudent and appropriate that a no costs order be made.

[40] In the light of the findings I made above, I am of the opinion that it would be just and equitable to make the following order:

Order

1. That the attachment in execution by the first respondent of the applicant's funds in its current bank account with the third respondent, account number: 620 2615 3221, be immediately uplifted;
2. The third respondent be authorised to release the funds of the applicant held by it on account number 62026153221;

3. First respondent be prohibited, pending the outcome of the intergovernmental relations framework dispute resolution, already in process as per the court order of 22 October 2018, from executing the judgments against the applicant under case numbers 4723/2014 and 5523/2018;
4. No order as to costs.

JJ MHLAMBI, J

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[1] Paragraphs 31 and 32 of the First Respondent Answering Affidavit

[2] Paragraphs 33 and 34 of the First Respondent Answering Affidavit

[3] Paragraph 22 of the founding affidavit

[4] Paragraph 33 of the founding affidavit

[5] Paragraph 73 of the Answering Affidavit.

[6] Paras 73 and 74 :Answering Affidavit

[7] Applicant's heads of argument para 72

[8] Para 60 Answering Affidavit

[9] Para 23:Answering Affidavit

[10] Para 2.1: Settlement agreement; page 89: Index

[11] Para 4.3.1: Settlement agreement; page 91: Index

[12] Paras 30 and 31: 1st respondent's answering affidavit

[13] Paragraph 2.1 of the settlement agreement which was made a court order on 22 October 2018

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- [14] Paragraph 37 of the Answering Affidavit
- [15] The ICC Minutes: ESK 8, page 208:Index; Para 35:Answering Affidavit
- [16] Para 2.1: Settlement agreement made an order of the court on 22 October 2018
- [17] Paragraphs 78 to 80
- [18] Case No: 901/2020 ZAFSHC delivered on 23 July 2020
- [19] Erasmus Superior Court Practice Volume 2 D6-12
- [20] Paragraphs 29 and 30 of the First Respondent's heads of argument.
- [21] 1978(2) SA 8722 (A)
- [22] (522-08)[2009] ZASCA 99 2010 1 All SA 280 (SCA) (18 September 2009)
- [23] 884 D-F
- [24] Christies's Law of Contract in South Africa 7th ed. Page 164 paragraph 4.1.6
- [25] Trollip vs. African Timbers 1946 AD 1063 1070.
- [26] 1959 (1) All SA 534, 1959 (3) SA 408 (C) 417
- [27] Design and Planning Service vs. Kruger 1974
- (2) All SA 55, 1974 (1) SA 689 (T) at page 695; Southern Era Resources Ltd vs. Farndell NO 2010 (4) SA 200 (SCA) [11] and [12]
- [28] Benoni Town Council vs. Minister of Agricultural Credit and Land Tenure 1978 (2) All SA 283, 1978 (1) SA 978 (T) 991 C
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