

SOUTH AFRICA / JUDGMENT

Osmers NO and Another v Eskom Holdings Limited and Another; Osomers v Eskom Holdings Limited and Another (A377/15; A377/2015) [2016] ZAGPPHC 1091 (14 December 2016) [2016] ZAGPPHC 1091

COURT

North Gauteng High Court, Pretoria

BEFORE

R G Tolmay, S P Mothle, N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

A377/15; A377/2015

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG DIVISION,
PRETORIA)

Case

number: A377/15

Date: 14/12/2016

Reportable: No
Of
interest to other judges: No
Revised.
In

the matter between:

EUGENE
BENJAMIN OSMERS
N.O. FIRST
APPELLANT
HAZEL
HAYNES
N.O. SECOND
APPELLANT
Versus
ESKOM
HOLDINGS
LIMITED FIRST
RESPONDENT
THE
NATIONAL ENERGY REGULATOR SECOND
RESPONDENT
CASE
NO: A377/2015
EUGENE
BENJAMIN OSMERS
NATIONAL
ENERGY REGULATOR SECOND
RESPONDENT

JUDGMENT

TOLMAY. J: INTRODUCTION

[1] The Appellants instituted two identical applications, wherein they sought declaratory and interdictory relief against the First

Respondent (Eskom). The first application was instituted on behalf of the Eugene Osmers Trust (the Trust) by Eugene Benjamin Osmers and Hazel Haynes in their capacities as trustees of the Trust under case number 28214/2014. The second application was launched by Eugene Benjamin Osmers in his personal capacity under case number 28157/2014. In both these matters, the Appellants asked the Court to grant the following declaratory relief:

1.1 That they are third parties for purposes of the Electricity Regulation Act, 4 of 2006 (the Act);

1.2 That the First Respondent is obliged to, in terms of section 21(3) of the Act, to provide them with non-discriminatory access to the power systems.

[2] Despite the reference to sec 21(3) in the application the actual section under which the applications are brought is sec 22(3).

[3] The Appellants also sought consequential relief in the form of a mandatory final interdict compelling Eskom to conclude an agreement

with the Eugene Benjamin Osmer Trust and Eugene Benjamin Osmer.

- [4] Eskom opposed the application and the Second Respondent did not participate in the application. Having heard argument, in the Court a quo, the Court dismissed the application and later granted the Appellants leave to appeal to the full Court.

BACKGROUND

- [5] Mr Osmer and Ms Haynes are life partners. Ms Haynes is the sole member of Amoret Trading 81 CC (Amoret) which conducted a chicken-

and pig-farming business on the farm, Portion 4 of Schalk Farms 3, Phalaborwa, Limpopo ("Schalk"). The farming business on Schalk was operated pursuant to a lease agreement allegedly entered into by Mr Osmer and Ms Haynes in their capacities as trustees of the Trust and Ms Haynes in her capacity as the sole member of Amoret. It needs mentioning that the alleged lease agreement was not attached to the papers.

- [6] Mr Osmer and Ms Haynes allegedly terminated the lease between the Trust, as represented by themselves, and Amoret, as represented by Ms Haynes. They alleged that the Trust took occupation of Schalk from 1 January 2014.

- [7] Pursuant to the aforesaid, Amoret entered into an agreement with Eskom in terms of which Amoret and Eskom agreed that Eskom would provide electricity to Schalk. Eskom provided electricity to Schalk from 14 December 2010 and levied charges for electricity

consumed. Amoret failed to pay in full and its electricity account fell into arrears. The last payment to Eskom from Amoret was received on 1 March 2012.

- [8] Eskom states that it attempted to mitigate its losses through the termination of the electricity supply to Schalk but Ms Haynes and Mr Osmer frustrated Eskom's efforts, by refusing access to Schalk.

- [9] Amoret, according to Eskom, aided by both Ms Haynes and Mr Osmer, continued to consume electricity through 2013 until 15 January 2014 when Eskom managed to terminate the electricity supply to Schalk. As at 10 February 2014, Amoret owed an amount of R634 939,17 to Eskom.

- [10] Pursuant to the termination of electricity by Eskom, Mr Osmer and Ms Haynes as trustees of the Trust, applied on 15 January 2014 to Eskom for the supply of electricity to Schalk. A deposit of R20 295-00 was paid by the Trust in order to secure the supply of electricity. Despite accepting the deposit Eskom refused to supply electricity to the Trust. After this refusal Mr Osmer applied on 15 February 2014 in his personal capacity for electricity to be provided to Portion 25 of Silonque, Phalaborwa (Silonque) and paid a R10 500-00 deposit to secure the supply of electricity. Schalk and Silonque are apparently adjoining properties.

- [11] Eskom allocated both these deposits to the debt that accumulated on Schalk, but refused to supply electricity to Schalk or Silonque. The lawfulness of the allocation of the deposits is not the subject of these appeals.
- [12] Eskom contends that the sole purpose of the applications for the supply of electricity was to circumvent the debt created by Amoret and contended that it should not be ordered to enter into agreements with Mr Osmers and the Trust, and that the corporate veil should be lifted as Mr Osmers and Ms Haynes are hiding behind the corporate identity to avoid paying the debt incurred by Amoret.

THE CAUSE OF ACTION

- [13] The Appellants brought their applications in terms of sec 22(3) of the Act.
- [14] The Appellants seek an order that they be declared third parties for purposes of the Act, and that Eskom be ordered, in terms of sec 22(3) of the Act to provide non-discriminatory access to the power systems.
- [15] In order to determine whether the Appellants are entitled to the relief sought one needs to look at the statutory framework under which Appellants approached the Court. The heading of the Act sets out the purpose of the Act as follows:

"To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator of South Africa the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, reticulation, trading and the import and export of electricity are regulated; to regulate the reticulation of electricity by municipalities; and to provide for matters connected therewith."

- [16] The purpose of this Act, it would seem, is to make Second Respondent the custodian and enforcer of the national electricity regulatory framework and then proceed to deal with licences and registration pertaining to the supply of electricity. It appears to be common cause between the parties that Eskom is a licensee in terms of the Act.
- [17] Section 22(3) on which the Appellants rely falls under Chapter 3 of the Act. The caption of this Chapter reads as follows: "Electricity licences and registration".

- [18] Section 22(3) provides as follows:

"A transmission or distribution licensee must, to the extend provided for in the licence, provide non-discriminatory access to the transmission and distribution power systems to third parties".

- [19] It is important to determine the nature of the relationship between the Appellants and Eskom in order to establish whether the Appellants are third parties. The Appellants carry the onus to prove that they are indeed third parties. A third party is not defined in the Act. The Respondents argued that third parties are for example municipalities to whom First Respondent provide electricity and does not include the Appellants, who are customers of

Eskom. If one considers the heading of the Act, which refers specifically to municipalities, there may be merit in this argument.

- [20] In the Act a customer is defined as follows: "customer" means a person who purchases electricity or a service relating to the supply of electricity". The Appellants purchased and want to purchase electricity and therefore must be customers. The Electricity Supply Agreements entered into between Eskom and Mr Osmers, attached to the papers defines the person to whom electricity is supplied, i.e. Mr Osmers, as a customer.
- [21] In order to determine whether the section find application one should not only try and define a third party but needs to read the whole section. This section implores Eskom to supply "non-discriminatory access to the transmission and distribution of power systems to third parties."
- [22] The Appellants have to show not only that they are third parties but that Eskom will discriminate against them if electricity is not supplied to them. In Oxford English Dictionary discrimination is defined as: "The practice or instance of discriminating against people on grounds of race, colour, sex, social status, age etc.; an unjust or prejudicial distinction". At the heart of the definition lies unfair treatment of someone in this matter the refusal to supply electricity was based on the fact that Amoret didn't pay its account. It was thus a business decision based on the circumstances of the case. There is no indication of any discrimination by Eskom in refusing to supply electricity to the Appellants.
- [23] If one considers the Act and the section I am of the view that the Appellants failed to prove that section 22(3) applies to them.

PIERCING THE CORPORATE VEIL

- [24] Eskom argued that as a result of the facts set out above that the Appellants failed to establish the existence of a distinct legal personality of Amoret and the Trust and failed to establish that the legal personalities are not being used as a facade to avoid paying for electricity consumed by Amoret.
- [25] The Appellants are of the view that the requirements for the piercing of the corporate veil have not been met. It was argued that an application to Court, presumably in the form of a declaratory order, is required and that the close corporation should be joined in the proceedings.[1]
- [26] It is trite that the proverbial corporate veil will only be pierced where special circumstances exist. Fraud will be such a special circumstance but it is not essential. In certain circumstances, the corporate veil will also be pierced, for example where the controlling shareholders do not treat the company as a separate entity, but instead treat it as their alter ego to promote their private, extra-corporate interests.[2] It was argued that the required special circumstances do not exist and that the piercing or lifting of the corporate veil in the circumstances of this case is not appropriate.

- [27] Eskom's counsel on the other hand argued that Amoret and the Trust were mere instrumentalities or business conduits for promoting, not their own business or affairs, but those of their controlling members and trustees, being Mr Osmer and Mrs Haynes. For all practical purposes, it was argued, the two concerns are in truth one.[3]
- [28] A consideration of the authorities shows that Courts will ignore or look behind the separate legal personality of a company where justice requires it.[4]
- [29] The argument on behalf of Eskom was that the determination to disregard the distinctness provided in terms of a company's separate

legal personality appears in each case to reflect a policy-based decision. The Court will weigh the importance of giving effect to the legal concept of juristic personality, acknowledging the material practical and legal considerations that underpin the legal fiction, against the adverse moral and economic effects of countenancing an unconscionable abuse of the concept by the founders, shareholders or controllers of a company. The Courts have shown, it was argued, an acute appreciation that juristic personality is a statutory creation and that their separate existence remains a figment of law, liable to be curtailed or withdrawn when the objects of their creation are abused or thwarted.[5]

- [30] Eskom's argument went further to state that, equally the core idea of a Trust is the separation of ownership (or control) from enjoyment. Though a trustee can also be a beneficiary, the central notion is that the person entrusted with control exercises it on behalf of and in the interests of another. It was argued that this is why a sole trustee cannot also be the sole beneficiary, such a situation would embody an identity of interests that is inimical to the trust idea, and no trust would come into existence.[6]
- [31] Applying the legal principles to the facts, it was argued that the calculated manner in which the appellants shielded Amoret from its contractual obligations is a clear sign of the unconscionable flouting of separate legal personality. Eskom was, for a period in excess of a year, prevented from terminating the supply of electricity of Schalk as both Ms Haynes and Mr Osmer, in breach of the contract that Amoret entered into with Eskom, prevented Eskom from entering the property for purposes of terminating the power supply.
- [32] As a result of Eskom being denied access to Schalk, Amoret continued to incur a debt it was unable to settle throughout 2013 to the detriment of Eskom. Ms Haynes, Amoret and Mr Osmer, enjoyed the benefit of unpaid electricity from March 2012 until January 2014.
- [33] When Eskom terminated the supply of electricity, the appellants almost immediately applied for it to be reconnected through the veneer of the Trust. The Trust applied for the reconnection a day or so after the termination of the supply of electricity to Schalk. Shortly after Eskom refused the Trust's application, Mr Osmer in February 2014, applied for a new electricity connection to Silonque.

- [34] I agree with Eskom's argument that the coordinated manner in which the Appellants operated, using the juristic personality of Amoret, to enjoy the use of electricity, accumulate the debt and thereafter use the juristic personality of the Trust to frustrate the termination of the electricity supply, and obtain a new supply contract with Eskom requires of the Court in the interest of justice to lift the corporate veil and see the machinations of how the appellants attempted to escape from paying for the electricity they consumed.
- [35] Eskom does not, at this stage, seek to hold Mr Osmers and Ms Haynes personally liable for the debts of the Trust or Amoret, nor does it ask for any declaratory relief which may impact on the rights of Amoret. Eskom merely argues that a peek behind the corporate veil is required to establish why it should not be obliged to enter into an electricity supply agreement with either Mr Osmers or the Trust.
- [36] I am of the view that as no declaratory order is sought or any relief claimed against Amoret, there exists no basis on which Amoret should join the proceedings. I am further of the view that in the particular circumstances of this case one should lift the corporate veil insofar it is necessary to establish whether Eskom should be obliged to enter into an electricity supply agreement with the Appellants. After doing so I find that no such obligation should be put on Eskom.
- [37] Consequently I am of the view that no case was made out for the granting of the orders sought by the Appellants.
- [38] Consequently the following order is made:
1. The appeals in both application 2821412014 and 28157/2014 are dismissed; and
 2. The Appellants are ordered to pay the costs of the appeal relating to each of the applications.

R G TOLMAY

JUDGE OF THE HIGH COURT

S P MOTHLE

N JANSE VAN NIEUWENHUIZEN

DATE OF HEARING:

2 NOVEMBER 2016

DATE OF JUDGMENT:

14 DECEMBER 2016

ATTORNEY FOR APPELLANT: MAGDA KETS INCORPORATED

ADVOCATE FOR APPELLANT: ADV R RAUBENHEIMER

ATTORNEY FOR RESPONDENT: RENQUE KUNENE INC

ADVOCATE FOR RESPONDENT: AND M MAJOZI

[1] Sec 65, The Close Corporation Act 59 of 1984

[2] See Airport Cold Storage (Pty) Ltd v Ebrahim and Others 2008 (2) SA 203 (C) para 25.

[3] Airport Cold Storage supra at para 26.

[4] Ex parte Gore N.O. and 37 Others NNO 2013 All SA (2) (WCC) 437 at para 28.

[5] Airport Cold Storage supra at para 29.

[6] See Land Agricultural Development Bank of South Africa v Parker and Others 2004 All SA 261 at para 19.

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