

SOUTH AFRICA / JUDGMENT

Oxior Civil Enterprices (Pty) Ltd v Eskom Holdings Soc Ltd and Another (2024/097461) [2025] ZAGPPHC 411 (30 April 2025)

[2025] ZAGPPHC 411

COURT

North Gauteng High Court, Pretoria

BEFORE

Janse Van Nieuwenhuizen

CASE / FILE NUMBER

2024/097461

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

Case

Number: 2024-097461

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

DATE:

30 April 2025

SIGNATURE:

JANSE VAN NIEUWENHUIZEN J

In

the matter between:

OXIOR

CIVIL ENTERPRICES (PTY) LTD

Applicant

and

ESKOM

HOLDINGS SOC LTD

First Respondent

THE

CHIEF EXECUTIVE OFFICER OF ESKOM

Second Respondent

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

Introduction

[1] The applicant seeks the following urgent relief against the respondents;

“2. That the first respondent be directed to forthwith remove the ‘purchase block’ on the applicant’s supplier profile on the first respondent’s supplier database, pending the outcome of its investigation, alternatively, pending the outcome of an action for damages to be instituted by the applicant against the first respondent.

3. Declaring that the applicant is innocent, until proven otherwise, of any wrong doing in respect of its historical contractual and/or other relationship with the first respondent.

4. In the alternative to prayer 2 supra that the decision taken by the second respondent on or about 28 July 2023, alternatively December 2023, further alternatively July 2024, to place a ‘purchase block’ on the applicant’s supplier profile on the first respondent’s supplier database system be reviewed and set aside;”

[2] To the applicant’s credit, it did not pursue the relief claimed in prayer 3 of the notice of motion.

Background

[3] For ease of reference, the first and second respondents will collectively be referred to as Eskom. It is common cause between the parties that the applicant has been providing electrical and civil construction works for Eskom for the past eight years and that the applicant is currently rendering services to Eskom in terms of at least 11 existing contracts.

[4] The vast majority of the contracts are on an “as and when required” basis, which means that Eskom would provide the applicant with a task order for the provision of certain works, as and when Eskom requires such works to be performed. The applicant would then perform the works and issue Eskom with an invoice for payment.

[5] This mutually beneficial business relationship between the applicant and Eskom was problematic when the applicant received a letter sent on 28 July 2023 by a certain Winile Madonsela (Madonsela), employed by Eskom as Acting Group Executive: Legal and Compliance.

[6] The relevant portion of the letter reads as follows:

“3.1 Eskom has evidence from 2017 regarding allegations of an undeclared relationship, conflict of interest and suspicion of gratification given to Mr Lucky Ngobeni, an Eskom employee at Dunnottar Customers Network Centre (CNC) and Tsakane CNC, involving the Supplier and/or its directors, employees, agents, its affiliates, associates, related entities, sub-contractors etc.

.....

3.3 The evidence emanating from the Eskom investigation has been referred for criminal investigation by the South African Police Service (SAPS). The SAPS investigation is still ongoing.

3.4 Given the fact that a criminal referral is pending, a “purchase block” will be implemented on the Supplier on Eskom’s Supplier Database for an initial period of two years pending the outcome of the criminal investigation.....

5. The above decision in paragraph 3.3 will not impact on any existing contract with the Supplier which is not tainted by the allegations and Eskom will make all payments under such contract in the ordinary course, however, currently no new tenders and contracts may be awarded to the supplier until the abovementioned criminal investigation has been concluded.”

[7] Quite understandably, Mr Mafuma (“Mafuma”) deponent to the founding affidavit and sole director of the applicant, was astounded. Mafuma stated that he was approached in 2017/2018 by the Special Investigative Unit (SIU) and questioned about his

relationship with Mr Ngobeni (Ngobeni). He was informed that the applicant’s NHBRC certificate had been found in Ngobeni’s

possession and was asked whether the applicant had built a house for Ngobeni. Mafuma informed the SIU that he never had any dealings with Ngobeni, that he had no idea why Ngobeni would be in possession of the applicant’s NHBRC certificate, and that the applicant certainly had never built a house for Ngobeni.

[8] Mafuma told the SIU that he will give his full corporation with their investigation. Subsequent to the visit by the SIU, Mafuma made specific enquiries with the NHBRC, who confirmed that no house was ever registered as having been built by the applicant for Ngobeni.

[9] Mafuma heard nothing further from the SIU and was dumbfounded when he learnt some seven years later that the applicant has suddenly been blocked on Eskom’s Supplier Database due to the Ngobeni investigation. Mafuma confirmed that no one at Eskom has for past seven years approached or questioned him concerning the Ngobeni allegations. Furthermore, no criminal charges have ever been brought against the applicant or himself and he has never been contacted by SAPS concerning the allegations.

- [10] Mafuma responded to Madonsela's letter on 17 August 2023 and explained that he never had any dealings with Ngobeni and that he, furthermore, had not in any manner whatsoever tried to influence any employee of Eskom. He recorded that the charges are frivolous, that he has never seen a shred of evidence in support thereof, and that the sanction being imposed is unreasonable and tantamount to the applicant being considered guilty until proven innocent. No response was received and in the ensuing months the applicant continued to receive task orders as normal.
- [11] Mafuma assumed that his response had laid the issue to rest. It was, however, sadly not the end of the applicant's ordeal. At the beginning of December 2023 Mafuma noticed that the applicant no longer receives any task orders from Eskom in respect of existing agreements. Mafuma stated that prior to this date, the applicant had been receiving task orders to the value of R 2,8 million per month.
- [12] The applicant encountered a further problem, namely, that the purchase block prevented the amendment of existing orders. Mafuma mentioned as an example a project known as the Amahlathi Electrification 23/24 Project. The applicant needed a rock drill to complete the project, but due to the purchase block a further task order could not be issued to the applicant. The work on the project has, as a result, come to a standstill.
- [13] Correspondence in respect of the aforesaid problems were exchanged between the parties during December 2023 and January
2024. I pause to mention, that Mafuma did inform Eskom on 12 December 2023 that the applicant will resort to litigation if the issue is not resolved.
- [14] Amidst the exchange of correspondence between the parties, Eskom issued a new task order in terms of an existing contract to the applicant on 25 January 2024. Eskom further entered into a new contract with the applicant on 1 February 2024 for the provision of electrification in the Northern Cape. The contract period is three years.
- [15] On 5 February 2024 and 11 March 2024, Eskom also issued two further task orders to the applicant in respect of an existing contract.
- [16] According to Mafuma the purchase block was back in mid-March 2024 and was wreaking havoc on existing contracts.
- [17] On 13 March 2024, the applicant's erstwhile attorneys recorded the aforesaid problems in a letter to Eskom. Eskom's attorneys responded on the same day and advised as follows:
- "4. As previously advised by our client, your client may not be awarded any new contracts or task orders pending the outcome of the criminal investigation into your client's undeclared conflict of interest and alleged corruption of an Eskom employee." (own emphasis)*

- [18] For no apparent reason and notwithstanding Eskom's firm stance reflected in the letter of 13 March 2024 supra, the applicant received five new task orders during the period 25 March to 5 May 2024.
- [19] Furthermore and on respectively 25 March 2024 and 31 May 2024 Eskom extended two existing contracts for respectively an additional six and twelve months. Everything returned to normal until mid-May 2024 when the applicant started experiencing payment problems. Upon queries directed by Mafuma, he was informed by Solly Mathe, an employee of Eskom via email on 23 May 2024, that he could not, due to the purchase block, process payment.
- [20] Mafuma endeavoured to clear up the payment issue with Madonsela during June 2024, to no avail. Furthermore, and during June and July 2024, four of the applicant's quotations for task orders in existing contracts were not accepted due to the purchase block.
- [21] This prompted the applicant to, once again, seek legal advice. On 8 July 2024, the applicant's current attorney wrote a letter to Eskom and their attorneys, informing them that should the purchase block not be removed by 12 July 2024, the applicant intends to institute legal action.
- [22] The decision to launch this application on a semi urgent basis was taken on 15 July 2024, but due to the volume of the documents requested by counsel, various consultations with counsel to finalise the application and a desperate search for funds to pay the deposit, the application was only issued on 28 August 2024. The time lapse was also caused by the public holiday in August and the attorney's unavailability for a week. The aforesaid challenges were explained in detail by Mafuma with reference to specific dates.
- [23] Prior to the launching of the application and on 31 July 2024 Mafuma spoke to Captain Matlou, the investigating officer in the criminal matter, in a further attempt to resolve the impasse between the parties. Mafuma asked Captain Matlou about the status of the case and indicated he was more than willing to give whatever assistance the Caption he may require to finalise the investigation. Captain Matlou informed him that Eskom opened the case some five years ago and that Eskom is yet to provide him with the evidence they claim to have for him to investigate. Without the evidence there was nothing to investigate and since there was no evidence against the applicant or Mafuma, he did not require any information from them. He, furthermore, informed Mafuma that there was nothing he could do to expedite the matter.
- [24] In respect of the alternative relief of review, the applicant advanced various grounds of review. Due to the view I take of the matter it is for present purposes not necessary to deal with each and every ground of review.

Urgency

- [25] Eskom contends that the matter is not urgent. The matter was set down in the urgent court and served before Neukircher J on 21 November

2024. Eskom admitted in its answering affidavit that the applicant is entitled to payment of its outstanding invoices and the court ordered Eskom to make payment of an amount of R 1 136 751, 33 by no later than 5 December 2024.
- [26] The court further ordered that the issues between the parties be referred to a court appointed mediator, and that the mediation shall commence no later than 9 December 2024. The court did not make any finding on the urgency or merits of the matter. Although the parties requested that costs be reserved, the court did not make any order in respect of costs, which entails that each party is liable for its own costs for the hearing on 21 November 2024.
- [27] During the mediation process it became clear that the officials representing Eskom in the mediation have no authority to consent to the upliftment of the purchase block. It was only Eskom's Governance Committee who could take a decision to uplift the purchase block. Although the Committee was scheduled to meet in December 2024, the meeting did not take place. The applicant and the mediator were informed that the meeting was now scheduled to take place on 11 February 2025. Due to the aforesaid the applicant agreed to postpone the matter to a date after 11 February 2024.
- [28] For reasons that are not apparent from the papers, the Committee, once again, failed to meet on 11 February 2025. No alternative date for a sitting had at that stage been proposed.
- [29] Consequently, the applicant had no other choice than to set the matter down for hearing. The first available date on the opposed motion court roll was approximately in November 2025. The applicant explained that its financial position was already in jeopardy in November 2024 and that, due to lapse of time since November 2024, the business had almost come to a standstill and will most probably no longer operate in November 2025.
- [30] In the result, the matter was set down in the urgent court for hearing on 11 March 2025. Due to the voluminous papers filed in the matter, the matter did not proceed in the urgent court and was postponed to a special motion court date, being the date of the hearing of the application before this court on 24 April 2025.
- [31] I am mindful that the urgency of the matter needs to be determined with reference to the initial hearing date, being 21 November 2024.
- [32] Mr Mokotedi SC, counsel for Eskom, submitted that more than a year had lapsed between the date on which the applicant was informed of the purchase block and the date on which the application was launched. During this period the applicant threatened on two occasions, to wit in December 2024 and March 2025 that legal action will be taken but failed to do so. This in itself mitigates against any notion that the relief claimed herein is urgent. Should any urgency exist, the urgency is self-created.
- [33] In casu Eskom changed its stance in respect of the enforcement of the purchase block numerous times during the period under consideration. The applicant, furthermore, endeavoured on a continuous basis to resolve the purchase block issue with Eskom. The

endeavours did not bear any fruit and in a final attempt to resolve the issue before rushing to court, Mafuma approached the investigating officer in the criminal case on 30 July 2025. Due to no fault on the part of Captain Matlou, it became clear that the reason for the purchase block will not be resolved speedily.

- [34] It is trite that even protracted dealings between parties prior to the launch of an urgent application do not constitute self-created urgency if the attempts were reasonable in the circumstances. [See *Nelson Mandela Metropolitan Municipality and others v Greyvenouw CC and Others* 2004 (2) SA 81 (SE)]
- [35] In casu, I am satisfied that the applicant's attempts to resolve the issue between the parties were reasonable and that the applicant will not obtain proper redress in the normal course. The matter is thus urgent.

Interim Interdict

Prima facie right

- [36] In defending the enforcement of the purchase block Eskom relies, inter alia, on section 217(1) of the Constitution, which mandates it to enter into contracts for goods and services in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.
- [37] In casu the issuing of new contracts and tenders by Eskom must be in compliance with its obligations in terms of section 217(1). Conversely, the applicant is entitled to be treated fairly and equitable in tendering for new contracts or tenders. The system followed by Eskom must, furthermore, be competitive which entails that no person may be excluded from the opportunity to enter into contracts for the provision of goods and services.
- [38] In the result, the applicant has a prima facie right to the relief claimed herein. The right is, however, not absolute. Eskom contends that the applicant does not have a prima facie right to compete for new tenders and contracts due to the purchase block. According to its answering affidavit, suppliers, such as the applicant, may be, inter alia, blocked due to:

"81.1 Corruption and Fraud Concerns: Eskom has been involved in various investigations and has been the target of scrutiny regarding corruption, particularly in relation to high-profile state capture and procurement scandals. If there are suspicions that a supplier is involved in unethical or illegal

practices, Eskom might block the supplier to protect itself from potential financial or reputational damage.

..

81.4 Ongoing investigations: If Eskom is investigating a supplier for alleged wrongdoing, it may suspend them from bidding for new contracts until the matter is resolved. This is often done to mitigate and ensure that Eskom's procurement process is not compromised."

- [39] The fact that Eskom has procedures in place to combat corruption is laudable. The question in casu is whether the applicant falls prima facie in one of the aforesaid categories.
- [40] Save for the allegation in respect of Ngobeneni in the letter dated 23 July 2023, there are at this stage no facts whatsoever before court to support the “suspicion” that the applicant is involved in unethical or illegal practices.
- [41] Insofar as the investigation into alleged wrongdoing is concerned, it is clear from the facts and from the interaction with Captain Matlou, that there is practically no investigation at this stage.
- [42] In the result, I am prima facie of the view that the applicant has in the interim a right worthy of protection.

Well-grounded apprehension of irreparable harm

- [43] Although Eskom denied that the purchase block has any bearing on task orders being issued in respect of existing contracts, the uncontested facts and the contents of the letter from Eskom’s attorneys dated 13 March 2024 prove otherwise. It might be that task orders were issued in some instances, but the inconsistent enforcement of the purchase block leads to a well-grounded apprehension of irreparable harm.
- [44] Furthermore, invoices issued from 7 March 2024 were not paid due to the purchase block. The fact that the court had to order Eskom on 21 November 2024 to pay R 1 136 751, 33 in respect of the outstanding invoices speaks for itself. Although Eskom denied that the purchase block is the cause of the non-payment of invoices, it did not advance any other explanation for the non-payment.
- [45] Mafuma explained the applicant’s predicament as follows:
- “89.1 Unless the purchase block is removed, Oxior will continue suffering huge financial losses, which will invariably result in a large number of Oxior’s employees losing their employment. Many of these employees are breadwinners with families who are dependent on them for their maintenance needs”*
- [46] The aforesaid coupled with the fact that the applicant may not bid for future tenders or contracts for an undetermined time in future exacerbates the applicant’s already precarious financial position.
- [47] The apprehension of irreparable harm is manifest.

Balance of convenience

- [48] In the interim and pending the finalisation of the criminal charge, Eskom will receive the goods and services that had been satisfactorily provided by the applicant for the past eight years. According to Eskom the prejudice it will suffer if the interim interdict is granted is “potential financial or reputational damage” and its inability to ensure that its “procurement process is not compromised”.

[49] The prejudice that will be suffered by the applicant if the interim relief is not granted far outweighs the aforesaid prejudice that might be suffered by Eskom.

[50] The duration of the relief claimed herein is, furthermore, dependent on Eskom's willingness to provide captain Matlou with the necessary evidence in order for the criminal investigation to be finalised. Eskom is thus in a position to curtail the period of any prejudice that it might suffer as a result of the interim interdict.

Alternative remedies

[51] Pending the finalisation of the criminal investigation, the applicant has no alternative remedy to protect its rights in the interim.

Costs

[52] Costs should follow the cause.

ORDER

The following order is granted:

1. The first respondent is directed to forthwith remove the 'purchase block' on the applicant's supplier profile on the first respondent's supplier database, pending the outcome of the criminal investigation against the applicant and/or Mazwi Sydney Mafuma.
2. The respondents are ordered to pay the costs of the application, including costs of counsel on scale C.

N. JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

DATE HEARD:

24 April 2025

DATE DELIVERED:

30 April 2025

APPEARANCES

Counsel for the Applicants:

EJ Ferreira SC

Instructed by:

Doyer & Doyer Attorneys

Counsel for the Respondent: KM Mokotedi SC

S Salela

Instructed by:

Ngeno & Mteto Inc

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Prepared on 14 October 2026 · Esheria