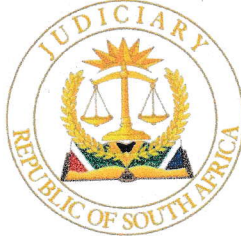



PUBLIC OF SOUTH AFRICA



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

CASE NO: 76183/2019

(1)	REPORTABLE: NO/ YES
(2)	OF INTEREST TO OTHER JUDGES: NO/ YES
(3)	REVISED ✓
21/8/21	
DATE	SIGNATURE

In the matter between :

ESKOM HOLDINGS SOC LTD

Plaintiff

And

EMFULENI LOCAL MUNICIPALITY
THE MUNICIPAL MANAGER OF THE
EMFULENI LOCAL MUNICIAPALITY
NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA

1st Defendant

2nd Defendant

3rd Defendant

PREMIER, GAUTENG PROVINCIAL GOVERNMENT:

DAVID MAKHURA N.O.

4th Defendant

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by e mail. The judgment is further uploaded to the electronic file of this matter on Caselines by the Judge or his/her secretary. The date of the judgment is deemed to be 21/8/21

Judgment

LI VorsterAJ

1. This is an application for summary judgment in terms of which the plaintiff claims from the first defendant:
 - 1.1. In respect of claim 1 – payment of R25 million and interest which is the outstanding balance owed by the first defendant to the plaintiff in terms of an acknowledgement of debt and repayment agreement concluded between the parties.
 - 1.2. In respect of claim 2 – payment of R1 326 797 999,75 and interest for electricity supplied to the first defendant by the plaintiff in terms of the electricity supply agreement for which the plaintiff was not paid.

1.3. In respect of both claims the plaintiff claims attorney and client costs.

2. The existence of the acknowledgment of debt and repayment agreement concluded between the plaintiff and the first defendant is not in dispute as well as the existence of the electricity supply agreement between the plaintiff and the first defendant.

3. The first and second defendants in their plea disputed the validity of the acknowledgement of debt and repayment agreement on the basis that the document was not signed by the plaintiff (Eskom) and also that the debts based on the electricity supply agreement between the parties was not correct as it was erroneously calculated by the plaintiff. Both those defences appear to be disingenuous and opportunistic and merit no further attention. The plaintiff in its affidavit supporting summary judgment annexed extracts from affidavits made in a previous case which I shall refer to later in which both the acknowledgement of debt and the repayment agreement as well as the debt owed by the first respondent to the plaintiff is admitted. That brings me to the main defence raised by the first and second defendants.

4. The main defence is founded on section 41(3) of the Constitution read with section 41(1) of the

Intergovernmental Relations Framework Act, No 13 of 2005.

4.1. Section 41(3) of the Constitution provides as follows:

"41(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."

4.2. Section 41(1) of the Intergovernmental Relations Framework Act provides as follows:

"41(1) An organ of State that is a party to an intergovernmental dispute with another government or organ of State may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing."

5. The allegations of the first and second defendants is that the plaintiff failed to declare a dispute in terms of Section 41(3) of the Constitution and in terms of Section 41(1) of the Intergovernmental Relations Framework Act prior to

instituting summons against the first defendant in this matter. On that basis the first and second defendants ask for dismissal of the plaintiff's claims.

6. The aforesaid defence is without substance as I shall indicate below.

7. During 2018 the plaintiff cut the supply of bulk electricity to the first respondent because the debt of the first respondent to the plaintiff was escalating and the first respondent did not honour its obligations in relation to payment for electricity with the plaintiff. A firm called Cape Gate (Pty) Ltd then instituted an application to the South Gauteng Division of the High Court claiming that the electricity bulk supply to the first defendant must not be interrupted because it suffered big or great damage as a result of such interruption. That led to a fully fledged application in which a number of applicants joined the suit and also the National Energy Regulator as well as the Premier of Gauteng were joined as respondents. The matter was heard and decided by a Full Bench and the judgment is reported as Cape Gate (Pty) Ltd & others v Eskom Holdings (SOC) Ltd & others [2018] ZAGPPHC 599 2019(4) SA 14 (GJ). The fact that there was an intergovernmental dispute within the meaning of that expression in Section 41 of Act No 13 of 2005, was found and recognized by the Court in that matter and pursuant to

that finding, an order was made to be found in paragraph 174 of the judgment in that matter as follows:

"(a) The dispute between the four respondents concerning the non-payment by the second respondent to the first respondent for bulk electricity supply and the manner and the timing of its resolution given the intervention of the fourth respondent is, in terms of section 41(4) of the Constitution referred back to the respondents for resolution in terms of section 41(3) of the Constitution.

(b) In the event that the said dispute is not resolved within 6 months of date of this order any party may set down this application for determination of Part B."

8. It follows that a dispute between the first defendant and the plaintiff has been declared and was fully ventilated in Court which referred the matter back to *inter alia* the plaintiff, the first respondent, the National Energy Regulator and the Premier of Gauteng Provincial Government to be resolved. The matter was not resolved, the debt is not serviced by the First Defendant and keeps on spiralling. That necessitated the Plaintiff instituting this action. It follows that the defence raised by the first and second defendants that the action is premature for want of compliance with the provisions of section 41 of the

Constitution and Act 13 of 2005 cannot be upheld. The dispute was declared and was incapable of resolution within the matter of 6 months from date of the judgment in the Cape Gate matter. The inevitable result is that the plaintiff has no other alternative to institute this action to claim redress from the first defendant to resolve the matter. I am driven to the conclusion that the application for summary judgment must succeed. I make the following order:-

Order

Summary judgment is granted to the plaintiff as follows:-

1. Claim 1:-

- 1.1. Judgment for the sum of R25 million;
- 1.2. Interest on the amount of R25 million at a rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of Southern Africa plus 2,5% calculated from the date of judgment until date of final payment;

1.3. The first defendant shall pay the plaintiff's costs on a scale of attorney and client.

2. Claim 2:-

2.1. First defendant is ordered to pay to plaintiff the sum of R1,326,797,399,75;

2.2. First defendant is liable for interest on the sum of R1,326,797,399,75 at the rate per annum equal to the prevailing prime overdraft rate charged by First National Bank of South Africa plus 2,5% calculated from 1st of October 2019 until date of final payment;

2.3. First defendant shall pay the plaintiff's costs on an attorney and client scale.



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Appearances: Plaintiff Adv. P L Uys

1st Defendant W Mokhare SC
L M Mataboge

Date of hearing 13 August 2021