

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2019/39240

- (1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

[27 FEBRUARY 2020]


.....
SIGNATURE

In the matter between:

ESKOM HOLDINGS SOC LTD

APPLICANT

and

IMAB ENGINEERING (PTY) LTD

1ST RESPONDENT

JYOTI STRUCTURES AFRICA

2ND RESPONDENT

J U D G M E N T

MUDAU, J:

- [1] Applicant launched an urgent application in this court in which it sought certain interdictory relief against the respondent. The notice of motion was subsequently amended over and above the question of urgency for the following relief:

"2. Declaring that the applicant is the owner of the structural steel manufactured, sold and delivered by the first respondent, to the second respondent at the Ariadne Eros Transmission Line 2 132/400kv Multi Circuit Line (Section A) site

camps (including the site camps at Cato Ridge on Sub 43 (of 11) of the farm Honingkrantz No. 945 and Stoneleigh Farm in Umzinto ("the site camps").

3. *Interdicting and restraining the first respondent from removing, or causing to be removed, any structural steel or other materials from the site camps.*
 4. *Directing the first respondent to deliver all structural steel removed from the site camp located at Stoneleigh Farm in Umzinto to an appropriate farm to be nominated by the applicant.*
 5. *In the alternative:*
 - 5.1. *interdicting and restraining the first respondent from removing or causing to be removed, any structural steel or other materials from the site camps pending the final adjudication of an action to be instituted within 20 (twenty) days of the date of this Court Order for a final order in respect of the ownership of the structural steel".*
- [2] On 27 November 2019 the matter served before Nel AJ. Nel AJ made an order as agreed between the parties with costs reserved that, *"until final disposal of the application, which application will be enrolled for hearing in the special motion court, the first respondent shall not sell, destroy or encumber the steel that was and still is stored on the Umzinto Land and that forms the subject matter of the application"*.
- [3] This application concerns the ownership of sophisticated steel components that were manufactured by the first respondent ("IMAB") destined to be used in the construction of specialised transmission towers for the applicant. On 24 April 2016, the applicant ("Eskom") and the second respondent ("Jyoti") concluded a written contract for the procurement of the Ariadne Eros Transmission Line 2 1324/400 KV Multi Circuit Line ("the works"). The works consisted of the construction of 105km multi circuit transmission line from the Ariadne substation to Oribi substation. The works was intended to bring electricity to areas previously not electrified as well as general improvement of the integrity of the Eskom grid in KwaZulu-Natal.
- [4] The works to be delivered by Jyoti included the manufacture, transportation and erection of specialised transmission line towers. The structural steel that is the subject of this application consisted of steel components delivered to Jyoti by IMAB to be used in the assembly and erection of the towers. The

which remained unpaid, excluding on IMAB's version, nearly R6.1 million of interest that accrued on the arrear amounts owing by Jyoti.

- [9] Jyoti, despite IMAB performing fully in terms of their contract, regularly failed and or neglected to pay IMAB for the structural steel timeously. Attempts to make Eskom pay directly to IMAB for the structural steel fell through. On 18 October 2019, Eskom terminated the contract it had with Jyoti. The termination certificate was signed by Ms. Lisa Brown (who deposed to the founding affidavit) on behalf of Eskom. It is significant that no reference is made to this aspect by Eskom in the founding papers in this regard.
- [10] In order to meet its contractual obligations with Eskom, Jyoti entered into two other contracts: firstly, with a Mr Payn trading as Stoneleigh Estate for the lease of a portion of land situated on Lot, 385, Umzinto (the first lease agreement); and secondly, a partly written and partly oral agreement with IMAB for the manufacturing and delivery of the structural steel. Jyoti leased the Umzinto land as an off-site storage for the offloading and safekeeping of the structural steel. It did so pursuant to clause 4.7 of its contract with Eskom which provided that Jyoti must provide "on safe storage for materials and plant".
- [11] IMAB contends that, the Umzinto land does not fall within the boundaries of any of the various servitudes registered in favour of Eskom on which the transmission lines were to be erected. Eskom was not a party to the first lease agreement and consequently, obtained no rights flowing from the contract of lease between Jyoti and Stoneleigh Estate.
- [12] After the Eskom contract was cancelled, Jyoti surrendered the unpaid structural steel to the value of R17, 386 153.58 it could not pay for to IMAB, as well as additional structural steel valued at approximately R20 million that Eskom allegedly failed to pay Jyoti for that steel. Consequently, possession of all the structural steel that Jyoti stored at Umzinto was surrendered to IMAB. Ownership of the structural steel that Jyoti owned was transferred to IMAB to defray the interest and damages that IMAB stood to suffer as a result of Jyoti's breach of its contract with IMAB. IMAB embarked on a process to remove some of the steel to its site in Nigel. On 29 October 2019, IMAB concluded a second lease agreement with Mr Payn in respect of the Umzinto land on terms

mind was, in effect, the death knell on the question of urgency. As at the time that the interim relief was granted by Nel AJ, the proverbial horse has already bolted.

- [17] Significantly, on its own version, Eskom had cancelled its contract with Jyoti and thus disrupted the works being undertaken. It is accordingly clear that the absence of a contractor to complete the works is the cause of the delay and not the conduct by IMAB. There is accordingly no basis for this application to have been enrolled on an urgent basis with the time periods for delivering affidavits truncated to the extent detailed in the notice of motion.
- [18] It remains to deal with whether Eskom is entitled to the relief it seeks on the merits regarding ownership of the structural steel. Counsel for Eskom contended that if Eskom is the owner, IMAB is in unlawful possession of the steel which ought to be returned. The flipside being that if Eskom is not the owner or has no legitimate defence to IMAB's claim for ownership, Eskom's application for either final or interim relief must therefore fail.
- [19] As to the merits, Eskom seeks a declaratory order that it is the owner of the steel. Accordingly, not only must Eskom make this allegation that it is the owner of the steel, it is obliged to prove it by way of acceptable evidence. Eskom could only acquire ownership from Jyoti, if Jyoti was the owner or had the right to transfer ownership of the steel.
- [20] Relevant in this regard is clause 71.1 of the contract Between Eskom and Jyoti which reads as follows: "71.1 The Supervisor marks Equipment, Plant and Materials which are outside the working areas if (a) this contract identifies them for payment and (b) the contractor has prepared them for marking as the works information requires". In this case, Eskom failed to demonstrate that the structural steel kept at Umzinto land was marked by the supervisor as required for identification purposes. The Umzinto land was used as a storage base but not for the construction and erection of the towers.
- [21] In our law, it is a well-established principle that no one can transfer more rights than he/she has.¹ Applied to this case it means that Jyoti had no rights to ownership of the unpaid steel property and, in the absence of the owner's

¹ This is the common law principle also known as "*nemo dat qui non habet*", which has been described as the "golden rule" of the law of property. See e.g. Badenhorst, Pienaar & Mostert (5th edition) Silberberg and Schoeman's the Law of Property 73.

authority, in this case IMAB, Jyoti could not have transferred ownership to Eskom². This to my mind disposes of this issue in favour of IMAB.

- [22] The remedy sought by Eskom is a final interdict in its nature and not a claim for damages. The requirements for a final interdict are usually stated as (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy³. In order to succeed in obtaining the remedy of an interdict against a third party, in this case IMAB, Eskom therefore has to show: (a) that the contractual right it obtained from Jyoti protects an interest that is also enforceable against a third party outside the contract; (b) that the third party, IMAB, unlawfully infringed or threatened to infringe that right; and (c) that there was no adequate alternative remedy.
- [23] In the instant case, there is no doubt that there is a material dispute of fact regarding ownership of the structural steel. In *Oakland Nominees (Pty) Ltd v Gelria Mining & Investment Co (Pty) Ltd*⁴, Holmes JA held: 'Our law jealousy protects the right of ownership and the correlative right of the owner in regard to his property, unless, of course, the possessor has some enforceable right against the owner'. In this case, Eskom's major hurdle to overcome is proof of its ownership of the steel material which was in the possession of Jyoti. IMAB has demonstrated that its rights over the steel property were expressly reserved until Jyoti fulfils its payment obligations. Eskom has further failed to establish that it did receive delivery of the steel material. That being the case, the owners of property are free to do with it what they wish as they have done by removing some of it to Nigel.
- [24] As regards estoppel by conduct, in *Concor Holdings (Pty) Ltd t/a Concor Technicrete v Potgieter*⁵ it was held that: 'Our law is that a person may be bound by a representation constituted by conduct if the representor should reasonably have expected that the representee might be misled by his conduct and if in addition the representee acted reasonably in construing the representation in the sense in which the representee did so Nevertheless

² See *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC and Others* (2011 (2) SA 508 (SCA); [2011] 3 All SA 173 (SCA) at para 26).

³ See *Setlogelo v Setlogelo* 1914 AD 221 at 227.

⁴ 1976 (1) SA 441 (A) at 452A.

⁵ 2004 (6) SA 491 (SCA) at 495A-C and 496D-E.