IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 17339/2020

In the matter between:

CJ NAUDE N.O **First Applicant**

ESTELLE COETZEE N.O. **Second Applicant**

(First and Second Applicants, acting in their Capacities as the duly appointed trustees of CJ NAUDE FAMILIE TRUST IT NO. 3884/2014

CHRISTIAAN JOHANNES NAUDE **Third Applicant**

and

ESKOM HOLDINGS SOC LIMITED **Respondent**

(Registration Number: 2002/015527/31)

JUDGMENT DELIVERED ELECTRONICALLY: TUESDAY, 27 JULY 2021

NZIWENI AJ

Introduction

[1] Pursuant to the respondent disconnecting the electricity supply to the farm Vrymansfontein, Durbanville, on 19 November 2020, the applicants launched an application for spoliation, *ex parte,* on 20 November 2020, seeking an order on an

urgent basis that the respondent be directed to restore the supply of electricity to the farm. Gamble J granted the relief sought by the applicants ("the order").

[2] The order that was made was in the following terms:

1. The respondent was ordered to immediately restore the supply of electricity to the farm Vrymansfontein, Durbanville;

2. A Rule *nisi* was issued, returnable on a date to be determined by the above Honourable Court, calling upon the respondent to show cause why it should not be ordered that:-

   2.2 The respondent restores the supply of electricity to the farm Vrymansfontein, Durbanville; and

   2.3 The respondent pays the cost of the application on an attorney and client scale;

3. The relief referred to in sub-paragraph 1 above was ordered to operate forthwith pending the return day of the Rule Nisi; and

4. The respondent had the right to anticipate the return day of the Rule Nisi with 48 hours' notice to the applicants.

[3] On 18 January 2021 the Rule *nisi* was extended for hearing on 12 March 2021; the respondent also tendered to pay an amount of R25 000 in respect of wasted costs. On the 20 May 2021 the Rule *nis*i was once again postponed for hearing, to 20 May 2021.

[4] When the matter appeared before me it was on an extended day of the Rule *nisi.*

Issues

[5] The issue which is pivotal in this application, is whether the respondent acted lawfully when it disconnected the electricity.

[6] On the other hand, it was submitted on behalf of the respondent that this court should determine the following issues:

a. Whether the third applicant's account with the respondent is in arears;

b. Whether the respondent has reached an agreement with the third respondent for arrears;

c. Whether the third applicant failed to sign an agreement reached with the applicant for the supply of electricity; and

d. Whether the respondent is empowered to disconnect the third applicant's electricity, in terms of section 21 (5) (b) and or (c) of the Electricity Regulation Act 4 of 2006 ("the Act"), or both.

[7] It was further contended, on behalf of the respondent, that if the answers to the above questions are in the affirmative, then this court should find that the respondent acted lawfully when it disconnected the electricity.

[8] Respondent's counsel staunchly contended that when the respondent disconnected the electricity it acted lawfully; hence, there can never be spoliation.

Therefore, the argument continues, the discontinuation of electricity to the farm was an exercise of the respondent's statutory duties.

Background history

[9] According to the respondent, the farm started to fall into arrears with its account in 2016. Those arrears outstanding prior to 22 March 2016 were fully settled. It is the respondent's contention that the farm's electricity account, after the settlement of the arrear amount, remained dormant on its system. According to the respondent's papers, during 2019 the respondent conducted an inspection on the dormant accounts, and noticed that the farm's electricity meter was in fact active. The respondent then invited the third applicant to its offices, in order to arrange for the reactivation of the farm's electricity account. According to the respondent, the meeting resulted in the third respondent paying a fee for the reactivation of the account, from its dormant status.

[10] The respondent avers further that, following the reactivation of the account, the respondent visited the farm for an onsite reading of the meter, for the period from 22 March 2016 until 22 July 2019. Based on that reading, the farm was billed for the sum of R647 223,40.

[11] In this matter it was never disputed that the farm did not pay any amount for the usage of electricity for the period from March 2016 until 22 July 2019, as it was not being billed by the respondent due to the farm's account being categorised as dormant during that period.

[12] It is also common cause that the farm's electricity supply was disconnected in January 2020. However, after discussions and exchanges of correspondence, the electricity supply was duly restored without the involvement of a court application.

[13] Resulting from the January 2020 disconnection of the farm's electricity, it is further not in dispute that the third applicant's attorneys caused an email, dated 10 February 2020 ("CJ8"), to be written to the respondent's employee.

[14] The third applicant has consistently disputed the amount claimed by the respondent, for electricity for the period from 22 March 2016 until 22 July 2019.

[15] As a result of the underlying dispute regarding the amount payable, it was then arranged between the parties that the farm's electricity meter would be tested. It is not in dispute that this testing never materialised.

[16] On 21 May 2020 the third applicant's attorneys wrote a letter to the respondent's manager, regarding the testing of the electricity meter, stating as follows:

'Dear Lusanda

My client's intention is to test the meter as he does not understand how the amount can be so higj *(sic)* with the minimum consumption being used on the farm from that power point.

Unfortunately no electrician is available on a non-urgent basis, and he has to wait till level 3 to get someone out.

Surely ESKOM is more equipped to do the monitoring and the testing of the accuracy of the meter?

My client will allow anyone from ESKOM on the farm to do the testing.

Can this be arranged?'

[17] On 19 October 2020 Lusanda Ndzuzo, on behalf of the respondent, sent an email to the third applicant's attorneys, as follows:

'Good day

I sent several emails in order to finalise the payment arrangement on the account, I have stated in so many emails that were are working from home and therefore we can't meet. The debt is accumulating every month and is flagged for disconnection of supply.'

[18] On the same day the third applicant's attorneys responded to Ms Ndzuzo's email:

'Dear Lusanda

I refer to our telephonic conversation a few minutes ago during which you informed me that:

You will instruct the relevant parties to disconnect the service to the farm because of noncompliance by my client

You will no longer deal with my office as appointed attorneys in this matter but only with the client

My client has reneged on his undertakings.

My client has at all relevant times disputed the amount allegedly owing from 2016 to end 2019, and ESKOM was tasked to prove the correctness (sic) of the readings.

My client wanted to employ the services of outside electricians to test the accuracy of the reading meter, to which you objected and undertook to get ESKOM technicians to do the exercise.

To date nor I or my client received any feedback or report in this instance.

Please find attached my letter to you which contains the final agreement.'

[19] Ms Ndzuzo responded as follows:

'Good day

I have explained the process in case the functionality of the meter is questioned. The outside electrician is not allowed to touch Eskom meter.

The customer has to pay for the meter test and get the meter tested in our test centre in Brackenfell.

The meter test is not paid as yet.

The meter reading taken by the customer are in line with the readings taken before and that proves the correctness of the current meter.

Julie can you also advise further on the meter test.'

[20] The third applicant's attorneys responded as follows:

'Dear Lusanda

This process was not explained to us.

This is news to me.

Please put the process in motion to rest the meter.

Why should my client pay for it?'

[21] There is also another email, dated 19 October 2020, written by Ms Ndzuzo to the third applicant's attorney, in the following terms:

'Good day Mr Visser

We had an engagement with the customer before you became involved. Ameer, please confirm if the meter test can be done without the upfront payment, and should the meter test results confirm that the meter is right what happens to the meter test fee?'

[22] As far as I can glean from the papers, the discussions relating to the meter test fee were concluded when the respondent indicated the costs involved in the meter testing.

[23] It further appears to be common cause that, just before the disconnection of the farm's electricity, the respondent sent CJ18 to the applicants; the essence of CJ18 was to inform the applicants that the respondent's representatives paid a visit to the farm to inspect the electricity meter, and that the officials could not gain access to the farm. From what I can gather from the illegible copy of CJ18 filed by the applicants, it seems that the letter urged the applicants to arrange another appointment within 48 hours, failing which the electricity would be cut.

[24] It is common cause that the farm's electricity supply was disconnected on 19 November 2020.

[25] On that same day the third applicant's attorneys wrote an email to an official of the respondent:

'My client advised me this afternoon that the electrical supply to the farm was terminated today.

He also forwarded to me a notice earlier today from ESKOM advising him that the inspectors could allegedly not gain access to the meter to do a reading.

He could not tell if the notice and the termination of the supply goes hand in hand. . . advise me that ESKOM in the past has easily gained access to its meters on the farm, and the access is certainly not a problem.

ESKOM frequently communicates with me as the attorney, and also with the client, so a simple phone call or brief email would have sufficed to get access.

In any event, there can be no just reason for the halting of the power supply to the farm as my client has abided meticulously to the arrangements that were formalised with ESKOM.

During our recent communications with your office you insisted that the power to the farm must be suspended because the issue of the balance on the account is not addressed to your satisfaction.

I pointed out to you that ESKOM has dragged its feet to bring that matter to a finality. My client has always contended that the meter reading cannot possibly be correct, and that was the whole reason that we reached an agreement pending the inspection and testing of the meter.

It now seems that ESKOM has, in breach of the agreement, and without attending to the pre-conditions of verifying the correctness of the meters, wilfully terminated the electrical supply to the farm.

My client is suffering damages at the moment and demands that the power be re-connected immediately. . .'

Were the respondent's actions, in disconnecting the electricity, lawful?

[26] According to the applicants the letter (CJ 8) written by the third applicant's attorneys, dated 10 February 2020, constitutes an agreement between the third applicant and the respondent. On the other hand, the respondent strenuously disputes that there was ever an agreement reached between the parties pertaining to the outstanding debt.

Was there an agreement reached between the parties?

[27] The respondent contends that it tried to reach a settlement agreement with the third applicant in order to settle the arrears. The respondent's founding affidavit states the following:

'. . . however, the third applicant and I failed to reach any agreement as the third applicant was still not satisfied with the proposed concession . . . on 22 November 2019 the third applicant and his son in law . . . attended at the respondent's Bellville offices . . . After lengthy discussions, I presented the third applicant with a proposal for the settlement of the arrears

on behalf of the respondent on the following basis . . . The third applicant made a counter proposal . . . I accepted the third applicant's counter proposal. . .'

[28] The respondent avers further that on 22 November 2019 a first deferral agreement was reached, between the third applicant and the respondent, regarding the payment of the arrear account; it is also alleged by the respondent that the third applicant refused to sign the first deferral agreement.

[29] The respondent's answering affidavit further reveals that after the third applicant's failure to sign the first deferral agreement, the third applicant also paid an amount which fell short of what was agreed upon in terms of the first deferral agreement. According to the respondent, because of that, the first deferral agreement lapsed.

[30] It is further contended on behalf of the respondent that subsequent attempts to get the third applicant to sign a second deferral agreement, in January 2020, failed because the third applicant once again did not sign the agreement. The respondent then arranged for the disconnection of farm's electricity supply, which was effected on 27 January 2020.

[31] The following is further alleged in the respondent's answering affidavit:

'I advised the third applicant's attorney that the respondent would be amenable to reconnecting the electricity supply, on condition that the third applicant makes an advanced payment of R90 000 and sign and submit agreement forms to the respondent. On 19 February 2020, the third applicant made the requisite payment of R90 000 and the respondent reconnected the electricity supply forthwith, whilst still awaiting receipt of the signed arrangement agreement for the settlement of the balance.

However, the third applicant again failed to sign the deferral payment agreement for the settlement of the balance of the outstanding arrears . . . I engaged the third applicant's attorney over the telephone and explained the bill to him and the third applicant. These telephonic discussions culminated in the respondent sending the third applicant again the third deferral agreement proposal for his signature and to revert to the respondent with a signed copy . . . In April 2020, the third applicant made an additional combined payment . . . without reverting to the respondent with a signed deferral agreement proposal furnished to him.'

[32] It is alleged on behalf of the respondent that after the payments, the third applicant's account was still in arrears, and the third applicant was presented with a revised deferral agreement. However, once again the third applicant failed to sign it.

[33] It is further averred on behalf of the respondent that after several failed attempts to have the third applicant sign a deferral agreement, the respondent disconnected the electricity supply in the exercise of its rights in terms of the law.

[34] According to the respondent, CJ8 is nothing but a mere recordal of without prejudice settlement negotiations between the parties, and it does not constitute an agreement. It is further contended on behalf of the respondent that CJ8 was never finalised by way of an agreement signed by all parties concerned.

[35] The third applicant, in his replying affidavit, maintains that the only agreement between himself and the respondent is the one concluded on 11 February 2020. According to the third applicant, on 11 February 2020, it was agreed between the parties, at the respondent's Bellville offices that, if a dispute regarding account number 8432321223 cannot be settled within thirty days from the agreement, the respondent may resort to litigation to attempt to prove its alleged claim and recover such amounts proved.

Does the email dated 10 February 2020 (CJ8) constitute an agreement between the parties?

[36] It was contended on behalf of the applicants that the third applicant noted that the respondent was levying interest on the disputed amount. It was further asserted that the respondent then, out of the blue, and notwithstanding the existence of an agreement, threatened to terminate the electricity supply.

[37] It is always very critical that there should be a meeting of the minds between parties, that they have reached a legally binding agreement between them. The pivotal question which this court has to decide is whether an agreement was reached between the parties on 11 February 2020.

[38] In this matter, CJ8 is at the heart of the dispute between the parties. It is therefore necessary at this juncture to consider the content of CJ8. I am going to set same out in full:

'THE MANAGER

ESKOM HEAD OFFICE

Ndzuz. . .@. . . za

Attention: . . .

WITHOUT PREJUDICE

OUR CLIENTS: . . . ACCOUNT NUMBER . . .

FARM VRYMANSFONTEIN, DURBANVILLE

I refer to our telephone conversation over the past week regarding a possible settlement of the matter without the need to resort to litigation.

I confirm that all such negotiations were done without prejudice to any of the parties, and was conducted solely to attempt to settle the matter.

My client's without prejudice settlement proposals, which are in line with our last discussion today that narrowed the issue, are as follows:

1. My client pays the amount of R90 000-00. The above amount represent the approximate amount owing on this account according to your records for electrical usage by my clients for the date the meter reading was done in or during June/ July 2020 until the reading in January 2020. This payment is without prejudice and without any admission that the amount is due, owing and payable or that it is correctly computed.
2. ESKOM immediately reconnects the electrical supply to the farm that was terminated on 27 January 2020 on receipt of the aforesaid amount.
3. The parties re-enter into discussions regarding the balance of R 445 590 allegedly owing by Mr. Naude in respect of the alleged usage by the client for the period commencing in or during March 2016 to June/July 2019, if any, in order to resolve the dispute regarding the correctness of the amount.
4. Pending the outcome of these discussions my client continues to pay the future monthly tax invoices submitted to him in respect of Account Number . . . Payment of these invoices will not constitute any admission that any amount is indeed owing by our client in respect of this account, and all our client's rights are reserved in this regard.
5. If the parties are unable to settle this dispute within 30 days from the date that the interim agreement (as proposed herein) is signed, ESKOM shall have the right to institute action against my client for the recovery of the amount that ESKOM alleges is due, owing and payable. My office address . . . is hereby appointed by my client as the service address of Mr . . . where he will accept the summons and all other process in this matter.
6. Pending the finalisation of the dispute, whether by agreement or by order of the court, and whilst my client makes payment of the tax invoices in respect of this account as provided for in paragraph 4 supra, ESKOM shall continue to provide electricity to the farm. As this matter is regarded as extremely urgent in view of the current situation on the farm as stated in previous correspondence, I must insists on your response by 12h00 on Tuesday 11 February 2020.

Should my client's proposal be accepted, I will draft a Settlement Agreement that contains the above provisions to be made an order of Court.

Kind regards'

(Signed by author)

[39] First and foremost, it must be emphasised that CJ8 was drafted in letter format and is clearly marked 'without prejudice'. It should also be noted that CJ8 constitutes correspondence, drafted and signed only by the third applicant's attorney.

[40] Obviously, the phrase 'without prejudice' contained in CJ8 is also very telling under the circumstances. CJ8 begins by stating the following:

'My client's without prejudice settlement proposals, which are in line with our last discussion today that narrowed the issue, are as follows . . .'

[41] In the first place, the use of the words 'without prejudice' in CJ8 is instructive; it strongly suggests that the document was part of frank negotiations between parties. Over and above, it can also be gleaned from the excerpt just quoted that CJ8 is identified as a settlement **proposal**.

[42] Importantly, paragraph 5 and the last paragraph of CJ8 record the following:

'5. If the parties are unable to settle the dispute within 30 days from the date that the interim agreement (***as proposed herein***) ***is signed*** . . .

Should my client's proposals be accepted, **I will draft a Settlement Agreement that contains the above provisions to be made an Order of the Court.**' (Own emphasis added.)

[43] Once again, the words 'as proposed herein' are very illuminating. In my mind, the use of these words in the context of the document strongly suggests that the document was merely a settlement proposal, facilitated by the third applicant's attorney. Essentially the third applicant's attorney was putting proposals on the table.

[44] I am acutely aware that on 11 February 2020 an official of the respondent responded as follows to CJ8:

'Good day

The proposal is confirmed and confirmed by the Manager. We will wait for the proof of payment and thereafter arrange for the reconnection.'

[45] The third applicant strongly contends that an agreement between the parties came into being on 11 February 2020, when the above email was sent by an employee of the respondent. On the other hand, the respondent contends that when the electricity was reconnected and the R90 000 was paid, no binding agreement came into being between the parties.

[46] It is settled law that a contract comes into being once an offer is accepted. It is also an established principle that acceptance of an offer by the offeree must be clear, unequivocal and unambiguous, and must correspond with the offer.

[47] Clearly, the applicants would like the court to believe that the email from the respondent's employee, dated 11 February 2020, was a mode of acceptance of the offer made in CJ8. However, it is my view that if regard is had to the last paragraph of CJ8, it becomes clear that the parties had intended the purported agreement to be valid and binding only when reduced to writing and made an order of the court. In my mind, when the third applicant's attorney inserted the last paragraph in CJ8, he fundamentally prescribed or proposed a particular method of offer and acceptance. Notably, the last paragraph of CJ8 clearly stipulates that if the proposal is accepted a settlement agreement would be drafted and made a court order. Manifestly, these are part of the provisions or terms of the proposal (CJ8). Therefore, the proposal indicates categorically that there should be a drafted deed of settlement which contains the provisions of the proposal.

[48] From the terms of CJ8, the inference is inescapable that the parties involved during the negotiations agreed beforehand that a written deed of settlement will constitute a formality, in order for an agreement to come into being. Consequently, the parties that facilitated the negotiations expressly agreed that before their agreement can have binding force, it should be in the form of a drafted and signed settlement agreement.

In *Driftwood Properties (Pty) Ltd v McLean* 1971 (3) SA 591 (A), at 597D, the following was stated:

'It is trite that an offeror can indicate the mode of acceptance whereby a *vinculum juris* will be created, and he can do so expressly or impliedly.'

[49] Essentially the last paragraph of CJ8 created a condition which could only be fulfilled when a settlement agreement was drafted encapsulating the terms of CJ8, and which was then made a court order. As a result, the offer was subject to a condition. Clearly, the proposal becoming an agreement was conditional upon the drafting of the settlement agreement.

[50] Therefore, the email by the respondent's employee did not establish a *vinculum juris* between the applicants and the respondent. I hold the view that when the respondent's employee wrote the email dated 11 February 2020, she was actually communicating an intention to create legally binding obligations on the terms set out in the proposal (CJ8). It is also clear from the content of the email that the respondent's employee was amenable to the provisions of the proposal. It is undisputed between the parties that the third applicant and the respondent did perform partially in terms of CJ8. Importantly, there is no contract without the fulfilment of the condition, even though the parties performed. It is my firm view that when the

respondent reconnected the electricity supply, it acted in terms of a proposal, which had no binding effect, as it was not reduced to writing as contemplated in the proposal.

[51] I am alive to the fact that once the parties reach a settlement based on a document marked 'without prejudice', the privileged nature of that document is gone. However, the pertinent enquiry in this matter is whether an agreement was reached.

[52] In the instant matter it is evident that CJ8 conveys that the author intended to have a written and signed agreement. Of course, mindful of the fact that circumstances can vary widely from case to case, under the circumstances of this case, the use of the term 'without prejudice' as a preface to the document is the first red flag, which flies in the face of the attempt to describe CJ8 as an agreement. This is so because CJ8 was basically a product made in the process of negotiations.

[53] CJ8 is nothing but mere correspondence, which was generated in efforts by a party to settle the dispute without resorting to litigation. This becomes more apparent when the response from the respondent's official is given regard to.

[54] In the context of this matter, it is rather disingenuous of the applicants to seek to label a clear proposal as an agreement, particularly if regard is had to the fact that the purported agreement specifically states that:

'If the proposal is accepted, I will draft a settlement agreement that contains the above provisions to be made an order of the court.'

[55] Since it was specifically mentioned in CJ8 that if the proposal was accepted a settlement agreement would be drafted, surely after the purported acceptance of the proposal by the respondent's official, one would have expected to find a written settlement agreement, as contemplated in CJ8. Regarding the email dated 11

February 2020, written by the respondent's employee, it is similarly a form of back-and-forth communication between the respondent and the third applicant's attorney, during negotiations.

[56] Interestingly, in the applicants' papers, there is no explanation for the absence of the settlement agreement, as envisioned by CJ8. What is also surprising is that the Eskom official, in the answering affidavit, specifically mentions the following:

'On the 19 of February 2020, the third applicant made requisite payment of R90 000 and the respondent reconnected the electricity supply forthwith, whilst still awaiting receipt of the signed arrangement agreement for the settlement of the balance.'

[57] Significantly, clause 5 of CJ8 pertinently states that if the parties are unable to settle the dispute within 30 days from the date the interim agreement (as proposed therein) is signed, the respondent will have the right to institute action for the recovery of the amount. Clearly from clause 5, the clock for the respondent would start ticking 30 days after the agreement was signed. As already alluded to, there is no signed agreement. This, by necessary implication, must mean that if there is no signed document; Eskom does not have reference date from which to calculate the 30 days envisaged in clause 5. It is rather interesting to note that when the third applicant refers to clause 5, he merely states the following in the replying affidavit:

' . . . if a dispute regarding account number 8432321223 cannot be settled within thirty days from the agreement, the respondent may resort to litigation to attempt to prove its alleged claim and recover such amounts proved.' (Own emphasis added.)

[58] Plainly, the third applicant does not cite what is embodied in clause 5 correctly. Clause 5 does not only say within thirty days of the agreement, but rather states the following:

'If the parties are unable to settle the dispute within 30 days from the date that the interim agreement (***as proposed herein***) ***is signed***. . .' (Own emphasis added.)

[59] Clause 5, in my view, supports the assertion that it was the parties' intention that, pursuant to the acceptance of the offer by the respondent, the proposal terms contained in CJ8 should be reduced to writing. Additionally, the last paragraph of CJ8 categorically states that a settlement agreement containing the provisions of CJ8 would be drafted and made a court order. Undoubtedly, in this matter the devil is in the details. There are pointers and tell-tale signs everywhere to assist in the determination that, if there had been a settlement agreement, it would have been signed by all relevant parties.

[60] It is also clear from clause 5 that once the settlement agreement was signed by the parties, the thirty days for the parties to try and settle the dispute of the monies owed, would start running. If regard is had to the terms of CJ8, it becomes clear that the parties intended that a signed settlement agreement would embody their contract.

[61] In *Goldblatt v Freemantle* 1920 AD 123, at pages 128-129, the following is stated:

'Subject to certain expectations, mostly statutory, any contract may be verbally entered into, writing is not essential to contractual validity. And if during negotiations mention is made of a written document, the Court will assume that the object was merely to afford facility of proof of the verbal agreement, unless it is clear that the parties intended that the writing should embody the contract. (*Grotius* 3.14.26 etc). At the same time it is always open to parties to agree that their contract shall be a written one (see *Voet* 5.1.73. *V Leeuwen* 4.2., sec. 2, *Deckers'* note); and in that case there will be no binding obligation until the terms have been reduced to writing and signed. The question is in each case one of construction.'

[62] Consequently, I find that there is no binding contract that exists between the parties.

Section 21 (5) (b) and/or (c) of the Act

[63] It was strongly contended on behalf of Eskom that it is statutory empowered to disconnect the supply of electricity to its customer. Section 21 (5) of the Act states the following:

'A licensee may not reduce or terminate the supply of electricity to a customer, unless-

(a) the customer is insolvent;

(b) the customer has failed to honour, or refuse to enter into, an agreement for the supply of electricity; or

(c) the customer has contravened the payment conditions of that licensee.'

Was the respondent supposed to have filed a certificate that it is a licensee?

[64] It was submitted on behalf of the applicants that the respondent was supposed to have produced, for purposes of this application, a certificate to prove that it is a licensee as contemplated in section 25 of the Act. I however wish to point out that it was not the applicants' case that the respondent is not a licensee as contemplated in the Act. This much is not averred in the applicants' pleadings.

[65] In South Africa, Eskom is quite a well-known state-owned public company. It is my view that this court can take judicial notice that the respondent, Eskom, is a licensee with a license to, amongst others, distribute as principal supplier electricity in South Africa. It is also common knowledge, and unquestionable, that Eskom is licenced by the National Energy Regulator of South Africa to generate, transmit and distribute electricity to the entire country.

[66] In *Tokologo Local Municipality v Eskom Holdings Soc Ltd and Others* (4991/2018) [2019] ZAFSHC 241 (13 December 2019), the following was stated:

'(19) It is unquestionable that the first respondent is permitted to interrupt and disconnect electricity against defaulting customers.'

[67] It is my firm view that counsel on behalf of the applicants was being overly technical regarding the submission of a certificate.

The disputed amount

[68] The respondent is statutorily obligated to collect all money that is due and payable to it. The applicants are disputing the monies owed to the respondent. The dispute, as already alluded to hereinabove, is about the accuracy of the amount owed.

[69] It was never the applicants' case that the services for the period in question were never rendered, or that the applicants paid their account in full for the period in question. Gleaning from the papers it appears that the bone of contention between the parties is the accuracy of the electricity meter. Therefore, the dispute between the parties does not pertain to whether the respondent is owed or not, but how much is owed. Put differently, the amount of arrears is in dispute. This is also confirmed by the third applicant's assertion in paragraph 63.3 of the replying affidavit:

'I maintained from the very onset that the staggering amount that accrued for the alleged usage of electricity in respect of account number . . . is simply not possible.'

[70] Consequently, I cannot be faulted for finding that it is not in dispute that there are monies owed by the third applicant to the respondent for the period in question.

[71] In my view, the question which aptly arises is whether the dispute pertaining to the amount owed prevents the respondent from terminating the electricity supply to the farm. The third applicant does not dispute that on 24 December 2020 he made a payment of R50 000 towards the arrear amount; however, he maintains that he was compelled to do so in order to avoid termination of the electrical supply to the farm. The third applicant further maintains that he was coerced to offer a once-off payment.

[72] It is additionally not in dispute that the third applicant, on 19 February 2020, made a payment of R90 000. However, the third applicant maintains that the R90 000 was paid in terms of the agreement, and that nothing occurred since then that gave the respondent the right to disconnect the electricity to the farm.

[73] Clearly the third applicant is not correct in saying that nothing has happened since the payment of the R90 000, because the agreement which was envisioned in terms of CJ8 never came into being.

[74] Furthermore, it is alleged in the respondent's answering affidavit that the third applicant made additional payments totalling R25 640,45. In answer to this averment, the third applicant simply makes a bald allegation that the amounts he paid were payments in respect of other accounts with the respondent, and were in all probability incorrectly allocated to the disputed account by the respondent. These allegations made by the third applicant regarding the amount of R25 640,45 must be assessed in light of the papers before this court. Moreover, the third applicant's response, when it comes to the amount of R25 640,45, is in needlessly bald and vague terms with no attempt to produce any proof that the amounts were never meant to defray the arrears in dispute. I would have expected the third applicant to have taken the court into his confidence, and explain more. Essentially the third applicant fails to substantiate

the bald allegation. For that matter, the third applicant does not even identify those accounts to which the amounts were supposed to have been allocated. Consequently, the third applicant's denial fails to produce a real, genuine or *bona fide* dispute of fact.

[75] To me, under the circumstances of this case, this explanation by the third applicant is not sustainable. The papers, in my view, establish on a balance of probabilities that the amount of R25 640,45 was paid towards the arrear amounts. Consequently, I accept the averments made by the respondent.

[76] In this matter, the pleadings reveal that attempts were made to resolve disputes through signing of agreements and attempts to conduct testing on the electricity meter, but to no avail. The dispute regarding the amount has been in existence for years now. According to the pleadings, on 19 November 2020, the respondent decided to cut the electricity supply to the farm, after its officials were not able to test the electricity meter. The pleadings further establish that that was not the first time the electricity supply to the farm was disconnected, on grounds of the arrears in question.

[77] Though the third applicant strenuously wants to convince this court that he disputes the amount owed to the respondent, the papers show however that he has made payment totalling R165 640,45 towards the arrears.

[78] I have already found that there is no binding agreement between the parties. Furthermore, in paragraph 51.3 of the replying affidavit, the third applicant admits that he refused to sign the first deferral agreement proposed by the respondent. Similarly, in paragraphs 53 and 53.1 of the replying affidavit, the third applicant confirms that he also refused to sign the second deferral agreement proposed by the respondent.

[79] The third applicant also admits that he is refusing to pay the amount which the respondent claims he owes.

[80] The admissions by the third applicant puts him squarely within the ambit of both section 21 (5) (b) and (c) of the Act.

[81] In *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and others* 2021 (3) SA 47 (SCA), the following was stated at para 55:

'It is therefore correct, as counsel for Eskom argued, that s 21(5) of the ERA empowers Eskom to reduce or terminate the supply of electricity to its customers in the circumstances spelt out in the section. And that it may exercise that power without prior authorisation by a court.'

[82] In *Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC), the following is stated in para 36:

'Section 21(5)(b) contemplates two scenarios. The one scenario is where there is an agreement between a resident and the municipality as to the supply of electricity by the municipality to the customer, and the customer refuses to honour the agreement. The other scenario is where there is no agreement for the supply of electricity and the customer refuses to enter into an agreement. In either case the municipality would be entitled to cut off the electricity supply to the resident or customer if it were already supplying electricity to the customer. Section 21(5)(c) is very important.'

[83] In the *Rademan*, supra the court further states the following in paragraph 39:

"One of the Municipality's conditions of payment is that a resident or ratepayer has no right to decide on the manner of settlement of his or her account for municipal services if he or she does not settle his or her account in full or is in arrears. Another one is that, when the Municipality has consolidated a resident's accounts for various services, the various accounts become one consolidated account and the resident is obliged to pay the whole consolidated debt. If a resident pays for one component of the account and not others or pays for some components but not another one, he or she contravenes the Municipality's conditions of

payment. This, then, entitles the Municipality to cut off the resident's electricity supply or the supply of any other service. The Municipality is not confined to cutting off the supply of a particular service but may cut off the supply of any service to the resident. In this case Ms Rademan failed to pay her rates account and the Municipality cut her electricity supply off. It was entitled to do so in the circumstances of this case."

[84] Evidently, there is a long historical background between the third applicant and the respondent, which eventually culminated in the litigation at hand. The ongoing standoff between the third applicant and the respondent relates to the monies claimed by the respondent, for electricity services to the farm, for the period from 22 March 2016 until 22 July 2019.

[85] According to the third applicant, under the circumstances of this matter, the standoff can only be resolved by the respondent through institution of an action in court for the payment of the amount it is claiming.

[86] It is so that the action taken by the respondent in disconnecting the supply of electricity to the farm is both severe and has far-reaching implications. With all things considered, I am of the view that though the act of disconnecting the supply of electricity is harsh, in terms of the law, the respondent was allowed to do so. In *Eskom Holdings Soc v Masinda* 2019 (5) SA 386 (SCA), Leach JA, said the following regarding a right that stems from a contractual relationship and spoliation:

"[24] In seeking restoration of her electricity supply, Ms Masinda's claim could hardly have been more terse. She said no more than that Eskom's officials had unlawfully disconnected

the supply of electricity to her house and the prepaid meter, and asked that it be reconnected to the national grid. There was no attempt to show that such supply was an incident of her possession of the property. She relied solely upon the existence of the electrical supply to justify a spoliation order. In the light of what is set out above, this was both misplaced and insufficient to establish her right to such an order.

[25] In addition, there is the common–cause fact that Ms Masinda purchased her electricity on credit through the prepaid system which I have described. In these circumstances, her right to receive what she had bought flowed, not from the possession of her property, but was a personal right flowing from the sale. Similar to the case in *Xsinet*, her claim was essentially no more than one for specific performance (and to the limited extent of a supply worth no more than the unused credit still due after her last purchase). This personal, purely contractual right cannot be construed as an incident of possession of property. As the mandament does not protect such a contractual right, for this reason too the claim ought to have been dismissed."

[87] It is clear that the third applicant wants to dictate terms to the respondent as to how it should conduct its business. Throughout the papers in this matter, the hallmark which is distinct is that the third applicant wants to prescribe the rules of the game and is consistently shifting the goal posts. For instance, refusing to sign agreements, proposing a settlement agreement and not following through with the terms of the proposal.

[88] In this matter, what stands out quite clearly is that the respondent did not immediately throw down the gauntlet on the third applicant; or flex its statutory muscle by disconnecting the electricity reticulation to the farm. In my view, the respondent tried by all means to act proportionately and fairly with the third applicant. Equally, the respondent cannot be faulted for trying to exhaust other means of settling the dispute with the third applicant, other than cutting off the electricity supply to the farm. In my opinion, the respondent actually bent over backwards trying to find a resolution.

[89] The respondent is providing a critical service the entire country, and Eskom cannot be held to ransom and prevented from enforcing what they are entitled to do for the sake of legal niceties. In *Rademan*, supra, the court perfectly encapsulated the purpose of statutory muscle, when regulated entities are dealing with recalcitrant debtors when it opined:

"[18] The Systems Act is a legislative measure that seeks to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and to perform their functions . . .

[20] A municipality is obliged to collect all money that is due and payable to it, subject to the Systems Act and any other applicable legislation. . ."

[90] It is thus quite clear in my view, that the respondent has successfully raised a defence against the operation of the Rule *nisi*.

[91] **In the result, I make the following order:**

a. The Rule *nisi* issued on 20 November 2020 is hereby set aside with costs on a party and party scale, including the costs of counsel.

CN NZIWENI
Acting Judge of the High Court

APPEARANCES

Counsel for the Applicants: Adv. JT Benade

Counsel for the Respondent: Adv. M Titus