REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, JOHANNESBURG)

(1) REPORTABLE: YES / NO (2) OF INTEREST TO OTHER JUDGES: YES / NO (3) REVISED: YES / NO DATE: 28 NOVEMBER 2022 AJ THUPAATLASE	**CASE NO. 22/3059**

ATOLL METAL RECOVERY (PTY) Ltd **PLAINTIFF**

And

EKHURHULENI METROPLITAN MUNICIPALITY **DEFENDANT**

Judgment

Thupaatlase AJ

Introduction

[1] The plaintiff is a duly registered and incorporated company in terms of the Company laws of the Republic of South Africa having its registered address at 116 Dummer Street La Sandra, Somerset West, Cape Town, Western Cape and has its principal business operations at Main Reef Road, Rynsoord, R29 Benoni Ekurhuleni, Gauteng.

[2] The plaintiff conducts business as an open cast mine and stone crusher, producing dolomitic stones. The plaintiff is a customer of the defendant as defined in section 1 of the Electricity Regulation Act 4 of 2006. The plaintiff purchases electricity from the defendant. The plaintiff defines itself as end user of the electricity. The electricity is used to power the operations of the plaintiff's business operations.

[3] The defendant is an organ of State and local municipality duly established in terms of the Local Government: Municipal Structures Act 117 of 1998 and having its principal place of business at 15 Queen street, Germiston, Ekurhuleni, Gauteng.

[4] The defendant is being sued as a licensee as defined in Section 1 of the ERA in that it holds a licence granted or deemed to have been granted by the National Energy Regulator of South Africa (NERSA) to distribute and supply electricity to all consumers of electricity within the areas prescribed in the licence. The defendant holds a electricity distribution licence.

[5] The distribution licence allows the defendant to distribute and supply electricity within the area designated in the Schedule to the licence. The distribution and supply of electricity customers is done upon payment of levy charged.

[6] There are further conditions attached to the distribution and supply licence issued by NERSA. Among such terms is that the defendant is enjoined not to reduce or to discontinue the supply of electricity to consumer unless the consumer is insolvent, or the consumer has failed to pay the charges or failed to comply with the conditions of supply.

Relief Sought

[7] The plaintiff instituted action against the first defendant for the payment of certain amounts alleged to be due under a service contract and for damages arising out of the breach of the contract. There is alternative claim against the defendant for alleged breach of a legal duly imposed by legislation. Plaintiff alleges that the defendant terminated electricity to its open cast mine from the period 31 July 2020 to 04 August 2020 and again on 31 August 2021 to 01 September 2021.

[8] According to the plaintiff the action by the defendant resulted in a complete cessation of its mining and stone crushing operations during the aforesaid periods.

[8] In the alternatively the plaintiff alleges that defendant breached its legal duty as provided in terms of the section 21(5) (a) to (c) of ERA and also the terms of the licence condition. As a result of the breach of such a legal duty the municipality acted negligently. This resulted in the defendant suffering damages in the amount of R 3 297 298.71 in relation to loss of production time, salaries which the plaintiff was obliged to pay staff despite the staff not being able to attend to their work and for overtime paid to staff to mitigate the plaintiff's loss and a loss of sale during the mentioned period.

[9] The defendant did not respond to the summons. The summons was served on the defendant by the sheriff on the 28 January 2022. The issue of merits doesn't arise in this matter. The plaintiff is entitled to approach court in terms of Rule 31 for a default judgment.

[10] The court postponed the matter to deal with the issue of the computation of the amount claimed. The plaintiff submitted a detailed affidavit showing how the damages were calculated. In terms of Rule 31(2)*(a)* "Whenever in an action the claim or, if there is more than one claim, any of the claims is not for a debt or liquidated demand and a defendant is in default of delivery of notice of intention to defend or of a plea, the plaintiff may set the action down as provided in subrule (4) for default judgment and the court may, after hearing evidence, grant judgment against the defendant or make such order as it deems fit." See ***Royce Kincaid (Pty) Ltd v Wylfred (Pty) Ltd and Another*** 1974 (2) SA 554 (D).

[11] The defendant did not is at this stage not entitle to any indulgence or further notice of the action contemplated by the plaintiff. In this case the action is to apply for default judgment. This so because no notice to defend the action was delivered by the defendant. In term of subrule 31(4) 'the proceedings referred to in subrules (2) and (3) shall be set down for

hearing upon less than five days' notice to the party in default: Provided that no notice of set down shall be given to any party in default of delivery of notice of intention to defend'. It is clear that the defendant falls under the proviso.

[12] The law regarding contractual damages has occupied courts and has been dealt with by academic writers. In the case of ***Basson v Hanna*** (37/2016) [2016] ZASCA 198 (6 December 2016) the court undertook a detailed discussion on the subject. The court quoted with approval from Christie's *Law of Contract in South Africa* 7 ed (2016) where it is stated at page 616 that: 'The remedies available for a breach or, in some cases, a threatened breaches of contract are five in number. Specific performance, interdict, declaration of rights, cancellation, damages. The first three may be regarded as methods of enforcement and the last two as recompenses for non-performance. The choice among these remedies rests primarily with the injured party, the plaintiff, who may choose more than one of them, either in the alternative or together, subject to the overriding principles that the plaintiff must not claim inconsistent remedies and must not be overcompensated'.

[13] There are many cases in which it was held that if one party to the agreement repudiates the agreement, the other party at its election, may claim specific performance of the agreement or damages in lieu of specific performance and that the claim will in general be granted, subject to the court's discretion.

[14] The purpose of damages where there has been a breach of contract is to place the injured party in the position it would have been in had the breach of agreement/contract not taken place. **See *Holmdene Brickworks (Pty) Ltd v Roberts Construction Co Ltd 1977 (3) SA 670 (A).*** The position in which the prejudiced party finds itself after the breach must be compared with the position he would have been in, had the contract been fulfilled properly. See ***Lillicrap*, *Wassenaar and Partners v Pilkington Brothers*** 1985 (1) SA 475 (A).

[15] I am satisfied that contractual damages suffered by the plaintiff as a result of breach of agreement by the defendant has been proved.

Order

There will be judgment against the first defendant for payment of:

a. Payment of the amount of (three million two hundred and ninety-seven two hundred and ninety-eight rand and seventy-one cents (R 3 297 298.71).
b. Interest thereon at the rate of 7% per annum temporae morae from date of demand to date of final payment.
c. Costs of suite, including costs of counsel

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Thupaatlase AJ

Heard on: 14 September 2022

Judgment delivered on: 28 November 2022

Appearances:

For the Applicant: Mpho Sethaba

Instructed by: Webber Wentzel Attorneys

For the Respondent: No Appearance