

**IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, PRETORIA**



(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: Yes

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Signature

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Date

Case No: 17532/2019

In the matter between:

**BIZZ TRACERS (PTY) LTD**

Applicant

(Registration number: 2012/212910/07)

and

**ESKOM HOLDINGS SOC LTD**

Respondent

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**JUDGMENT**

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**SARDIWALLA J**

[1] This is an application for summary judgment in terms of Rule 32(2) of the Uniform Rules of Court. The relief sought is as follows:

1.1 Payment in the amount of R57 000 000.00

1.2 Interest on the sum of R57 000 000.00 at the rate of 10,50% per annum a from date of summons.

1.3 Costs of suit;

1.4 Further and/or alternative relief.

### **Factual Background**

[2] The Applicant and Respondent entered a written agreements on pr about 19 October 2019.

[3] The alleged express terms, alternatively tacit, alternatively implied and conditions of the agreement were *inter alia* the following:

3.1 The Plaintiff would track and recover Ghost Vending Machines (hereinafter referred to as the “machine”) which are used to defraud Eskom (the Defendant) of electricity sales revenue;

3.2 The Defendant would pay commission in the amount of R57 000 000.00 (FIFTY-SEVEN MILLION RAND) inclusive of VAT, for every successful recovery of a machine; and

3.3 The commencement date of the Agreement was 19 October 2015 and the completion date was 19 September 2018;

3.4 On or about the 3 August 2017, the Applicant recovered an Eskom machine.

3.5 The Applicant was requested to identify the machine, which the Applicant allegedly identified positively as an Eskom Ghost Vending Machine with Serial Number: 04061187946.

3.6 Subsequently the Respondent failed to make payment to the Applicant for the successful recovery of the Machine per the Agreement despite the Applicant having followed the agreed procedure below:

3.6.1 An invoice for payment was issued and delivered by the Applicant to the Respondent on or about 14 January 2019;

3.6.2 On 5 February 2019 the Applicant sent an email to the Respondent confirming receipt of the invoice.

3.6.3 On or about 1 March 2019 a further letter of demand was sent requesting payment of the invoice to the Respondent.

[4] The Applicant alleges that it followed the same process for verification and payment previously and no payment has been affected. Therefore, the amount of the time of the application for summary judgment the invoice was outstanding for a year and eight month and it is the Applicant's contention that the Respondent has no *bona fide* defence.

[5] The summary judgment is resisted on the following basis:

5.1 There is a dispute of fact relating to the Plaintiff's claim which dispute can only be resolved at trial.

5.2 There was and cannot be any justification in terms of Eskom's procurement policy for the Agreement being entered into and in the way it was entered into. The services were acquired from a sole source, contrary to Eskom's policy.

5.3 The approval of the Agreement by Triple adjudication waqs invalid in that the Triple Adjudication applies to the approval of the commercial transactions not exceeding R5 000 000.00.

5.4 The Agreement contravenes the provisions of the Public Finance Management Act ("PFMA") specifically section 45 and it constitutes financial misconduct in terms of section 83 of the PFMA and section 217 of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution").

5.5 There is prima facie proof of money laundering and/or corruption relating to the conclusion of the Agreement.

5.6 The Respondent intends to issue a counterclaim against the Applicant for the recovery of all amounts paid to the Applicant as a result of the invalid, unconstitutional and unlawful Agreement. The basis for this contention in so far as the Defendant alleges that in terms of Clause C 1.1, C 2.1 and Clause 11.2 (4) the Plaintiff failed to comply with all its terms and conditions and that the parties agreed that the price for each ghost machine that was recovered would be agreed, upon recovery.

5.7 It was never the intention of the parties that the Applicant would be paid R50 000 000.00 for each ghost machine recovered.

5.8 The Agreement clearly states that that the Applicant would be apid a total of R50 000 000.00 (excluding VAT) on the recovery of all ghost machines. That is the total amount that would be set aside for the purpose of recovering the ghost machines for the purposes of the Agreement.

5.9 On the Plaintiff's own version the Respondent had previously paid an amount of R9 000 000.00 for the recovery of each ghost machine. Therefore, there is no basis upon which the Applicant now claim's R57 000 000.00 in respect of each ghost machine.

5.10 The calculation methodology referred to in Applicant's letter dated 12 April 2019 makes several incorrect assumptions of the rates. No evidence was provided by the Applicant to sustain that the Respondent was sustaining losses of R50 000 000.00 per month as a result of the unrecovered ghost machines.

5.11 The Respondent states that the Applicant provided no detail as to the basis upon which he concludes that the machine is an Eskom machine. The Respondent denies the machine is an Eskom machine.

5.12 The Plaintiff alleges that he attended an inspection of the machine but has provided no of what the inspection entailed and/or whether a report was compiled in respect of the Ghost machine. Therefore, it is clear that authentication is required prior to a machine being regarded as an Eskom machine let alone that the fact that a fee is payable in respect of that machine.

## **ISSUES FOR DETERMINATION**

[6] Whether the Respondent has a *bona fide* defence.

[7] Whether there are triable and mitigating issues raised by the Respondent.

## **Legal Principles**

[8] In terms of Rule 32(2) (b) the Applicant has to identify a point in law and facts relied upon which its claim is based. The Applicant has the onus to prove why the

defence pleaded does not raise any issues for trial. It is not enough to merely state that the Respondent did not have a *bona fide* defence. To the contrary the Respondent has to prove that he at the very least has a defence and state the material facts upon which his defence is based. This then enables the court to decide as to whether he has a *bona fide* defence or not.

[9] The onus rests with the plaintiff to show that the defendant does not have a defence on the merits of the case. See **Breitenbach v Fiat SA (Edms) BPK 1976 (2) SA 226 T at 227F.**

[10] The contentious issue for determination is whether the Respondent has raised *bona fide* defences. The Applicant submitted that the Respondent has not succeeded in disclosing triable issues and therefore issues raised by the Respondent, do not constitute *bona fide* defences. Further that the Respondent's Legal Representatives have been unable to provide this Court with proof of its mandate for this Court to consider the Summary Judgment and grant it leave to defend. As a direct result of this the opposing affidavit is invalid and the matter is actually unopposed.

[11] It is contended by the Respondent that the provisions of the Rule 32(4) are peremptory and therefore the Applicant's attempt to introduce further evidence in this application for Summary judgment is unavailing and improper. Secondly on the Applicant's version four "ghost vending machines" were recovered by the Applicant and on three occasions the Applicant was paid as follows:

A) 1<sup>st</sup> Ghost Machine (Ghost CDU)

– recovered and paid by Eskom on 20 December 2016 -R 9 285 756.

B) 2nd Validator/ Ghost Office Machine

- 6 July 2017 -R9 756 653.52

C) 3<sup>rd</sup> Ghost Machine (Ghost CDU)

- 21 December 2017 – R 9 120 000.00

[12] Therefore, as can be previously seen the Applicant was only paid in the region of R9 000 000.00 per machine and the Applicant can provide no basis for contending that this amount would now be R57 000 000.00 in respect of each machine. Further that the Applicant is claiming a liquidated amount and there cannot be any grounds for summary judgment in this matter as there is a dispute of fact that cannot be resolved on the papers alone. Lastly that the Agreement is unlawful, unconstitutional and invalid as it contravenes the Constitution and the PFMA therefore summary judgment cannot be utilised to protect an illegally obtained right. On these basis the summary judgment should be dismissed with costs. It is the Respondent's contention that it has raised or set out sufficient facts in its affidavit, which if proved will constitute and answer to the Applicant's claim and or is a *bona fide* defence therefore the court should not grant the summary judgment.

[13] The Respondent contends that it has *bona fide* defences and has raised triable issues entitling it to leave to defend Applicant's claim.

[14] Summary judgment is an extraordinary, stringent and drastic remedy, it calls for strict compliance with the prerequisites as provided for in Rule 32 (2) (b). See **Gull Steel (Pty) Ltd v Rack Hire BOP (Pty) Ltd 1998 (1) SA 679 (O)** at 683 H.

[15] In **Maharaj v Barclays Ltd 1976 (1) SA 418 (A) Maharaj v Barclays Ltd 1976 (1) SA 418 (A) Maharaj v Barclays Ltd 1976 (1) SA 418 (A)** the courts are vested with an unfettered discretion which has to be exercised judicially when considering summary judgment applications. Summary judgment will be granted in the event where the plaintiff has made out an unanswerable case against the defendant who simply wants to unnecessarily delay the plaintiff's case. In **Maharaj supra**, the court held that in deciding whether or not to grant summary judgment, the principle is that the court has to look at the matter and all the documents that are properly before it.

[16] The Applicant averred that he had followed the same processes as he did with previous invoices for Ghost machines recovered and therefore there is clearly and Agreement between the parties and the debt has not been paid for the machine recovered on 3 August 2017. He further stated that the Agreement cannot be unlawful

as he states that the processes for procurement were different as this was contract was “specialized” in nature. Further that a forensic investigation into service providers and suppliers was done by Eskom in which the Applicant also submitted documents and compulsory interviews received a clean audit. Therefore, there are no defences. The Applicant, however, significantly has made no averment on how the Respondent is liable to pay R57 000 000.00 for one machine when it previously charged approximately R9 000 000.00 per machine for the recovery of three other machines.

[17] The Respondent has taken issue with the calculation of the rate at which the Applicant has calculated the amount owing amongst several other issues in that the Agreement itself was unlawful. Therefore, there is no explanation from the Applicant why it proceeded to pursue payment for R57 000 000.00 from the Respondent and the Respondent’s defence remains unanswered.

[18] The Applicant’s cause of action which constitutes its foundation in this application is disputed. In my view the defences raised do provide an explanation to the claim and the claim therefore has been answered by the Respondent. In respect of the defence that the process contravenes the PFMA and the Constitution I am satisfied that there is a triable issue. In respect of the second defence raised the Applicant has in its own papers averred that it was paid approximately R 9 000 000.00 for each machine previously, therefore the defence that the Respondent is indebted to the Applicant for R57 000 000.00 for one machine is non-sensical and must be factually incorrect.

[19] I am satisfied that the defences raised by the Respondent to the Applicant’s case are *bona fide* defences which can be sustained by the Respondent at the subsequent trial.

**[20] I therefore make the following order:**

**20.1 Summary judgment is granted with costs.**

**20.2 The Respondent is granted leave to defend the action.**

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**SARDIWALLA J**

**Appearances:**

For the Applicant:

Adv Karabo B Kgoroadira

Instructed by:

Hefferman Attorneys

For the Respondent:

X Hilita

Instructed by:

Mamatela Attorneys Incorporated