

SOUTH AFRICA / JUDGMENT

Afriforum NPC v National Energy Regulator of South Africa and Another (2024/061972) [2024] ZAGPPHC 1381 (5 December 2024)

[2024] ZAGPPHC 1381

COURT

North Gauteng High Court, Pretoria

BEFORE

De Vos

CASE / FILE NUMBER

2024/061972

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

CASE

NO: 2024-061972

(1)

REPORTABLE: NO

(2)

OF INTEREST TO OTHER JUDGES: NO

(3)

REVISED: NO

Date:

5 December 2024

SIGNATURE:

In

the matter between:

AFRIFORUM
NPC
Applicant
and
NATIONAL
ENERGY REGULATOR OF SOUTH AFRICA
First Respondent
SOUTH
AFRICAN LOCAL GOVERNMENT ASSOCIATION
Second Respondent

JUDGMENT

DE VOS AJ

- [1] AfriForum seeks interim execution of an order pending an appeal.[1] The appeal will be heard by a Full Bench of this Court, most likely in the second term of 2025. AfriForum seeks the interim execution of the order in the public interest and aims to prevent municipalities from charging end-users unlawful electricity tariffs pending an appeal process.
- [2] The application is opposed by NERSA, the energy regulator responsible for approving electricity tariff increases. NERSA persists in its stance that the tariffs are lawful and contends that the requirements of interim execution have not been met. SALGA, which represents the interests of more than one hundred and fifty municipalities, agrees with AfriForum that the tariffs are unlawful but submits that AfriForum has not met the test for interim execution.
- [3] The context of the dispute is the methodology NERSA is required to apply to determine electricity tariff increases. The Electricity Pricing Policy mandates municipalities to conduct cost-of-supply studies, and section 27(h) of the Electricity Regulation Act 4 of 2006 states that NERSA's methodology must comply with the Policy. Read together, the legislation and the policy mandate that NERSA's methodology must be premised on cost-of-supply studies.
- [4] AfriForum and SALGA are in agreement that NERSA's methodology must be based on cost-of-supply studies. NERSA initially accepted that its methodology must be based on cost-of-supply studies, but in the face of non-complying municipalities, did away with requiring cost-of-supply studies and settled for a cost-breakdown methodology for the 2024/2025 financial year. It is common cause that NERSA's current methodology does not require a cost-of-supply study.
- [5] AfriForum challenged NERSA's methodology for determining tariff increases for the 2024/2025 financial year, as the methodology did not require cost-of-supply studies. This Court concluded that NERSA's

2024/2025 methodology did not require a cost- of-supply study, and consequently, the methodology was unlawful. The judgment is *AfriForum NPC v National Energy Regulator of South Africa* (“*AfriForum v NERSA*”).[2] It is in this order that *AfriForum* requests the Court to execute pending an appeal.

[6] This Court’s order in *AfriForum v NERSA* was not the first time NERSA’s methodology has been declared unlawful. In *Nelson Mandela Bay Business Chambers NPC and Another v National Energy Regulator and Others*,[3] NERSA’s methodology for the financial years of 2021/2022 and 2022/2023 was declared unlawful. The order of invalidity was

suspended for a year to provide NERSA a grace period to get its house in order. This means this Court has in *Nelson Mandela Bay* in 2022 and again in *AfriForum v NERSA* in 2024 declared NERSA’s methodology unlawful.

[7] It is in this context, after two successful challenges to NERSA’s methodology, in *Nelson Mandela Bay* and *AfriForum v NERSA*, that *AfriForum* now approaches the Court seeking interim execution of the order pending the appeal. *AfriForum* wants to stop NERSA and the municipalities from imposing unlawful tariffs on end-users for yet another financial year. *AfriForum* submits that if this Court does not grant the interim execution, then there will be no end to NERSA employing an unlawful methodology. The harm to the public is that they will continue to pay inflated and unlawful tariffs not based on the actual cost of supply of electricity.

[8] *AfriForum* points to a perpetuation of unlawfulness by NERSA, year after year. The difficulty is that a successful challenge to the methodology is, according to NERSA, overtaken by its subsequent tariff decisions. Take the matter before this Court as an example; the matter was argued in the last week of June 2024 in relation to NERSA's methodology for determining tariffs for the 2024/2025 financial year. The order declaring the methodology unlawful was handed down on 28 June 2024, two days after the hearing of the matter. However, during the week the matter was heard, NERSA was considering and approving new tariff increase applications for the 2024/2025 financial year. NERSA contends that its tariff decisions for 2024/2025 overtake the challenge to its methodology – rendering the court order moot. NERSA pleads that the order of this Court "will not regulate the next tariff approval cycle".[4] NERSA contends that if a party wishes to challenge the tariffs, they must bring a formal review of the tariff decisions.

[9] *AfriForum* points out that NERSA makes this argument, knowing that such a review of the tariff decisions cannot be finalised before the next financial year, at which stage NERSA will announce the new tariffs again. *AfriForum* submits that if there is no interim execution, it means that despite a successful challenge to the methodology, consumers will continue to pay inflated and unlawful tariffs, year after year, with NERSA yearly blocking any challenge to its unlawful methodology by relying on mootness.

- [10] AfriForum is concerned that NERSA and the municipalities will continue to charge inflated and unlawful tariffs and that they will continue to escape accountability for this unlawful conduct. AfriForum's concern has a historical basis, as this is what NERSA has now done twice against judgments that its methodology is unlawful. In Nelson Mandela Bay, NERSA argued that before Kubushi J in relation to the 2021/2022 and 2022/2023 financial years, the issue had become moot. Her Ladyship Justice Kubushi recorded NERSA's submission in the judgment as follows: "The submission made by NERSA is that serious material events have overtaken the relief which the applicants are seeking in these proceedings." [5] The material events before Justice Kubushi were that NERSA had made a new tariff decision for the next financial year. Now, for the second time, for this financial year 2024/2025, NERSA again submits that this Court's order in *AfriForum v NERSA*
- declaring NERSA's methodology unlawful in June 2024 - was overtaken by NERSA 2024/2025 tariff decisions.
- [11] AfriForum's case is the use of an unlawful methodology will persist – and whilst NERSA keeps applying an unlawful method and then raising the subsequent tariff determination as a mootness argument – end-users will pay unlawful tariffs for forever long. To break this never-ending cycle of unlawfulness, AfriForum requests the Court to grant interim execution. AfriForum contends that bar such interim execution, there will be no other way to stop NERSA from applying a method that is unlawful.
- [12] Having set out the motivation for the application, I consider the legal requirements for the relief AfriForum seeks.

Statutory framework

- [13] An appeal of a final order suspends the operation of the order. As the appeal may change the outcome, the immediate execution of the order has the potential to cause enormous harm to a party that may ultimately be successful. [6] A clear example is when a court ordered the execution of an eviction order pending its appeal. [7] The practical effect is that the occupiers were subject to eviction and the irreparable harm that would cause – despite the fact that they might overturn their eviction on appeal. To prevent harm to a party that might be successful on appeal, the general rule is that an appeal suspends the operation of the order.
- [14] At common law, unless the Court, in the exercise of a discretion, ordered otherwise, an application for leave to appeal and an appeal pursuant to leave being granted suspended the operation of the order. [8] It was not open to the successful party to execute on, or otherwise act pursuant to, that order. [9] This common law rule and the power to grant an execution order is now expressly embodied in s 18(1), read with s 18(3), of the Superior Courts Act 10 of 2013.

- [15] The grant of leave to execute is constrained by the requirements that it may only be granted if there are exceptional circumstances if the applicant will suffer irreparable harm if it is not granted, and if the grant will not cause the respondent to suffer irreparable harm. A further safeguard against the risk of harm being caused by an execution order is the automatic right to an urgent appeal given by s 18(4). Pending such an appeal, the statute expressly provides in s 18(4)(iv) that the operation of the suspension order is itself suspended.[10]
- [16] The first jurisdictional fact to be proven by an applicant seeking interim execution is the existence of exceptional circumstances. Courts have always eschewed any attempt to lay down a general rule as to what constitutes exceptional circumstances.[11] The reason is that the enquiry is factual. There is a helpful summary in the *MV Ais Mamas*[12] that has been endorsed by the Supreme Court of Appeal[13] and the Constitutional Court.[14] In the context of s 18(3), the exceptional circumstances must be something that is sufficiently out of the ordinary and of an unusual nature to warrant a departure from the ordinary rule that the effect of an application for leave to appeal or an appeal is to suspend the operation of the judgment appealed from. It is a deviation from the norm.[15] The exceptional circumstances must arise from the facts and circumstances of the particular case.
- [17] Furthermore, section 18(3) requires the applicant for an execution order to establish that the respondent will not suffer irreparable harm if the order is granted and the absence of harm to the respondent. The law does not require a balancing exercise.[16] Instead, the requirements of irreparable harm to the applicant and no irreparable harm to the respondent, unlike the common law position, do not involve a balancing exercise between the two but must both be established on a balance of probabilities. If the applicant cannot show that the respondent will not suffer irreparable harm by the grant of the execution order, that is fatal. It is unnecessary to decide whether, in those circumstances, the Court would be empowered to grant other relief pending the hearing of the appeal in order to protect the applicant's position.
- [18] Our courts have also indicated that discretion is retained after considering the specific statutory requirements. In *Justice Alliance*[17] it was held that the Court has a broad discretion to grant or refuse an execution order once the statutory requirements are satisfied and that prospects of success in the appeal have a role to play in considering the exercise of that discretion. Similar dicta appear in *UFS v Afriforum*[18] and *Ntlemeza*[19]
- though in these cases, the record in the main appeal was not before this Court, and the appeals had perforce to be decided without the full record or any consideration of the merits of the main appeals.
- [19] The most recent authority by an appellate Court is that of the Supreme Court of Appeal in *Tyte Security Services CC v Western Cape Provincial Government and Others* (“Tyte”).[20] In Tyte, the Supreme Court of Appeal recognised two elements that had not previously been emphasised concerning Rule 18(3) applications.

[20] The first is that exceptional circumstances become an overarching requirement and that the factors to be considered, the absence of irreparable harm to the respondents and the presence of irreparable harm to the applicants, are not sealed off from each other and not be considered as hermeneutically sealed. The issue which the Supreme Court of Appeal was called on to consider was whether the applicant for an execution order has to establish three separate, distinct and self-standing requirements, namely: first, exceptional circumstances; second, that it will suffer irreparable harm if the order is not made; and, third, the party against whom the order is made will not suffer irreparable harm if the order is made.[21]

[21] The Supreme Court of Appeal held –

“Even accepting that the legislature has employed the words 'in addition [to exceptional circumstances] proves on a balance of probabilities' in s 18(3), it would be passing strange that if an applicant comes short in respect of either the second or third requirements it would nonetheless still be able to successfully meet the exceptional circumstances threshold. The use of the words 'in addition proves' in s 18(3) ought not to be construed as necessarily enjoining a court to undertake a further or additional enquiry. The overarching enquiry is whether or not exceptional circumstances subsist. To that end, the presence or absence of irreparable harm, as the case may be, may well be subsumed under the overarching exceptional circumstances enquiry. As long as a court is alive to the duty cast upon it by the legislature to enquire into, and satisfy itself in respect of exceptional circumstances, as also, irreparable harm, it does not have to do so in a formulaic or hierarchical fashion.”[22]

[22] The second is that the applicant bears the onus to prove the jurisdictional facts of section 18(3) on a balance of probabilities; there may be instances where the respondents attract something akin to an evidentiary burden. The Court must, when considering the jurisdictional facts, consider that –

“The enquiry into each can thus hardly be mutually exclusive, particularly because as far as the third is concerned, unlike the second, the onus cast upon an applicant would be to prove a negative, in accordance with the usual civil standard. This suggests that, as with the exceptional circumstances enquiry, a court considering both the second and third must have regard to all of the facts and circumstances in any particular case. Insofar as the third goes, although s 18(3) casts the onus (which does not shift) upon an applicant, a respondent may well attract something in the nature of an evidentiary burden. This would be especially so where the facts relevant to the third are peculiarly within the knowledge of the respondent. In that event, it will perhaps fall to the respondent to raise those facts in an answering affidavit to the s 18 application, which may invite a response from the applicant by way of a replying affidavit.”[23]

[23] It is within this statutory framework that the application must be considered. The starting point is whether the applicant has proven exceptional circumstances on a balance of probabilities.

Exceptional circumstances

AfriForum's case

- [24] AfriForum submits that neither SALGA nor NERSA has taken issue with the declaration of unlawfulness in their applications for leave to appeal. AfriForum submits that exceptional circumstances allow for execution if the appeal does not go to the heart of the order appealed against. The limited scope of the leave to appeal itself constitutes an exceptional circumstance. This further indicates that the unlawfulness of NERSA's methodology is not truly in dispute.
- [25] AfriForum further submits that a conservative estimate is that an appeal will be heard in the second half of 2025, after the start of the 2025/2026 financial year. If the order is suspended, the public will remain remediless, and NERSA and those municipalities that did not conduct and support their applications for the 2024/2025 financial year with the cost of supply studies will have escaped the consequences of unlawful conduct to the detriment of the public.
- [26] AfriForum submits that it will be exceptional if a party acting in the public interest, who takes action to prevent illegality from continuing, is left remediless in the present circumstances.
- [27] Afriforum submits that the impact of a refusal of execution means that by the time the appeal is heard, the horse would have bolted – and NERSA and the guilty municipalities will escape accountability in a way that is detrimental to the public. Afriforum contends that it is extremely exceptional if a party acting in the public interest takes timeous and urgent actions to stop illegality – but, due to an appeal process, is deprived of an effective remedy, year after

year, particularly where there is no real dispute regarding the unlawfulness.

NASA's case

- [28] NERSA denies that AfriForum has proven exceptional circumstances.
- [29] NERSA contends that AfriForum has ignored that exceptional circumstances are a fact-based inquiry, and the second is that prospects of success are a relevant consideration in the Court's determination of the existence of exceptionality. These two factors, namely NERSA, have been neglected by AfriForum, as they present an insurmountable difficulty in AfriForum's case.
- [30] NERSA submits that Tyte did not establish a new legal principle – and that AfriForum must still prove on a balance of probabilities: first, exceptional circumstances; second, that it will suffer irreparable harm if the order is not made; and, third, the party against whom the order is made will not suffer irreparable harm if the order is made. This emphasises that NERSA is a fact-based inquiry. NERSA submits that AfriForum has failed to make out such a fact-based case.

[31] NERSA referred the Court to *Ntlemeza v Helen Suzman Foundation and Another*[24] specifically, paragraph 35, which held that section 18 (1) entitles a court to order otherwise 'under exceptional circumstances'. Section 18(3) provides a further controlling measure, namely, a party seeking an order in terms of s 18(1) is required 'in addition' to prove on a balance of probabilities that he or she will suffer irreparable harm if the Court does not so order and that the other party will not suffer irreparable harm if the Court so

orders.

[32] NERSA submits this must be considered with *Tyte*, which held –

“It is important to recognise that the existence of ‘exceptional circumstances’ is a necessary prerequisite for the exercise of the Court's discretion under s 18. If the circumstances are not truly exceptional, that is the end of the matter. The application must fail and falls to be dismissed. If, however, exceptional circumstances are found to be present, it would not follow, without more, that the application must succeed.”[25]

[33] Read together; this means that if a party has not proven exceptional circumstances, they do not even get in the door of section 18(3). NERSA points to *AfriForum's* founding affidavit, which has specific headings addressing prospects of success, irreparable harm and the absence of irreparable harm to the respondents – but no heading dealing with exceptional circumstances. This submits NERSA, is fatal to *AfriForum's* case. Without establishing exceptional circumstances – *AfriForum* cannot request the Court to grant execution as the first jurisdictional fact is absent. NERSA submits that *Tyte* did not disturb this legal principle.

SALGA's case

[34] SALGA contends that *AfriForum* has not proved that exceptional circumstances exist to justify a departure from the general rule. An analysis of *AfriForum's* founding affidavit shows that *AfriForum* relies on ordinary factors in its attempt to make out a case in which exceptional circumstances exist to justify the relief it seeks.

[35] SALGA accepts that in its application for leave to appeal, SALGA does not contest the declaration of invalidity granted by this Court. The fact that SALGA does not contest the declaration of invalidity has been SALGA's position even during the hearing of the main application. This factor is not unusual considering the position adopted by SALGA in this litigation. Accordingly, it does not constitute an exceptional circumstance for the purposes of section 18(1) of the Superior Courts Act.

[1] *AfriForum* seeks the interim execution of all aspects of the order except for those dealing with costs (paragraph 8) and with future financial years (paragraph 4).

[2] (2024/061993) [2024] ZAGPPHC 638 (8 July 2024)

[3] (63393/2021) [2022] ZAGPPHC 778 (20 October 2022)

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- [4] NERSA's AA, para 25
- [5] Kubushi J para 33
- [6] Knoop para 1
- [7] Philani-Ma-Afrika and Others v Mailula and Others [2009] ZASCA 115; 2010 (2) SA 573 (SCA); [2010] 1 All SA 459 (SCA).
- [8] Knoop para 2
- [9] South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) 1977 (3) SA 534 (A) (South Cape Corporation) at 544H-545G.
- [10] Knoop para 2
- [11] Knoop para 46
- [12] MV Ais Mamas: Seatrans Maritime v Owners MV Ais Mamas and another 2002 (6) SA 150 (C) at 156E- 157
- [13] Knoop para 46
- [14] Liesching and Others v The State [2018] ZACC 25; 2019 (4) SA 219 (CC)
- [15] University of the Free State v Afriforum and Another (929/2016)
- [2016] ZASCA 165; [2017] 1 All SA 79 (SCA); 2018 (3) SA 428 (SCA) (17 November 2016) ("UFS v Afriforum") para 13
- [16] UFS v Afriforum para 13
- [17] The Minister of Social Development Western Cape & others v Justice Alliance of South Africa & another [2016] ZAWCHC 34 paras 26-29
- [18] UFS v Afriforum para 15
- [19] Ntlemeza v Helen Suzman Foundation and Another (402/2017) [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (9 June 2017)
- [20] (479/2024) [2024] ZASCA 88; 2024 (6) SA 175 (SCA) (7 June 2024)
- [21] Tyte para 9
- [22] Tyte para 14
- [23] Tyte para 15
- [24] 402/2017) [2017] ZASCA 93; [2017] 3 All SA 589 (SCA); 2017 (5) SA 402 (SCA) (9 June 2017)
- [25] Tyte para 11
- [26] Kubushi J para 33

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- [27] South African Local Government Association and Another v Afriforum NPC (2024-061993)
[2024] ZAGPPHC 826 (19 August 2024) at paras 60 - 63
- [28] AfriForum FA para 35
- [29] AfriForum FA paras 36 and 37
- [30] Tyte para 25
- [31] NERSA AA para 29
- [32] SALGA AA para 2.25
- [33] SALGA AA para 2.27
- [34] City of Tshwane v Afriforum [2016] ZACC 19
- [35] Id para 59
- [36] Hoffmann-La Roche & Co AG and Others v Secretary of State for Trade and Industry, Lord
Wilberforce
- [37] SALGA AA para 2.13
- [38] SALGA AA para 2.14
- [39] SALGA AA para 3.8
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