

SOUTH AFRICA / JUDGMENT

Botha and Others v Eskom Holdings SOC Limited (UM144/2019) [2020] ZANWHC 75 (14 September 2020) [2020] ZANWHC 75

COURT

North West High Court, Mafikeng

BEFORE

M.E. Mahlangu

CASE / FILE NUMBER

UM144/2019

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION - MAHIKENG

Case

no: UM144/2019

In

the matter between:

PETER
HAROLD BOTHA
First Applicant
PETER HAROLD BOTHA N.O
(as trustee of THE PETER
HEROLD
BOTH
BOTH
TRUST)
Second
Applicant
JOHANNA SUSANNA BOTH
N.O
BOTH
TRUST)
Third
Applicant
and
ESKOM
HOLDINGS SOC LIMITED
Respondent

JUDGMENT

INTRODUCTION

[1] On 23 September 1999, the respondent (“Eskom”) and the first applicant entered into a written Electricity Supply Agreement (“ESA”) in terms of which it was agreed that, the respondent would sell electricity to the first applicant at a farm known as Portion 5 Geyerspan 477 JP, North West Province (“the farm”). The electricity was to be supplied via the use of three installation

points or polls at the farm with electricity meter numbers KS 523/87, KS 523/94 and KS 523/87A/3 (“installation points”).

[2] Eskom is, in terms of section 2 and 3 of the Eskom Conversion Act 13 of 2001, a public company with its entire share capital held by the State. It is the national generator and distributor of electricity and is licensed to provide electricity directly to customers in the area in which the applicants are situated.

[3] During 2006, Eskom terminated the electricity supply to two of the three installation points at the farm because of the alleged non-payment by the first applicant. In July 2011, Eskom terminated the electricity supply to the remaining installation point due to alleged non-payment of the electricity.

Urgent application

[4] Eskom terminated the electricity supply at the farm on 28 August 2019.

[5] On 3 September 2019, the applicants brought an urgent application which was granted by Leeuw JP. The order was granted in the following terms:

“IT IS ORDERED

(By agreement)

1. THAT: The Respondent be and is hereby directed to restore the electricity supply to the (3) three installation points on the farm Geyerspan (portion 5 of the Farm Geyerspan 477JP, North West province) with electricity meter numbers: KS 523/87, KS 523/94 and KS 523/87A/3 (also marked with the number KS 523/90).
2. THAT: The Respondent be and is hereby directed not to disconnect and/or not to cause the electricity supply to the (3) three installation points on the farm to be disconnected until the finalization of this application for any reason relating to the disputes between the parties as set out in the Applicant’s application.
3. THAT: The Respondent shall file its answering affidavit within 15 (fifteen days) from date of this order.

4. THAT: The Applicants will file their replying affidavit, if any, within 10(ten) days after the Respondent has filed its answering affidavit.

5. THAT: The costs are reserved.”

[6] The applicant seeks this Court to grant a final interdict in terms of prayer 3 of their Notice of Motion which reads as follows:

“3. THAT the Respondent be directed not to disconnect and/or to cause the electricity supply to the (3) three installation points on the farm for any alleged historic amounts due emanating from services or actions prior to 4 July 2017, unless First Applicant fails to comply with an order (yet to be obtained) or settlement (yet to be concluded) in this regard.”

BACKGROUND OF THE MATTER

[7] As per ESA, Eskom supplied electricity at the three installation points at the farm and the first applicant was supposed to pay Eskom on the monthly basis for the usage of electricity.

[8] Eskom alleges that between 2006 until the beginning of 2016, the applicants did not pay for their electricity usage. Eskom further alleges that, in some instances, the applicants tempered with the electricity meters at the installation points. Eskom alleges that, the payment of the temper fine by the applicant is an admission that they tempered with the installation points.

[9] Eskom alleges in its affidavit that for the period 2006 to 2016, it did not invoice the first applicant for electricity consumption on the farm because it has since disconnected it. Eskom was unaware that applicants had unlawfully reconnected the electricity meters at the farm and only discovered the connectivity during 2016.

[10] The first applicant alleges in his affidavit that, the farm always had problems with Eskom's electricity supply. Their installation points were not fixed on time which caused damages to the crops. Their payment of the temper fine was not an admission that they tempered with the installation points but to make sure that electricity is reconnected to prevent further damages to their crop.

[11] Eskom submits that they had a right to terminate electricity at the farm as the first applicant continued to refuse to pay their electricity usage between the years 2006 and 2016.

[12] There were several meetings telephonically and physically, that were held between the first applicant and Eskom trying to solve the issue of the outstanding debt of electricity bill.

[13] On 20 March 2018, a meeting was held between Mr Venter representing Eskom and some other employees of Eskom and the applicants' attorney Mr Steenkamp.

- [14] Eskom presented their electricity bill calculations to the first applicant's representative, Mr Steenkamp, which amounted to R5 million. The first applicant, through his attorney, admitted that the applicants are indebted to Eskom in the amount of R1.3 million. It offered that, that amount would be a full and final settlement of the debt owed by the applicants to Eskom. Eskom accepted that offer and an agreement was reached at a meeting that the first applicant would pay the aforementioned amount in 6 instalments.
- [15] On 4 April 2018, Eskom received a letter from the applicants' attorneys in terms of which they again admitted that the first applicant owed Eskom R1.3 million and proposed that the second applicant pay the sum to Eskom in 6 monthly installments.
- [16] The letter received from the first applicant on 4 April 2018 was written "WITHOUT PREJUDICE". The applicants argued that, they did not commit themselves into paying Eskom R1.3 million in that letter. It was an offer which was not binding on them.
- [17] Several correspondences were made between the parties. Eskom requested the first applicant to sign the acknowledgement of debt. The first applicant insisted that, Eskom promised to draft paperwork where the acknowledgement of debt by the applicants would be finalized. On 6 June 2019, Eskom sent an acknowledgement of debt agreement to first applicant to be signed. The acknowledgement of debt was not signed by the first applicant even though he made promises to sign it. On 23 July 2019, Eskom sent a letter to the first applicant informing him that, he should sign the acknowledgement of debt otherwise the electricity supply to the farm would be cut.
- [18] On 28 August 2018, Eskom cut electricity at the farm. The first applicant alleges that, the electricity cut was not in terms of the ESA and also not in terms of Electricity Regulation Act No 4 of 2006 ("ERA"). Eskom submitted that, the termination of electricity at the farm was lawful and in terms of section 21(5)(b) and 21(5)(c) of ERA which permits Eskom to terminate electricity supply to defaulting customers. Eskom further submitted that, the relationship between the first applicant and Eskom is governed by ESA read together by ERA. Eskom submitted that, the fact that the first applicant does not intend to sign the acknowledgement of debt, does not make the electricity debt owed to Eskom disappear.
- [19] The first applicant alleged that he did not sign the acknowledgment of debt as it did not contain all terms contained in the letter sent to Eskom on 4 April 2018.

ISSUES

- [20] At the hearing of the final interdict. The following issues were addressed by the parties.

Jurisdiction

- [21] Counsel for the applicants argued that this Court has jurisdiction to hear this matter. He referred to section 4(b) of the ERA which provides that:

"The Regulator-

(a)

(b) may

(i) mediate disputes between generators, transmitters, distributors, customers or end users;

[22] Counsel for the applicants further referred to section 30(1)(a) of ERA which provides that:

“(1) The Regulator must, in relation to any dispute arising out of this Act-

(a) If a dispute arises between licensees, act as a mediator if so required by both parties to the dispute;”

[23] Counsel for the applicants argued that the Regulator, as provided for in ERA, may only mediate a dispute between the licensee (“Eskom”) and the customer if both parties agree to that mediation. He further submitted that the application of the National Energy Regulator Act (NERSA) does not oust the powers of the courts.

[24] Counsel for Eskom submitted that he is in agreement with the applicants’ counsel that, NERSA cannot oust the power of the courts and that NERSA is the appropriate forum to adjudicate on this matter. He further argued that, the fact that the applicants refuse to sign the acknowledgement of debt, does not mean that they do not owe Eskom. Further, failure by the first applicant to sign an acknowledgement of debt is a clear indication that, there is a dispute regarding the amount owed to Eskom which the appropriate forum to resolve it is NERSA. Counsel referred to section 30(1)(b) of ERA which provided that:

“30(1)(b) if a dispute between customer and end user on the one hand and a licensee, registered person, a person who trades, generates,

transmits, or distributes electricity on the other hand, settle that dispute by such means and on such terms as the Regulator thinks fit.”

[25] Eskom submitted that the parties could not reach a settlement agreement because the first applicant did not sign an acknowledgement of debt. That creates a dispute between the parties as to how much is owed by the applicants to Eskom. Eskom argued that only NERSA has the expertise of calculating the electricity supply to Eskom customers. This Court would not know how to make those calculations.

[26] Counsel for the applicants submitted that, applicants resorted to this Court as the wheels of NERSA are not as urgent as court proceedings.

[27] Both parties referred the court to the matter of National Treasury and others v Opposition to Urban Tolling Alliance and others 2012(6) SA 223 (CC) (National Treasury matter). The following was held at paragraph 63:

“There is yet another and very important consideration when the balance of convenience is struck. It relates to separation of powers. In ITAC we followed the earlier statements in doctors for life and warned that-

“where the Constitution or valid legislation has entrusted specific powers and functions to a particular branch of government, court may not usurp that power or function by making a decision of their preference. That would frustrate the balance of power implied in the principle of separation of powers. The primary responsibility of a court is not to make decisions reserved for or within the domain of other branches of government, but rather to ensure that the concerned branches of government exercise their authority within the bounds of the Constitution. This would especially be so where the decision in issue is policy-laden as well as polycentric.”

- [28] NERSA is therefore the correct forum to deal with the dispute between the parties. If the applicants are not going to be happy with the decision that would be taken by NERSA, then, they should review the decision in terms of Rule 53 of the Uniform Rules of Court.

Dispute of facts

- [29] The dispute of fact issue was raised by Eskom. Eskom alleges that, the main dispute in this matter is the amount owed by the applicants to Eskom. The first applicant does not intend to sign the acknowledgement of debt which was going to settle the issues between the parties. Counsel for the applicants submitted that, the dispute in this matter is whether the amount of R1.3 million is due and payable to Eskom or not.
- [30] The first applicant further mentioned that, he had never received a R1.3 million account statement from Eskom and therefore would not know which account to pay to Eskom.
- [31] In dealing with the dispute of facts, the courts in *Plascon-Evans Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 A (at 634 E-635C) held that, if disputes of fact become apparent on the affidavits, a final order or relief with a final effect may only be granted if the allegations in the applicants' affidavits which have been admitted by the respondent considered together with the allegations made by the respondent, justify such an order. In this matter, the respondent, Eskom, does not admit that, the disconnection of the electricity to the farm was unlawful. The applicants are of a view that, the disconnection is unlawful. The parties do not also agree on the amount owed by the applicants to Eskom. Thus, these creates a dispute of fact in this matter.
- [32] Eskom referred to the matter of *National Director of Public Prosecutions v Zuma, Mbeki and another* 2009(2) All SA 243 (SCA) (NDPP matter) where Harms DP stated that:
- “[26] Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special, they cannot be used to resolve the factual issues because they are not designed to determine probabilities. It is well-established under the Plascon-Evan rule that where in motion proceedings disputes of fact raise on the affidavits, a final order can be granted only, if the facts averred in the applicant's affidavit, which has been admitted by the respondent together with the facts alleged by the latter justify such an order...”*
- [33] It is therefore my view that there is a dispute of fact between the parties which cannot be resolved on papers.

Merits

- [34] The main issue in this matter is the disconnection of the electricity supply to the farm by Eskom. As it has already been mentioned above, the first applicant alleges that the disconnection is unlawful whereas Eskom is adamant that the disconnection is lawful.
- [35] The first applicant alleges that Eskom's termination of electricity at the farm was not in terms of either ESA or ERA. Eskom submitted that the termination of electricity at the farm was in terms of ESA and ERA.
- [36] ESA specifically states in paragraph 13.1 that, the account sent to the customer in this instance the first applicant, shall be due and payable on the date the account is received by the customer, which date shall be deemed to be not later than 7 days from the date of the account.
- [37] Paragraph 13.2 states that should the payment not be received within a period of 23 days from the date of the account, the account is deemed to be due and payable in terms of subclause 13.1. Eskom may cease to supply the customer with electricity and terminate this agreement after having given the customer 14 days written notice.
- [38] Paragraph 13.4 of ESA states that should the customer dispute an account, it shall not be entitled to reduce or set off its debt or defer payment thereof beyond the period of grace allowed for in sub-rule 13.2. Such account shall as soon as possible thereafter be adjusted if necessary.
- [39] Paragraph 15 which deals with meter readings and rendering of accounts states that, the meter(s) shall be read after expiry of so many months as Eskom may deem appropriate, provided that in the event of the period between successive meter-readings being longer than one month, an estimated account shall be rendered to the customer for each month between meter-readings. An adjustment account shall be rendered after the meters are next read, based on the actual consumption of electrical energy.
- [40] Eskom through its attorneys, caused a written notice in terms of 13.2 of ESA to be sent to the first applicant. The first applicant failed to pay the debt due to Eskom, Eskom terminated the electricity in terms of 21(5)(b) and (c) of ERA.
- [41] Section 21 (5) provides that:
- "5. 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 honor, or refuses to enter into, an agreement for the supply of electricity; or
 - (b) The customer has contravened the payment conditions of the licensee."

- [42] According to paragraph 13.2 of ESA, should the customer fail make payment to Eskom, Eskom may cease to supply the customer with electricity and may also terminate the agreement entered into by the parties.
- [43] Section 21(5) mentioned above, echoes the provisions of ESA in that
- (a) it allows that Eskom disconnect electricity supply to the farm if the applicants fail to honor the terms and conditions of the agreement, (b) if the applicants contravenes the Eskom payment conditions.
- [44] As it has already been mentioned above, the disconnection was due the applicants' failure to pay for the electricity usage between 2006 and 2016. Eskom alleges that the applicants admitted owing it R1.3 million but they are refusing to pay it. The applicants submitted that, the R1.3 million was a without prejudice offer which was not made final and therefore cannot be taken as an admission of debt. The first applicant submitted that the offer of R1.3 million to Eskom is no longer open for acceptance and he is not willing to settle the matter anymore.
- [45] The applicants further allege in the affidavit that, Eskom terminated the supply of electricity at the farm without a warning as per the ESA. Eskom submitted that the letter sent by their attorneys to the applicants on 23 July 2019 was a warning in terms of ESA. ESA does not limit Eskom's entitlement to terminate the electricity supply due to certain debts. All clause 13.2 requires of Eskom before cutting the electricity supply to the farm is give 14 day notice to the applicants, which was done by Eskom.
- [46] In the matter of *Rademan v Moqhaka Local Municipality* 2012 (2)SA 387(SCA) (Rademan SCA), the court held that:
- "Is a municipality expected to approach the court each time a rate-payer defaults to seek a court order authorizing discontinuation of services? Such a proposition is both unrealistic and untenable. Give the rate of the protest and demonstrations for delivery across the country, concomitant with the refusal by rate-payers to pay their rates and taxes and the fees for municipal services, I am of the view that it would not be practical for municipalities to pursue these matters in court. It cannot be gainsaid that such a step would result in municipalities being majorate in such cases, losing precious time in the process and incurring high legal bills unnecessarily."*
- [47] The courts have not declared section 21(5) of ERA unconstitutional, therefore Eskom still has the power to disconnect electricity to defaulting customers.
- [48] Eskom submitted that, the signing of the acknowledgement of debt was not a prerequisite for the amount of R1.3 million to be due and payable in terms of ESA. The acknowledgement was according to Eskom an indulgence offered to the first applicant to allow him to settle the debt in installments and not in accordance with the payments stipulated in ESA.

Requirements of final interdict

[49] It is therefore my view that the applicants failed to satisfy the requirements of the final interdict.

[50] In order for the applicants to succeed in obtaining an interdict, they were supposed to establish the following:

50.1 A clear right;

50.2 An injury committed or reasonably apprehended;

50.3 No alternative remedy.

[51] The applicants failed to demonstrate to this Court why they allege that they have a clear right and also failed to establish why they allege they do not have an alternative remedy. Applicants seeks an order from this Court to interdict Eskom from disconnecting electricity that they are not paying for. The applicants had an alternative remedy of signing an agreement with Eskom and arrange how they will pay for the debt owed. The applicants cannot expect to use the electricity that they are not paying for.

[52] In *Rademan v Moqhaka Local Municipality* 2013 (4) SA 225 (CC), the Constitutional Court held that a municipality (which stands on the same footing as Eskom) may exercise its powers under section 21(5) of ERA, to disconnect the electricity supply to defaulting customers.

[53] In the *Rademan* case, the Supreme Court of Appeal rejected the notion of pre-authorisation by the courts for the disconnections of services as held herein above.

[54] Section 21(5) of ERA has not been declared unconstitutional and therefore Eskom has the power to disconnect electricity to defaulting customers. The applicants have no clear right, to deprive Eskom of its powers in terms of section 21(5) of ERA.

Alternative remedy

[55] In terms of clause 13.2 of ESA even if the first applicant disputes the amount claimed by Eskom, he shall make payment of such amounts and corrections, if any, will be dealt with later.

[56] It is therefore my view that the applicants has an alternative remedy of paying Eskom the sum of R1.3 million and refer the complaint of the amount said to be owed to Eskom, to NERSA.

ORDER

[57] Consequently, the following order is made:

57.1 The application is dismissed with costs.

M.E. MAHLANGU

ACTING JUDGE OF THE HIGH COURT

NORTH WEST DIVISION, MAHIKENG

APPEARANCES

Date of Hearing

: 6 August 2020

Date of Judgment

: 14 September 2020

Counsel for the Applicant : Adv Legrange

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