

SOUTH AFRICA / JUDGMENT

Cradock Business Forum and Others v ESKOM Holdings SOC Limited and Others (1900/2019) [2020] ZAECGHC 65 (17 June 2020)

[2020] ZAECGHC 65

COURT

Eastern Cape High Court, Grahamstown

BEFORE

G H Bloem

CASE / FILE NUMBER

1900/2019

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

**IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE
NO. 1900/2019**

In the matter between:

THE
CRADOCK BUSINESS
FORUM
First Applicant
THE
MIDDELBURG RATEPAYERS ASSOCIATION
Second Applicant
THE
CRADOCK RATEPAYERS
ASSOCIATION
Third Applicant
and
ESKOM
HOLDINGS SOC
LIMITED
First Respondent
THE
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA
Second Respondent
THE
INXUBA YETHEMBA
MUNICIPALITY

Third Respondent
THE EXECUTIVE MAYOR OF
INXUBA
YETHEMBA
MUNICIPALITY NO
Fourth Respondent
THE MUNICIPAL MANAGER
OF INXUBA
YETHEMBA
MUNICIPALITY
NO
Fifth Respondent
THE MEC FOR
CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS, EASTERN CAPE
Sixth Respondent
THE MINISTER OF
CO-OPERATIVE GOVERNANCE
AND
TRADITIONAL AFFAIRS
Seventh Respondent

JUDGMENT

Bloem J :

[1] The Inxuba Yethemba Municipality, which includes amongst others Cradock and Middelburg, owes Eskom Holdings Limited (Eskom) a large sum of money in respect of electricity provided by Eskom for which the municipality has not paid. On 21 June 2019 the Cradock Business Forum, Middelburg Ratepayers Association and Cradock Ratepayers Association (the applicants) instituted an application against Eskom, the first respondent, the National Energy Regulator, the second respondent, the Inxuba Yethemba Municipality, its executive mayor and municipal manager, as third, fourth and fifth respondents respectively (collectively referred to as “the municipality”), the Member of the Executive Council responsible for Co-operative Governance and Traditional Affairs in the Eastern Cape, as the sixth respondent and the Minister responsible for Co-operative Governance and Traditional Affairs, as the seventh respondent.

[2] In their notice of motion the applicants essentially sought the following relief:

2.1. that Eskom and the municipality take every reasonable effort to settle the dispute between them, including exhausting all other remedies to resolve the aforesaid dispute in terms of the Intergovernmental Relations Framework Act[1] before the interruption of electricity supply by Eskom to the municipality as a result of the municipality’s default to pay;

- 2.2. that the municipality must pay, within 3 days, to Eskom all outstanding amounts due to Eskom for the supply of electricity and that Eskom must thereafter supply electricity to the municipality in the ordinary course on an interrupted basis;
- 2.3. alternatively to paragraph 2.2 above, that Eskom and the municipality shall, within 7 days, agree to a payment plan in respect of the municipality's indebtedness to Eskom;[2]
- 2.4. that the municipality shall comply with the terms of that payment plan and deviate therefrom only with the leave of this court;
- 2.5. that the municipality shall report to this court under oath on its compliance with the payment plan;
- 2.6. that the municipality shall ensure that all payments received by it in respect of electricity at Cradock be separated from the payments it received in respect of electricity at Middelburg and that portion of the equitable share for electricity be ring-fenced for those two towns for payment to Eskom for electricity usage; and
- 2.7. that the municipality and those respondents who oppose the application pay the costs of the application.

[3] Eskom and the municipality opposed the application and delivered opposing affidavits. The matter was postponed on three previous occasions to allow the council of the municipality to authorise the payment plan which Eskom, on the one hand, and the municipality's legal representatives, chief financial officer and municipal manager, on the other hand, devised. A day before the hearing the municipality delivered a supplementary affidavit to which a new payment plan was attached. That affidavit was deposed to by Khathutshelo Mulandzi, the municipality's chief financial officer who has been acting as its municipal manager since 29 May 2020. None of the parties objected to the admission of the municipality's supplementary affidavit. Based on that affidavit the applicants' legal representatives prepared a draft order. I was informed that the applicants and

the municipality seek an order in terms of the draft. However, Eskom had two problems with the draft order. The first related to the commencement of the payment plan and the second related to the amounts that the municipality was required to pay to Eskom on a monthly basis.

[4] The terms of the draft order were that:

"1. The Third Respondent is indebted to the First Respondent in the sum of R127 974 276.27 which shall be paid to the First Respondent in terms of the payment schedule annexed marked "A".

2. The municipality is directed to keep separate financial statements, including a balance sheet of its electricity reticulation business, as is envisaged in Section 27(i) of the Electricity Regulation Act No. 4 of 2006.

3. Such financial statements are to distinguish on a monthly basis firstly between capital and on-going expenditure in respect of reticulation infrastructure and the bulk purchase of electricity and, secondly, revenue received in respect of both reticulation infrastructure and the supply of electricity to customers.
4. The Third Respondent's financial statements must disclose, on a monthly basis, revenue received in respect of the supply of electricity and the extent to which such revenue is appropriated for payment of its current account with the First Respondent and its obligation in terms of annexure "A" to effect payment for arrears.
5. It is further ordered that the municipality report to this Court on or before the 15th day of every third month following this order in respect of the steps taken to implement paragraphs 3 and 4 above.
6. Such financial statements and reports shall set out the steps taken:
 - 6.1 To effect proper metering of its electricity supply;
 - 6.2 To effect proper billing in respect of metered electricity usage;
 - 6.3 To update and service its reticulation system and to comply with the requirements of its license;
 - 6.4 To reduce the incidents of theft of electricity.
7. The financial statements and reports referred to in paragraphs 3 and 4 above are, in addition to being filed with the Court, to be delivered to the Applicant's attorneys, Coetzee Venter Inc (reference : Mr Coetzee) and to Eskom's Attorneys, Netteltons (reference: Mr Nettelton).
8. The First Respondent and the Third Respondent are to nominate by name and designation, within 7 days of the date of this order, the responsible person or persons mandated to ensure compliance with the terms of this order and shall give written details of such persons to the Court, each other and the Applicant's attorneys.
9. Any party is granted leave to re-enrol this application on the same papers, duly amplified, for the purpose of formulating orders in regard to and arising out of the financial statements and reports referred to in paragraphs 3 and 4 above.
10. The municipality is directed to pay the costs of the Applicants in relation to the application, including reserved costs, such costs to include the costs of two counsel where employed."
- [5] Annexure "A" referred to in paragraph 1 of the draft order is a payment plan wherein provision was made for payment by the municipality to Eskom of the sum of R500 000.00 per month in respect of Middelburg from 31 September 2020 until 30 September 2033 and R250 000.00 per month in respect of Cradock from 31 September 2020 until 31 January 2037. The payment plan in respect of Middelburg accordingly covered a period of approximately 13 years and 17 years in respect of Cradock. During the hearing both Mr Shangisa, who appeared with Ms Rakgwale on behalf of Eskom, and Mr Quinn, who appeared with Mr

Poswa on behalf of the municipality, its executive mayor and its municipal, had no difficulty with this court issuing a payment plan which could be reviewed by this court after a shorter period at the instance of either Eskom or the municipality. Mr de la Harpe, who appeared with Mr Brown on behalf of the applicants, expressed some misgivings whether this court would be in a position to issue an order other than what was contained in the draft order.

[6] There are accordingly three issues to be decided, all of them related to whether or not this court had a discretion to refuse to make a draft order an order of court and, if so, to make its own order. The first issue is whether the payment plan should commence on 31 September 2020, as was contended for by Mr Quinn with agreement by Mr de la Harpe, or earlier, as contended for by Mr Shangisa. The second issue is whether this court should order the municipality to make monthly payments of about R1.6 million as contended for by Eskom, or R750 000.00 as contended for by the municipality. The third issue is whether this court can order a shorter payment plan.

[7] I shall start with the third issue first. A court which is presented with a draft order will not act as a mere rubber stamp of the parties and make the draft order an order of court simply because that is what the parties want. It has a discretion

whether or not to make the terms of the draft order an order of court. It follows that not any draft order should be accepted.

Our courts have been reluctant to circumscribe the ambit or scope of the discretion that the court has when faced with a draft order. That discretion must be exercised on the peculiar facts of the case in question.[3] On receipt of a draft order, the court must still act in a stewardly manner.[4] It must consider whether the order sought by the parties will meet the essential features of a court order. In *Eke v Parsons*[5] the essential features of a court order were set out as follows:

"[73] A court order must bring finality to the dispute or part of it, to which it applies. The order must be framed in unambiguous terms and must be capable of being enforced, in the event of non-compliance.

...

[74] If an order is ambiguous, unenforceable, ineffective, inappropriate, or lacks the element of bringing finality to a matter or at least part of the case, it cannot be said that the court that granted it exercised its discretion properly. It is a fundamental

principle of our law that a court order must be effective and enforceable, and it must be formulated in language that leaves no

doubt as to what the order requires to be done. The order may not be framed in a manner that affords the person on whom it applies, the discretion to comply or disregard it. ...

[75] Therefore, when a court considers granting an order based on the parties' settlement agreement, it must ensure that the order it issues has all the necessary features of a court order. If the order issued does not have the key elements of an order, the court would have failed to exercise its discretion properly. But the improper exercise of the discretion does not free parties on whom the order applies from complying with it, to the extent that they may ascertain what it requires them to do."

[8] The court will consider the terms of the draft order to determine whether, if made an order of court, such an order will be competent

and proper in the sense that it will relate to an issue or issues between the parties; it will be consistent with the Constitution and the law; that it will be effective and capable of being enforced in the event of non-compliance; and what impact it may potentially

have.[6]

[9] The draft order made provision for a payment plan of 13 years in respect of Middelburg and 17 years in respect of Cradock. The municipality's financial woes might improve during that period with the result that it might make higher payments to Eskom. It might not make such higher payments and utilise the revenue received in respect of electricity for other purposes. On the other hand, its financial situation might deteriorate with the result that it would be unable to make payments or make lower payments than stipulated in the payment plan, as contained in the draft order. The municipality's financial viability is, to say the least, uncertain. In the light of that uncertainty, it would, in my view, be inappropriate to make an order binding the municipality for a period of at least the next 13 years. That is sufficient reason for this court to order a payment plan for a shorter period. The court can review the efficacy of the payment plan at the end of the shorter period

based on evidence that Eskom and the municipality would have placed before it at that stage. During the hearing neither Mr Shangisa nor Mr Quinn had a problem with this court ordering a payment plan until December 2021 whereafter it would be reviewed. An order to that effect would be appropriate.

[10] I will now deal with the two outstanding issues, namely the monthly amounts to be paid by the municipality to Eskom until 31 December 2021 and the commencement of such payment. Mr Quinn relied on Mr Mulandzi's supplementary affidavit for the submission that the municipality should be ordered to pay the sum of R750 000.00 per month (R500 000.00 in respect of Middelburg and R250 000.00 in respect of Cradock) to Eskom, the first payment to be made on 30 September 2020. Mr Shangisa, on the other hand, submitted that the municipality should be ordered to pay the sum of R1 650 000.00 per month to Eskom, being R1 million in respect of Middelburg and R650 000.00 in respect of Cradock, the first payment to be made on or before 30 June 2020.

[11] In his affidavit Mr Mulandzi stated that the council of the municipality met on 28 May 2020 and considered two draft orders (the earlier draft orders). The earlier draft orders previously served before this court but were not made orders of court because, at the time, the drafters thereof had no authority from the municipality's council to agree that they be made orders of court. The earlier draft orders differ from the payment plan which was attached to Mr Mulandzi's affidavit in two respects. The first is the date when the first payment should be made by the municipality to Eskom in terms of the payment

plan and the second is the amount that the municipality should be ordered to pay to Eskom on a monthly basis. The earlier draft orders contained the amounts which Mr Shangisa submitted that the municipality should pay to Eskom.

[12] Mr Mulandzi stated in his affidavit that the municipality accepted inter alia that it was liable to Eskom in the sum of about R79 million in respect of Middelburg and R49 million in respect of Cradock for the supply of electricity and interest thereon up to and including January 2020, that its indebtedness to Eskom should be liquidated by monthly payments after payment in full of current and future accounts, "in a realistic and affordable amount given the current and anticipated future financial constraints, particularly the reduction of revenue by reason of Covid-19"; that "by reason of its present and anticipated future financial circumstances, repayments of the arrears should commence on 31 August 2020"; and that the municipality should report to the court, the applicants and Eskom on the liquidation of the debt and expenditure and revenue relating to electricity reticulation.

[13] Mr Mulandzi attached an extract of the municipality's monthly revenue report to his affidavit. It showed that the municipality collected revenue of only about R7 million for the month of April 2020 compared to approximately R9-, R12- and R11 million respectively for the three preceding months. The municipality anticipated that revenue collection in respect of municipal services would be decreasing in view of the adverse consequences of Covid-19; that the unemployment rate would increase; and that the consumption of electricity would decline. It also expected to receive the first of three tranches of approximately R15 million of its equitable share from the national government during July 2020.

[14] Mr Mulandzi stated that the municipality had a reasonable prospect of meeting the payment commitments contained in the payment plan, which was attached to his affidavit. He said that the payment plan, which made provision for monthly repayments of R750 000.00, should commence "on or before 31 September 2020 in anticipation of [the municipality's] billing and revenue increasing". Save for the anticipated payment of R15 million during July 2020, Mr Mulandzi did not state any other ground upon which he relied for the contention that the municipality's billing and revenue would increase.

[15] Mr Mulandzi's affidavit is unhelpful insofar as it referred to the date when the payment plan could commence. Early in his affidavit he mentioned August 2020 whereas later he referred to September 2020. Mr Mulandzi stated that the municipality would be able to commence payment on 31 August 2020 after it had considered its present and anticipated future

financial circumstances. He gave no reason why payment should commence only on 30 September 2020 other than the anticipation that the municipality's billing and revenue would increase. In my view there is no reason for the delay of the commencement of the payment plan beyond 31 August 2020. The municipality has had sufficient time since the commencement of the litigation herein during October 2019 to make payment to Eskom. The municipality will have sufficient time during (the remainder of) June, July and August 2020 to make preparations for the commencement of such payment on or before 31 August 2020.

- [16] It is common cause that the municipality has in the past acknowledged its indebtedness to Eskom and agreed to a payment plan on more than one occasion. It has hopelessly failed to honour its obligations in each of those instances. In the last instance the municipality acknowledged its indebtedness to Eskom on 11 September 2018. Therein it agreed to make payment to Eskom of R1 million per month commencing on 31 December 2018 and R7 million every 3 months until 31 July 2021. The

municipality made a few monthly payments in terms thereof until it stopped, claiming that it was unable to meet its obligations in terms of that payment plan.

- [17] Account must be taken not only of the municipality's indebtedness to Eskom, but also the consequences caused by such failure for Eskom. In this case the municipality acknowledged to being indebted to Eskom in the sum of approximately R128 million. It will take a long time for that indebtedness to be fully liquidated if this court were to order the municipality to make payment in the sum of R750 000.00 per month.

- [18] In my view and regard being had to the municipality's financial position and the need for the municipality's indebtedness to Eskom to be liquidated as soon as reasonably possible, it would be appropriate to order the municipality to make payment to Eskom on its present indebtedness in the sum of R900 000.00 per month, being R600 000.00 in respect of Middelburg and R300 000.00 in respect of Cradock, the first payment to be made on or before 31 August 2020.

- [19] I have satisfied myself that the remainder of the draft order will adequately address the issues raised in the main application. An order should accordingly be granted in terms thereof, as amended by the issues discussed above.

- [20] Eskom did not seek a costs order against the municipality, both entities being organs of state.

- [21] In the result, it is ordered:

21.1. The Third Respondent (the municipality) be and is hereby declared to be indebted to the First Respondent (Eskom) in the sum of R127 974 276.27 which shall be paid to Eskom in terms of the payment schedule annexed to this order and marked "A".

21.2. The municipality shall keep separate financial statements, including a balance sheet of its electricity reticulation business, as is envisaged in section 27(i) of the Electricity Regulation Act, 2006 (Act 4 of 2006).

21.3. The financial statements referred to in paragraph 2 above shall distinguish on a monthly basis: firstly, between capital and on-going expenditure in respect of reticulation infrastructure and the bulk purchase of electricity; and secondly, revenue received in respect of both reticulation infrastructure and the supply of electricity to customers.

21.4. The municipality's financial statements shall disclose, on a monthly basis, revenue received in respect of the supply of electricity and the extent to which such revenue is appropriated for payment of its current account with Eskom and its obligation in terms of annexure "A" to effect payment for arrears.

21.5. The municipality shall report to this Court on or before the 15th day of every third month following this order in respect of the steps taken to implement the provisions of paragraphs 3 and 4 above, the first report to be filed of record on or before 15 November 2020.

21.6. The financial statements and reports referred to in paragraphs 3, 4 and 5 above shall set out the steps taken by the municipality:

21.6.1. to effect proper metering of its electricity supply;

21.6.2. to effect proper billing in respect of metered electricity usage;

21.6.3. to update and service its reticulation system and to comply with the requirements of its licence; and

21.6.4. to reduce the incidents of theft of electricity.

21.7. The financial statements and reports referred to in paragraphs 3, 4 and 5 above shall, in addition to being filed with the Court, also be served on the applicants' attorneys, Coetzee Venter Inc (reference: Mr Coetzee) and Eskom's attorneys, Netteltons (reference: Mr Nettelton).

21.8. Eskom and the municipality shall, within 7 days of the date of this order:

21.8.1. nominate by name and designation, the responsible person or persons mandated to ensure compliance with the terms of this order; and

21.8.2. give written details of such persons to the Court, each other and the applicant's attorneys.

21.9. Eskom and the municipality be and are hereby granted leave to re-enrol this application on the same papers, duly amplified, for the purpose of formulating orders in regard to and arising out of the financial statements and reports referred to in paragraphs 3, 4 and 5 above.

21.10. The municipality shall pay the applicants' costs in relation to the application, including reserved costs, such costs to include the costs of two counsel, where employed.

G H BLOEM

Judge of the High Court

For the applicants: Mr DH de la Harpe SC and Mr G Brown, instructed by Coetzee Venter Inc, Cradock and Wheeldon Rushmere & Cole, Grahamstown.

For the first responden Mr SL Shangisa SC and Ms L Rakgwale, instructed by Smith Tabata Attorneys, East London, and Netteltons Attorneys, Grahamstown.

For the third, fourth and fifth respondents: Mr RP Quinn SC and Mr SG Poswa, instructed by Zepe & Company,

Queenstown and Yokwana Attorneys, Grahamstown.

Date of hearing:

4 June 2020.

Date of delivery of judgment: 17 June 2020.

ANNEXURE "A"

The first sum of the monthly payment is in respect of Middelburg while the second sum is in respect of Cradock.

1. R600 000.00 and R300 000.00 on or before 31 August 2020.
2. R600 000.00 and R300 000.00 on or before 30 September 2020.
3. R600 000.00 and R300 000.00 on or before 31 October 2020.
4. R600 000.00 and R300 000.00 on or before 30 November 2020.
5. R600 000.00 and R300 000.00 on or before 31 December 2020.
6. R600 000.00 and R300 000.00 on or before 31 January 2021.
7. R600 000.00 and R300 000.00 on or before February 2021.
8. R600 000.00 and R300 000.00 on or before 31 March 2021.
9. R600 000.00 and R300 000.00 on or before 30 April 2021.
10. R600 000.00 and R300 000.00 on or before 31 May 2021.
11. R600 000.00 and R300 000.00 on or before 30 June 2021.
12. R600 000.00 and R300 000.00 on or before 31 July 2021.
13. R600 000.00 and R300 000.00 on or before 31 August 2021.

- 14. R600 000.00 and R300 000.00 on or before 30 September 2021.
 - 15. R600 000.00 and R300 000.00 on or before 31 October 2021.
 - 16. R600 000.00 and R300 000.00 on or before 30 November 2021.
 - 17. R600 000.00 and R300 000.00 on or before 31 December 2021.
 - [1] Intergovernmental Relations Framework Act, 2005 (Act No. 13 of 2005).
 - [2] The relief sought in that regard was not persisted with because counsel (who did not draft the founding papers) correctly accepted in the heads of argument that this court cannot order parties to reach agreement.
 - [3] Maswanganyi v Road Accident Fund 2019
 - (5) SA 407 (SCA) at paras [28] and [33].
 - [4] Eke v Parsons 2016 (3) SA 37 (CC) at para [34].
 - [5] Eke v Parsons at paras [73] to [75].
 - [6] Eke v Parsons n 4 at paras 20 – 36.
-

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAECGHC/2020/65.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/cradock-business-forum-and-others-v-eskom-unknown-topic-aecghc-2020--6a3ea51c3b1caa9129812865>

Prepared on 11 October 2026 · Esheria