

SOUTH AFRICA / JUDGMENT

## Eskom Holdings SOC Ltd v Nketoana Local Municipality (1222/2018) [2021] ZAFSHC 102 (6 May 2021) [2021] ZAFSHC 102

COURT

Free State High Court, Bloemfontein

BEFORE

P. J. Loubser

CASE / FILE NUMBER

1222/2018

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IN

THE HIGH COURT OF SOUTH AFRICA,  
FREE  
STATE DIVISION, BLOEMFONTEIN

Case

number: 1222/2018

In

the matter between:

ESKOM  
HOLDINGS SOC LTD  
Applicant  
and  
NKETOANA  
LOCAL MUNICIPALITY  
Respondent  
HEARD

ON:

30 APRIL 2021

**JUDGMENT**

BY: LOUBSER, J

DELIVERED ON: 6 MAY 2021

[1] This is an application for leave to appeal against the judgement of this Court dated 7 January 2021 under case number 1222/2018. The judgement followed upon application proceedings where the present Respondent featured as the Applicant, and the present Applicant as the Respondent. For the sake of convenience, I will refer to the present Applicant as “Eskom” and the present Respondent as the “Municipality”.

[2] The Municipality moved for the following relief in the main proceedings:

1. That the application be heard as an urgent application.
2. That a Rule Nisi do hereby issue, returnable on a certain date and time, calling on the Respondent to show cause, if any, why the following orders should not be made final:

2.1 That the Respondent be interdicted and restrained from implementing electricity restrictions in Nketoana Municipality including those which is advertised to commence on Tuesday, 13 March 2018, and that the aforementioned electricity restrictions be stayed, pending the initialization and finalization of a process for the debatement of the Applicant’s account with the Respondent;

2.2 that the Respondent be ordered to render a complete reconciled account, fully motivated and supported by the underlying contracts, vouchers and meter readings, if applicable, on which the Respondent rely to hold the Applicant liable for electricity payments, such account to be delivered within 30 days from the date of the order;

2.3 that the Respondent avail three days after the period of 30 days in terms of paragraph 2.2 above has lapsed, on which it will avail personnel to meet with the Applicant’s representatives at the Respondent’s offices in Bloemfontein to debate the account of the Applicant;

2.4 that the Respondent pays the costs of the application in the event of its opposing the same;

3. That the relief in paragraph 2.1 above will apply with immediate effect as an interim interdict pending the finalization of the application.

[3] Eskom responded to this application by filing a counter application in which it sought the following relief:

1. Declaring that:

1.1 Nketoana Local Municipality was, at the end of October 2018, indebted to Eskom in the amount of R209 322 105.59, being an amount due and payable in respect of the electricity supplied to it by Eskom;

1.2 (1.2 and 1.3 deal with the interest to be paid);

1.4 the failure by the Municipality to pay the aforesaid amount within 10 days as envisaged in the Electricity Supply Agreements entered into between the Municipality and Eskom, would entitle Eskom to discontinue the supply of electricity to the Municipality after having given a further 14 days written notice of its intention to do so;

1.5 this right of discontinuation of the supply of electricity to the Municipality is subject to Eskom following a fair administrative process, especially with regard to parties who may be effected by the discontinuation of electricity supply to the Municipality;

1.6 (orders sought to declare the past process followed by Eskom to terminate the electricity supply a fair process envisaged by PAJA).

2. That the Municipality is directed to deliver a written report to this Court within 7 calendar days after expiry of a period of 90 calendar days after the granting of this order, accounting for the above-mentioned 90 calendar day period, the following:

2.1 the total amount received in respect of electricity sold to its end users; and

2.2 the amount of equitable shares received from national treasury as well as the portion thereof allocated for the use of electricity by the indigent.

[4] Having read the papers filed in the application and having heard counsel for the respective parties, this Court then handed down judgement on 7 January 2021 and ordered the following:

1. Eskom is interdicted from implementing interruptions in electricity supply to the Municipality pending resolution of the disputes between them within six months of the date of this order.
2. The disputes between the parties and the manner and timing of its resolution, are referred back to the parties in terms of Section 41(3) of the Constitution.
3. The parties are to make every reasonable effort to resolve their disputes by means of the mechanisms and procedures provided by statute.
4. Should the parties fail to resolve the disputes in the manner aforesaid within the period of six months, they are each granted leave to approach the court again for appropriate relief.
5. Eskom is to pay the costs of 9 March 2018 and the costs of the main application on the party and party scale.
6. The counter application is dismissed with no order of costs.

[5] The orders made by the Court were premised on the Court's findings that, inter alia, a termination of electricity supply would cause disaster to the residents of the Municipality, and further, that it was clear that a dispute existed between the parties for the purposes of Section 41(3) of the Constitution. This court further found that there was no evidence that a

formal dispute was ever declared in terms of Section 41 of the Intergovernmental Relations Framework Act 13 of 2005 (IRFA), and that the parties have not made every reasonable effort to settle their dispute by means of the mechanisms and procedures provided by statute.

- [6] On behalf of Eskom a number of grounds for an appeal against the judgement of this Court were submitted. It was argued on behalf of the Municipality that those grounds were without merit and that the orders in the main application are not appealable because the interim interdict did not constitute a final order. I deem it unnecessary to deal with the merits of the grounds advanced for a successful appeal and with the issue of appealability, because of the following:
- [7] Scarcely a week before this Court handed down its judgement in this matter, the Supreme Court of Appeal pronounced itself on the principles governing cases of this kind in *Eskom Holdings SOC Limited v Resilient Properties (Pty) Ltd and Others and related matters* (2021) JOL 49260 (SCA). At the time of this Court's judgement, it was not yet aware of the judgement of the SCA.
- [8] In its judgement the SCA came to the following conclusions, which are not intended to be a verbatim and full account of what was stated in the judgement:
1. Terminating the supply of electricity to an entire Municipality would adversely affect every consumer within the effected Municipality. Indeed, it would have the effect of collapsing the entire Municipality, rendering it unable to fulfil its constitutional and statutory mandate to provide basic services. (Par 58)
  2. Section 41 of the Constitution states that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute. (Par 62)
  3. Section 41(4) of the Constitution empowers courts to decline entertaining disputes that have not first legitimately travelled through the extra-curial mechanisms designed and available for that purpose. (Par 62)
  4. Eskom was required to comply with Section 41(3) of the IRFA before taking the decision to interrupt electricity supply to the Municipalities concerned because of their failure to pay for the electricity supplied. (This refers to the declaring of a formal dispute before the institution of judicial proceedings). (Par 61)
  5. A dispute between Eskom and a Municipality exists when there is a live dispute in relation to the manner as to how the debt would be liquidated and the remedies available to Eskom in the event of default. (Par 75)

6. Eskom is under a constitutional duty to ensure that Municipalities, which are solely dependent on it for electricity supply, are enabled to discharge their obligations under the Constitution. Eskom cannot act in a way that would undermine the ability of Municipalities to fulfil their constitutional and statutory obligations to the citizenry. (Par 80)
  7. Eskom's decision to interrupt or terminate bulk electricity supply to the entire Municipality without prior compliance with section 40 and 41 of the IRFA, is inimical to the constitutional obligations that it bears. (Par 80)
- [9] By now it must be obvious that none of the orders made by this court are at variance with what the SCA has confirmed in the judgment under discussion. It therefore cannot be found that there is a reasonable prospect that another court would come to a different conclusion.
- [10] The following order is made:
1. The application for leave to appeal is dismissed with costs.

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P. J. LOUBSER, J

On behalf of applicant:

Adv. L. T. Sibeko SC

Assisted by

Adv. N. H. Moloto

Instructed by:

Phatshoane Henney Inc.

BLOEMFONTEIN

On behalf of 1st respondent: Adv. M. Louw

Instructed by:

Peyper Lessing Attorneys

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Prepared on 12 October 2026 · Esheria