

SOUTH AFRICA / JUDGMENT

Rural Maintenance (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Another (2023/027739) [2023] ZAGPJHC 354 (20 April 2023)

[2023] ZAGPJHC 354

COURT

South Gauteng High Court, Johannesburg

BEFORE

E Molahlehi

CASE / FILE NUMBER

2023/027739

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FLYNOTES:

MUNICIPALITY AND AUTHORITY TO ACT
CIVIL
PROCEDURE – Authority – Municipality –
Applicants not producing affidavit confirming Municipality had
authorised the institution of application – Matter could not
be considered on the basis that other applicant instituted
application on its own – This proposition unsustainable
because not supported by any averment in the papers –
Uniform Rule 7.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA
GAUTENG
LOCAL DIVISION, JOHANNESBURG
Case
Number:2023/027739
NOT
REPORTABLE

	NOT OF INTEREST TO OTHER JUDGES NOT REVISED In
the matter between:	RURAL MAINTENANCE (PTY) LTD (Registration Number:[...]) First Applicant RURAL MAINTENANCE FREE STATE (PTY) LTD (Registration Number:[...]) Second Applicant MAFUBE LOCAL MUNICIPALITY Third Applicant MAFUBE BUSINESS FORUM Fourth Applicant and ESKOM HOLDINGS SOC LTD First Respondent NATIONAL ENERGY REGULATOR OF SOUTH AFRICA Second Respondent Neutral Citation: Rural Maintenance (PTY) Ltd and Others vs Eskom Holdings SOC Ltd and Others (Case Numbers:027739/2023) [2023] ZAGPJHC 354 (20 April 2023)
Delivery:	This judgment was handed down electronically by circulation to the parties' legal representatives by email, and uploaded on caselines electronic platform. The date of hand-down is deemed to be 20 April 2023.
Summary:	Urgent application – Rule 7 Uniform Rules of Court – Authority to initiate proceedings on behalf of Municipality not furnished on the Court – Application not properly before the Court and stands to be dismissed.

JUDGMENT

Molahlehi J

Introduction

[1] This is an urgent application in which the applicants seek an order preserving the status quo pending the resolution of the dispute between them and the first respondent, Eskom Holdings SOC Ltd (Eskom), in terms of section 40 of the Electricity Regulation Act of 2004.

[2] The status quo that the applicants seek to preserve concerns the self-load shedding on behalf of the Mafube Local Municipality (Municipality) by the second applicant, Rural Maintenance Free (Pty) Ltd. The authority to conduct the self-load shedding by the second applicant is a consequence of the agreement concluded between the Municipality and the first applicant, Rural Maintenance (Pty) (Ltd). In terms of that agreement, the first applicant was entitled to appoint any of its subsidiaries to perform the function of managing the distribution of electricity for the Municipality.

[3] The main relief sought by the applicants in the notice of motion is as follows:

"3. Restraining the first respondent from taking control of the point of connection of the national grid which supplies the distribution network in Frankfort and interfering with the provisions of electricity to Frankfort.

4 Directing the first respondent to admit the first and second applicants to continue:

4.1 Administering self-load shedding on behalf of the applicant according to the load shedding schedules so approved by the first respondent;

4.2 Voiding certain load shedding zones in daylight hours when the alternative solar energy generation source, which the first and second applicants have the right to use, is generating electricity at a capacity which exceeds the capacity of the load to be shed,

4.3 Applying load shedding as per the approved load shedding schedules when the alternative solar generation sources are not functioning or are not generating electricity at a capacity which exceeds the load to be shed."

The parties

[4] Afriforum is a public interest NGO which was admitted in these proceedings as amicus curiae.

- [5] The first applicant, Rural Maintenance (Pty) Ltd and the second applicant, Rural Maintenance Free State (Pty) Ltd, are private companies registered in terms of the company laws of South Africa. The second applicant is a wholly owned subsidiary of the first applicant and has been appointed to manage the contract between the first applicant and the Municipality.
- [6] The third applicant is Mahube Local Municipality, a category B Municipality in the Fezile Dabi District of the Free State serving the towns of Frankfort, Tweeling and Cornelia. The fourth applicant, Mafube Business Forum, is a business forum based in Frankfort.
- [7] The first respondent, Eskom, is a state-owned company with limited liability established in terms of the Eskom Conversion Act 13 of 2001. The second respondent is the National Regulator of South Africa (NERSA) established under the National Energy Regulator Act 40 of 2004.
- [8] The dispute between the parties concerns the threat by Eskom to interfere with the so-called 'self-load shedding' taking place in the Municipality. The second applicant, Rural Maintenance Free State (Pty) Ltd, manages the self-load shedding, where, in order to alleviate the effect of Eskom's load shedding on the town of Frankfort, the second applicant provides electricity to the Municipality from a private PV solar farm during the day.

The dispute

- [9] The second applicant manages electricity distribution on behalf of the Municipality in terms of a 25-year contract concluded with the first applicant. In addition to managing the electricity supplied by Eskom to the Municipality, the second applicant also has the right to use solar generation capacity from the solar farms (embedded solar facility) outside Frankfort for the benefit of the Municipality as well as when Eskom applies load shedding.
- [10] According to the applicants, the second applicant uses the embedded solar facility in terms of Schedule II of the Electricity Regulation Act No 4 of 2006 and, accordingly, does not require a licence by the owner in terms of section 7(2) Electricity Regulation Act. The solar facility is privately owned by farmers, businesses and community members.
- [11] In 2023, the Municipality approached Eskom and engaged in negotiations about ways of reducing the negative impact of load shedding on the community of Frankfort. In this regard, one of the approaches proposed was to access energy from the embedded solar facility during the day. Initially, the embedded solar facility was developed to assist with the economic growth of Frankfort, as Eskom did not have the capacity to provide further electrification of the area.

- [12] The second applicant is in control of the electrical connection point and, having identified the mechanism of reducing the impact of load shedding on the Municipality, provided electricity from the embedded solar facility to the Municipality. In the event that the electricity generated from the embedded solar facility exceeded the load to be shed, such load shedding would not be executed.
- [13] The applicants' case is that the system used in load shedding has no negative impact on the national grid because its connection is down the stream from that of Eskom's point of connection, enabling it to keep the electricity supply of the critical loads intact during the load shedding. They emphasised that the advantage of this system is that it keeps the water reticulation and sanitation services running on an uninterrupted power supply since self-load shedding was introduced in February 2023.
- [14] The applicants refer to the process used in providing an alternative source of energy to cover the shortfall of electricity when Eskom switches off certain customers as "voiding". Voiding is the utilisation of a determined alternative energy source used to cover the shortfall of electricity supplied by Eskom. It is the "practice whereby the second applicant does not switch off a zone or a combination of zones that were scheduled to be switched off per the schedule, due to supplementary energy supply exceeding that of the load of the zone or the combination of loads."
- [15] According to the applicants, voiding is not a reduction of the load and does not alleviate the constraints on the system.
- [16] Eskom opposed the applicant's application but did not dispute the process of negotiations it had with the second applicant regarding the implementation of self-load shedding on behalf of the Municipality.
- [17] Its complaint, in its answering affidavit, is that the second applicant should have disclosed during the negotiations that it intended to implement voiding once the agreement was concluded. According to Eskom, voiding undermines the purpose of load shedding, and that is why it is opposed to its implementation by the second applicant.

The issue of authority

- [18] Eskom has raised the issue of authority in respect of the Municipality in terms of rule 7 of the Uniform Rules of Court (Rules). Ordinarily, this being a point in limine, it should have been dealt with before hearing the merits of the dispute between the parties, but the hearing proceeded notwithstanding because the applicants' Counsel assured the Court, both in chambers and at the beginning of the hearing, that the affidavit from the Municipality supporting the institution of these proceedings was on its way.
- [19] In light of the challenge of authority as raised by Eskom, I do not intend to delve into the issues of urgency and the merits of this matter.

[20] It is trite that the procedure to be followed by a party disputing the authority of the person to act on behalf of another party in litigation, and in an instance such as the present is set out in rule 7 of the Rules.[1] The Municipality is an artificial person; thus, the representative must prove that the Municipality has authorised the initiation of the litigation.

[21] The purpose of rule 7 was set out in *North Global Properties (Pty) Ltd v Body Corporate of Sunrise Beach Scheme*,[2] in the following terms:

"The purpose of the rule is, on the one hand, to avoid cluttering the pleadings unnecessarily with resolutions and powers of attorneys. On the other hand, it provides a safeguard to prevent a cited person from repudiating the process and denying his or her authority for issuing the process."

[22] The court further held that rule 7 could be invoked at any time before judgment.

[23] The general approach adopted by the courts when dealing with a rule 7 challenge is to postpone the application to afford the affected party an opportunity to remedy the default. In the present matter, the applicants were alive of the need to provide proof that the Municipality had authorised the institution of the application. In the founding affidavit, its deponent averred that:

"1.3 I am duly authorised to depose to this affidavit on behalf of both the first and the second applicants. The third and fourth applicants support this application, which support will appear from the confirmatory affidavits filed evenly herewith."

[24] The deponent to the founding affidavit further avers as follows in paragraph 5.3:

‘The applicants were not able to obtain an affidavit from the third applicant's officials confirming its support of the application at the time of the signature of this affidavit. The applicants will endeavor to obtain same as soon as possible.’

[25] As indicated earlier, Eskom raised the issue of authority in its answering affidavit. The applicants, in their replying affidavit, did not produce any affidavit, as promised, confirming that the Municipality had authorised the institution of this application.

[26] As indicated earlier, Counsel for the first and second applicants indicated that the affidavit of authority would be made available before the conclusion of the hearing. However, when the Court inquired about the affidavit towards the conclusion of his submission, Counsel changed his tune regarding the applicants' position and stated that the matter should be considered on the basis that the second applicant instituted the application on its own. This is unsustainable because this proposition is not supported by any averment in the papers before the Court.

[27] For the above reasons, I find that the applicants' case is not properly before the Court and therefore application stands to fail.

Costs

[28] Eskom requested costs against AfriForum. I do not believe, in the circumstances, that it would be appropriate to award costs against an amicus curiae.

Order

[29] In the premises, the following order is made:

1. The application is dismissed.
2. The first, second, and fourth applicants are to pay the costs of the application, jointly and severally, the one paying the others to be absolved.

E Molahlehi

JUDGE OF THE HIGH COURT, Gauteng Local Division

JOHANNESBURG

Representation

For the applicants: E Labuschagne SC Instructed by: Shepstone & Wylie Attorneys For the respondents: Azhar Bham SC And: Catherine Kruyer Amicus Curiae: Adv. Johan Hamman

Date heard: 5 April 2023

Delivered: 20 April 2023

[1] Eskom v Soweto City Council 1992

(2) SA 703 (W) at 705E – 706C; Ganes and another v Telecom Namibia Ltd 2004

(3) SA 615 (SCA) at 624; ANC Umvoti Council Caucus and others v Umvoti Municipality 2010 (3) SA 31 (KZP) para 13 – 29.

[2] (12465/2011)

[2012] ZAKZDHC 47 (17 August 2012) at para 6.

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