

SOUTH AFRICA / JUDGMENT

Tokologo Local Municipality v Eskom Holdings Soc Ltd and Others (4991/2018) [2019] ZAFSHC 241 (13 December 2019)

[2019] ZAFSHC 241**COURT**

Free State High Court, Bloemfontein

BEFORE

M A Mathebula

CASE / FILE NUMBER

4991/2018

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Source record**IN THE HIGH COURT****OF SOUTH AFRICA,****FREE****STATE DIVISION, BLOEMFONTEIN****Case****number: 4991/2018****In****the matter between:**

TOKOLOGO
LOCAL
MUNICIPALITY Applicant
and
ESKOM
HOLDINGS SOC
LTD 1st
Respondent
NATIONAL
ENERGY REGULATOR OF SOUTH
AFRICA 2nd
Respondent
MINISTER
OF
ENERGY 3rd
Respondent
MINISTER
OF PUBLIC
ENTERPRISES 4th
Respondent
HEARD

ON:

27 JUNE 2019

JUDGMENT

BY: MATHEBULA, J

DELIVERED ON: 13 DECEMBER 2019

Interim interdict – Eskom entitled to cut back on the electricity supply of the non-paying customers – Decision to do so subject to judicial scrutiny – Balance of convenience favours the granting of the interim interdict.

Introduction

and parties

- [1] This matter involves a perennial problem of non-payment of electricity accounts by several municipalities to Eskom which has led to several legal skirmishes in our courts throughout the country. The applicant is a Local Municipality established in terms of section 2 of Act 17 of 1998. It is licensed by Nersa to distribute and supply electricity to consumers in the towns of Boshof, Dealesville, Hertzogville, Seretse, Dikgalaope and Kareehof. The first respondent, Eskom is a state owned entity duly incorporated in accordance with the Company Laws of the Republic.

Relief sought

- [2] In the application the applicant seeks a relief in the following terms:-

“2.1. Pending the outcome of an application to review the decision of the First Respondent to interrupt bulk supply of electricity to the Applicant, and further pending a determination of a dispute by the Second Respondent declared by the Applicant against the First Respondent, in accordance with the provisions of the Electricity Regulation Act 2006, (which dispute will be formally lodged with in one month of an order being granted in this application), First Respondent is interdicted and restrained from implementing its decision published on 28 September 2018 (“the interruption decision”) to interrupt the bulk electricity supply to the entire Tokologo Local Municipality district.

2.2. That the Respondents who opposed this application are directed jointly and severally to pay the costs of the application.”

- [3] In the counter application, the first respondent seeks the following relief:-

“1.The Municipality was, as at 3 December 2018, indebted to Eskom in the amount of R35, 727, 195.00 being an amount due and payable in respect of the electricity supplied to it by Eskom;

2. The failure by the Municipality to pay the aforesaid amount within 10 days as envisaged in the Electricity Supply Agreement (“ESA”) 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;
 3. This right of discontinuation of the supply of electricity to the Municipality is the subject to Eskom following a fair administrative process, especially with regard to third parties who may be affected by the discontinuation of the electricity supply to the Municipality;
 4. That the process initiated by Eskom on/or about 14 November 2016, which caused a notice of termination to be published in the public media circulating within the Municipality’s area of jurisdiction in terms of which:
 - 4.1. the public was requested to submit written representation by no later than 15 December 2016, as to why Eskom should or should not give effect to the disconnection;
 - 4.2 the public was informed that the written representations would be considered and a final decision made and published on 22 December 2016; and
 - 4.3 in the event that Eskom decided to continue with the disconnection, the disconnection would occur on/or about 5 January 2017’
- Was a fair process envisaged by the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”); 2.5 Eskom, to the extent necessary, has complied with its obligation of engaging in good faith as envisaged in Section 4 of the Constitution of the Republic of South Africa, read with the provisions of the Inter-Governmental Relations Framework Act 13 of 2005 (Cooperative Governments Requirements”), with the Municipality and provisional governmental representatives; and
5. Eskom, as a result is entitled to enforce its rights to discontinue electricity supply to the Municipality;
 6. The Municipality is directed to:
 - 6.1. Ringfence or revenue received by it in respect of electricity supplied by it in users;
 - 6.2. Pay over to Eskom all amounts due to it for electricity supplied to the Municipality in terms of the ESA under the account numbers held by the Municipality with Eskom whose details are set out in paragraphs 1.2 hereof;
 - 6.3. Alternatively to 4.2 above and only in the event that Municipality fails to pay any part of or full amount due in terms of the ESA to Eskom in any one month, to deliver a written report to this court within seven calendar days of such failure to pay, accounting for the month relating to the failure to make payments, the following:
 - 6.3.1. The total amount received in respect of electricity sold to its end users;

6.3.2. The amount of equitable share received from National Treasury as well the portion thereof allocated for the use of electricity by the indigent; and

6.3.3. Reasons for the non-payment of any party of or the full amount due to Eskom in respect of electricity supplied.

7. Granting Eskom such further or alternative relief as this Court may deem fit;
8. Directing the Municipality and such other Respondent who opposes, the relief sought herein, to pay costs of suit jointly and severally the one paying the other to be absolved.”

Chronology

- [4] It is an existing fact that the applicant owes the first respondent millions of rands on its electricity account. On 28 September 2018 the first respondent issued a notice that it was embarking on a scheduled electricity supply interruption as a last resort to combat escalating debt for the bulk supply of electricity. This is what jolted the applicant into action to approach the court for the relief to interdict or restrain the first respondent from doing so.
- [5] Prior to the first respondent taking the drastic step, there has been extensive engagement between the parties. It appears that the arrears have been gradually accumulating as far back as 2011. Given the worsening state of affairs, the parties concluded a written acknowledgment of debt and repayment plan in favour of the first respondent. This was followed by a revised financial recovery plan. In it the applicant clearly demonstrated its inability to pay the current amount and settle the outstanding debt. The applicant did not comply with its repayment obligations thus breached the written agreement.
- [6] On 8 October 2018 Mbhele J granted an Order per agreement between the parties in the following terms:-

“1.The applicant shall pay to the 1st respondent the amount of R2 869,819.34 on or before the 16th of October 2018;
 2. The applicant is directed to pay to the 1st respondent all further and future amounts payable and failing due to the 1st respondent in terms of the current accounts (account number 6784031577 and 8711160237) of the applicant with the 1st respondent
 3. The 1st respondent undertakes to suspend the decision published on the 28th of September 2018 to interrupt the electricity supply to the Tokologo Local Municipality district pending finalisation of this application;
 4. The 1st respondent shall file its opposing papers on or before the 22nd of October 2018;
 5. The applicant shall file its replying papers on or before the 5th of November 2018;
 6. The applicant shall file its Heads of Argument on the 7th of November 2018;

7. The 1st respondent shall file its Heads of Argument on the 9th of November 2018;
8. The application is postponed to the 15th of November 2018;
9. Costs of today to be costs in the cause.”

The applicant did not comply with it. This order is the genesis of the counter-application.

Submissions

on behalf of the applicant

- [7] Mr Louw on behalf of the applicant, commenced his submissions by sketching out the orders that are sought by both parties in the main and counter-application. He argued that the applicant is the custodian of the rights of the consumers. In terms of section

156(1)(d) of Act 108 of 1996 (Constitution) the applicant has an obligation to provide electricity to residents in its jurisdiction.

The interruption of supply of electricity to the residents was a threat to their constitutional rights. The action of the first

respondent to cut supply was an unlawful act as it amounted to self-help. He added that the first respondent was to be blamed

in that it allowed the arrears to accumulate to the point that it was impossible to redeem.

- [8] He emphasized that the interruption of the supply of electricity will have a catastrophic effect on the residents of the affected towns. Water reticulation and sewerage system will be affected in the sense that waterborne diseases may spread at an alarming rate. The very fragile economy of these semi rural towns will be brought to its knees forcing businesses to close down compounding the existing challenges of unemployment and poverty. The collapse of these basic services may also cause volatile situation among the residents.

- [9] Determined to strengthen his argument he quoted and relied on a number of decided cases the common denominator of which is the first respondent. In all the matters referred to the applicants were seeking a relief to interdict and/or restrain the first respondent

from interrupting or cutting the electricity supply.

- [10] In *Resilient Properties (Pty) Ltd v Eskom and 5 others*[1] the applicant brought an application for interim relief pending a review of the decision to cut supply of electricity. In that matter the court held on the facts that the first respondent’s proposed decision was irrational and the balance of convenience

favoured the applicant.

[11] The Resilient matter was followed in this division in Mieliehoofstad Sakekamer and another v Eskom.[2] The court confirmed that the first respondent is entitled to terminate or interrupt the supply of electricity given contractual

default. However, the decision as to which option to follow constitutes an administrative action which is reviewable in terms of the Promotion of Administrative Justice Act -3 of 2000.

[12] Reliance was also placed on Sabie Chamber of Commerce and Tourism v Thaba Chewu Local Municipality and 5 others.[3] There the court held that interruptions cannot be used as debt collection measures. Internal remedies must be exhausted

employing appropriate mechanism and procedures in dealing with inter-governmental disputes. The learned judge specifically referred

to the provisions of the Intergovernmental Relations Framework Act 13 of 2000. This aspect was also emphasised by the court in Cape Cate (Pty) Ltd v Eskom.[4]

[13] Turning to the counter application, he argued that the Order which is the subject of the counter application, was an Order sounding in money. The first respondent had various remedies open to it including provisional sentence. He pointed out that the debtor in this matter was an organ of state. The first respondent has never asked for the ringfencing of the electricity funds. In any event that route will be burdensome on a small municipality with limited capacity and resources like the applicant. This will necessitate the employment of extra staff members and separate books of accounts. Lastly he added that the procedure followed by the first respondent was insufficient.

Submissions

on behalf of the respondent

[14] In response Mr Sibeko refuted the submission that the applicant was acting on behalf of its consumers. He argued that the relief sought was encouraged by self-interest being an interim interdict pending the determination of a review. In this matter the delinquent applicant initiated the proceedings purely with the object of obtaining a payment holiday sanctioned by the court in respect of moneys owed and due by it to the first respondent as per agreement. The applicant was seeking a relief in order to resile its obligations as per agreement between the parties.

[15] He pointed out that the applicant essentially desired to prevent the first respondent from exercising its rights by law as imposed by statute. He quoted Sima v Minister where the court held that the interdict sought was to render an Act of Parliament ineffective and unconstitutional.[5] In this matter, the applicant instead of complaining of not being supported, was the one not supporting the applicant to carry out its mandate ie to supply the electricity to all citizens and its customers in neighbouring countries.

- [16] He added that the applicant consented to an order to pay about R2.8 million for electricity. It is clear that the promise was never intended to be complied with from the very beginning. On the issue of ringfencing he emphasized that it was a statutory obligation more than what the first respondent desired for itself. This was stipulated in the Municipal Financial Management Act 56 of 2003 that the applicant had to comply with some duties in dealing with its revenue.
- [17] He reiterated that there were remedies available to the applicant in the event of the lack of revenue. The applicant could have approached the Provincial Treasury for assistance. The other option was to request the Provincial Administration to be placed under administration. The applicant, aware of its problems over a period of time, folded its arms and took no positive steps to remedy the situation. If the applicant had acted responsibly, these provisions could have been invoked because there is nothing preventing it to do so.
- [18] On the issue of decided cases relied upon by counsel for the applicant, he stated that none of the applicants were municipalities

like the applicant. In two (2) matters the applicants were Chambers of Commerce representing end users. They had paid the municipalities

who in turn did not pay the applicant. Turning to the Cape Gate matter he outlined that it was not authority and the facts are

distinguishable to the matter on hand. In that matter the Emfuleni Municipality was under administration. In order to alleviate its woes, the Premier of the Province had prepared a financial recovery plan. Lastly the municipality owed the respondent more than R1 billion. He emphasized that the respondent participated in intergovernmental dispute resolution mechanism per invitation.

Discussions

- [19] It is unquestionable that the first respondent is permitted to interrupt and disconnect electricity against defaulting customers.

My view is that this power which has serious implications when exercised must be subjected to judicial scrutiny. I say so because

the provisions and supply of electricity is recognised as a constitutional right. It is also a fact that the applicant has not

complied with the payment conditions of the first respondent. The applicant is not only owing money for past accounts but accumulating

debt for current consumption.

- [20] I am convinced that the applicant has demonstrated a clear right in this regard. The applicant brings this application protecting the interest of the residents within its jurisdiction. It cannot be expected that individuals can do so in trying to interdict the first

respondent from cutting back the supply of electricity. I do not find any merit in the argument that the applicant is protecting a self-interest. The applicant does not exist for its own sake but that of its residents. Therefore it has a statutory obligation to protect their constitutional rights.

- [21] The consequences of the interruption of electricity supply will be akin to human catastrophe. Counsel for the applicant dealt with this aspect at length. There is insurmountable evidence that where the first respondent has embarked on this course, there has been nothing but disaster. Interestingly counsel for the first respondent did not convincingly deal with it. The situation is not simple that the first respondent may switch off because the debt is due. On this ground the applicant must succeed.
- [22] The adverse consequences that may be suffered by the inhabitants of the applicant may not be undone. They may still be lingering on even years after the first respondent has embarked on his intended plan of action. On the other hand the first respondent may still enforce its right through other means. These may include instituting of an action by issuing summons culminating in judgement being granted and such debt collected via writ of execution. This leads me to the conclusion that the balance of convenience favours the granting of an interim interdict.
- [23] It was argued that the applicant has many remedies available to it including being placed under administration, approaching Provincial Treasury for assistance etc. Although these remedies are available to the applicant, they do not happen overnight. It is an elaborate process with many implications. It will appear that the only remedy available is the interim interdict to prevent the first respondent from interrupting the supply of electricity by engaging in unfair procedures. What is certain in this matter is that there was no adequate engagement between organs of state within the legal framework provided by the Legislature. It is imperative that such an avenue must be extensively explored. In my view there is no alternative remedy available to the applicant. The conclusion is that the pre-requisites of the interim interdict laid in *Setlegelo v Setlegelo*, followed and redefined in our courts have been met.[6]
- [24] Turning to the counter application, there are no cogent reasons advanced that the applicant is in wilful default or acting mala fide in not effecting payment. The respondent is seeking court oversight on an issue that it can manage by applying the many remedies at its disposal. I have already lamented the fact that deliberations and/or interventions at inter-governmental level have not been embarked upon. The applicant has raised many issues which also compact on the exact amount of the debt to the respondent.

This will have a significant impact on the agreement relied upon. On this basis the counter-application should fail.

Order

- [25] I make the following order:-

25.1. Pending the outcome of an application to review the decision of the first respondent to interrupt bulk supply of electricity to the applicant, and further pending a determination of a dispute by the second respondent declared by the applicant against the first respondent, in accordance with the provisions of the Electricity Regulation Act 2006, (which dispute will be formally lodged within one month of an order being granted in this application), first respondent is interdicted and restrained from implementing its decision published on 28 September 2018 (“the interruption decision”) to interrupt the bulk electricity supply to the entire Tokologo Local Municipality district.

25.2 The counter application is dismissed.

25.3 Costs should stand over to be determined in the review application.

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M. A. MATHEBULA, J

On behalf of applicant:

Adv. M. Louw

Instructed by:

Kruger Venter Inc

C/O Hill McHardy & Herbst Inc

BLOEMFONTEIN

On behalf of 1st respondent: Adv. L. T. Sibeko SC

Assisted by

Adv. N H Moloto

Instructed by:

Symington & De Kok

/roosthuizen

[1] Case 2018 ZAGPJHC 527 (14 September 2018)

[2] Case 4045/2018 (FS)

[3] 2019 ZAGPHC 112 (7 March 2019)

[4] 2019 (4) SA 14 (GJ)

[5] 1995 (2) SA 401 (--) at 406 F

[6] 1914 AD 221

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