

**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

CASE NO: 803/2021

Reportable: YES/NO

Circulate to Judges: YES/NO

Circulate to Magistrates: YES/NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

**THE MEC: NORTHERN CAPE PROVINCIAL
GOVERNMENT: DEPARTMENT OF COOPERATIVE
GOVERNANCE AND TRADITIONAL AFFAIRS**

First Applicant

SOUTH AFRICAN MUNICIPAL WORKERS UNION

Second Applicant

and

THE RENOSTERBERG LOCAL MUNICIPALITY

First Respondent

ESKOM HOLDINGS SOC LIMITED

Second Respondent

JUDGMENT

CHWARO AJ:

Introduction

- [1] This is an urgent application launched by the Member of the Executive Council for Cooperative Governance and Traditional Affairs in the Northern Cape province, (*“the MEC”*) seeking an interim relief to stay the execution of the judgment obtained by Eskom Holdings SOC Limited (*“Eskom”*) against the Renosterberg Local Municipality (*“the municipality”*) pending the finalisation of the main application launched by the MEC to compel the municipality to declare a formal dispute with Eskom as envisaged in sections 41 and 42 of the Intergovernmental Relations Framework Act, 13 of 2005, (*“the IGRFA”*).
- [2] On 20 May 2022, the South African Municipal Workers Union (*“SAMWU”*) launched an urgent application to intervene as an interested party and to be joined as the second applicant in the present application and in the pending main application issued out of this Division of the High Court under case number 603/2022.
- [3] Eskom opposed the intervention application. At the hearing of this application and following arguments, this Court granted SAMWU leave to intervene as sought, hence its citation as the second applicant herein.
- [4] The main protagonist of the underlying dispute involved in this application , the municipality, opted not to participate in the present application. The relief sought by the MEC and SAMWU is opposed by Eskom.

Brief factual matrix

- [5] On 25 June 2021, Eskom obtained judgment against the municipality for payment of an amount of R93 278 478-00 (ninety-three million two hundred and seventy-eight thousand four hundred and seventy-eight rand) in respect of outstanding payments for the supply of bulk electricity to the municipality.
- [6] Prior to Eskom obtaining judgment, the municipality’s debt towards Eskom became a serious concern to the community, comprising of the towns of Petrusville, Philipstown and Vanderkloof , as a result of the measures taken

by the latter entity to implement scheduled interruptions of electricity supply within the municipality.

- [7] The community acted through the Vanderkloof Ratepayers Association and launched an application out of this Division of the High Court seeking, amongst others, an order compelling the municipality to honour its constitutional obligations towards the residents and Eskom by paying its debt. Eskom was cited as a party in that application.
- [8] Eskom launched a counter-application seeking various relief against the municipality, including an order for payment of the amount of R93 278 478-00. Despite numerous opportunities given to the municipality, Eskom's counter-application was not opposed by the municipality. It is not in dispute that the MEC, who was also cited as a respondent in the counter-application brought by Eskom, decided to abide.
- [9] The municipality did not honour the judgment and Eskom proceeded to obtain a Writ of Execution against movable property of the municipality, which writ was issued by the Registrar on 29 September 2021.
-]10] Armed with the writ of execution, Eskom attached the bank account of the municipality held at Standardbank and proceeded to secure payment to itself from the said bank account.

The launching of the main and urgent applications

- [11] The MEC was not content with the manner in which Eskom dealt with the municipality's bank account. In the view of the MEC, Eskom was dealing with the municipality's banking account as if it was its own account, resulting a massive disruption in the financial administration of the municipality.
- [12] This prompted the MEC to launch an application on 23 March 2022 against the municipality and Eskom, seeking , amongst others, an order directing the municipality to declare a formal intergovernmental dispute with Eskom and

convene a meeting as envisaged in sections 41(1) and 42(1) of the IGRFA to deal with the dispute relating to the payment of the judgment debt and take all necessary steps, including arbitration, to bring finality to the dispute.

[13] In the meantime, the initial writ of execution lapsed. The MEC sought an undertaking from Eskom to the effect that it will not re-issue a writ of execution for the attachment of the municipality's bank account. Eskom did not heed such a call and proceeded to issue a second writ of execution.

[14] On 25 March 2022, payment of a grant from the Department of Sport and Libraries in the amount of R500 000-00 was made into the bank account of the municipality. A further deposit of R5 608 000-00 from National Treasury was made into the bank account of the municipality on 30 March 2022.

[15] On 12 April 2022 and acting on the strength of the second writ of execution and attachment of the municipality's bank account, Eskom withdrew an amount of R6 891 525-11 from the municipality's bank account in part payment of the judgment debt.

[16] This latest conduct by Eskom led the MEC to launch the present application on 20 April 2022 to seek an interim interdict to stay the execution of the writ pending the finalisation of the main application.

[17] This application was initially set down for hearing on an urgent roll of 29 April 2022 but was subsequently postponed to 13 May 2022 by agreement between the parties to allow Eskom to file its opposing papers.

Issues for determination

[18] Except for the determination of urgency, this Court is therefore called upon to determine whether the MEC and SAMWU have made out a case for the granting of an interim relief pending the determination of the main application launched under Case Number 603/2022.

Urgency

- [19] The MEC contends that the manner in which Eskom acted in withdrawing money deposited into the banking account of the municipality after having re-issued the writ of execution was only intended to render the operations of the municipality moribund with severe consequences for the community.
- [20] Eskom argues that the urgency is self-created as the judgment, which is the subject matter of the execution, was granted in June 2021 and the MEC failed to do anything until the belated application that was launched on 23 March 2022, followed by the present urgent application.
- [21] In the often-quoted case of **Luna Meubels Vervaardigers (Edms) Bpk v Markin and another**¹ the court recognised the fact that there are varying “degrees of urgency” in certain instances and the learned judge went on to hold that:

“Practitioners should carefully analyse the facts of each case to determine, for the purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the rules and of the ordinary practice of the court is required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate with therewith.”

- [22] On the totality of the facts of this case, I am of the view that the MEC was justified in launching this application on an urgent basis. The apprehension of further attachment and removal of all deposits made into the banking account of the municipality was, in my view, well founded as there was a great possibility of greater chaos emanating from the municipality’s inability to transact on its own banking account.

¹ 1977 (4) SA 135 (W) at 137A-F

[23] The prejudice which Eskom would have suffered by the abridgment of periods of filing opposing affidavit and be heard was ameliorated by the postponement of the matter by agreement to enable it to file its opposing papers.

[24] The attachment and removal of all deposits made into the banking account of a municipality is a matter that cannot await a hearing in due course and having regard to the nature of the issues involved between the parties, their importance and the potential impact on the community, it is my conclusion that the application was properly enrolled for consideration on an urgent basis.

Principles relating to interim interdicts

[25] In assessing the case of the applicants, one need not, at this stage, traverse the merits of the main application nor make any conclusive views in relation thereto. The primary issue for adjudication herein is to determine whether the applicants have made out a case for urgency and for an interdictory relief pending the finalisation of the main application.

[26] The well-established requirements for an interim interdict are (a) the existence of a *prima facie* right, even if it is open to some doubt; (b) a reasonable apprehension of imminent and irreparable harm to such right; (c) the balance of convenience tilting in favour of the granting of the relief; and (d) absence of an adequate and/or effective remedy².

[27] In ***South African Informal Traders Forum & Others v City of Johannesburg & Others***³ the Constitutional Court stated the following regarding establishing a *prima facie* right which entitles an applicant to an interim relief:

“Once we grant leave to appeal our immediate concern becomes whether we should grant temporary relief. Foremost is whether the

² See *Setlogelo v Setlogelo* 1914 AD 221 at 227, *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton and Another* 1973 (3) SA 685 (A)

³ 2014 (4) SA 371 (CC) at para 24

applicant has shown a *prima facie* right that is likely to lead to the relief sought in the main dispute. This requirement is weighed up along with the irreparable and imminent harm to the right if an interdict is not granted and whether the balance of convenience favours the granting of the interdict. Lastly, the applicant must have no other effective remedy."

[28] In ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others***⁴ the requirement of a *prima facie* right was explained to mean that a particular applicant must establish not merely that he has a right to approach a court in order to challenge a particular decision, or as in this case, to compel the municipality to take a particular decision, but such applicant must demonstrate that if not protected by an interdict, irreparable harm would ensue to such a right.

[29] Put otherwise, separate from the right to launch an application which is pending for the relief sought against the municipality to declare a formal intergovernmental dispute with Eskom, the MEC and SAMWU ought to demonstrate a *prima facie* right that is threatened by impending or imminent irreparable harm.

Discussion

[30] It was contended on behalf of the first applicant that its *prima facie* right is rooted within the constitutional supervisory role entrusted on the MEC and legislative provisions regulating how municipalities are expected to deal with disputes that they have with other organs of state.

[31] During argument, *Mr Grobler SC*, counsel for the MEC, submitted that the municipality has refused to heed the call from the MEC to declare a dispute earlier or even after judgment was obtained. This led the MEC to launch the main application. On the face of it, this is suggestive of a recalcitrant municipality which is failing to properly execute its constitutional and statutory duties amidst a dispute having the potential to affect its operations.

⁴ 2012 (6) SA 223 (CC)

- [32] The MEC further admits that Eskom needs to be paid and therefore it would be improper to seek rescission of judgment as so provided in rule 42 of the Uniform Rules of Court.
- [33] *Mr Shangisa SC*, counsel for Eskom, submitted that Eskom has obtained judgment against the municipality and an attempt to further subject the dispute underlying the judgment to dispute resolution mechanisms envisaged in IGRFA would be an attack on the authority of our courts and the hallowed principle established since the dawn of our constitutional democracy which calls on all concerned to respect and honour court judgments.
- [34] It was further contended on behalf of Eskom that if the MEC or SAMWU were not content with the judgment granted on 25 June 2021, they had available avenues provided for in terms of rule 42 to either apply for rescission or variation of the judgment.
- [35] It is trite that local government is an autonomous and distinct sphere of government which is guaranteed by the Constitution.⁵ However, the same Constitution places certain responsibilities and obligations upon both national and provincial spheres of government to adopt measures aimed at supporting and strengthening municipalities in the performance of their duties.⁶
- [36] The above delineation of the respective powers and duties of different spheres of government were properly set out in the matter of ***Johannesburg Municipality v Gauteng Development Tribunal***⁷ where the Constitutional Court confirmed the fact that though both the national and provincial spheres of government have concurrent legislative authority on certain matters affecting local government, neither of these two spheres can by legislation accord to itself the power to exercise executive municipal powers or the right

⁵ In terms of section 151 of the Constitution of the Republic of South Africa, 1996

⁶ Sections 154(1), 155(6) and (7) of the Constitution

⁷ 2010 (6) SA 182 (CC)

to administer municipal affairs, except in exceptional circumstances and for a limited period and in full compliance with strict procedures.

- [37] The need for a province to monitor and support municipalities was recognized and elaborated upon in the matter of **Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and others**⁸ where the court stated the following:

“The Constitution establishes a relationship between the organs in these three spheres based on co-operation, aimed at the advancement of inter-governmental participation and support. Provincial governments are under a constitutional duty to support municipalities within their provinces and promote their developmental capacities. National and provincial governments must support and strengthen the capacity of municipalities to perform their functions and exercise their powers.....

Provinces may not, however, stand supinely by when there is performance by a municipality which is less than effective. The Constitution provides that provincial governments must not only support but also monitor municipalities and see to the effective performance of their functions. A provincial executive is fully entitled, if not obliged, to ensure that the Constitution and applicable legislation is adhered to by municipalities”.

- [38] Distilled to their purposive nature, these constitutional obligations are tools that are designed to ensure that the provincial government does not remain supine amidst deteriorating administrative functions at municipal level.
- [39] The provincial government, through the MEC, is thus entitled and indeed has a *prima facie* right, derived from these constitutional obligations, to see to it that the municipality is assisted in embarking on all available avenues

⁸ [2014] 4 All SA 67 (GP) at paras 28 - 30

provided by law to ensure the attainment of an amicable solution towards the liquidation of the debt owed to Eskom.

[40] The MEC's *prima facie* right is also informed by the obligations placed on the provincial government to ensure the delivery of basic services to communities through municipalities in a sustainable and most effective manner.

[41] It is equally trite that organised labour at any level of employment has an interest in the well-functioning and appropriately managed labour place. Employees of the municipality, represented by SAMWU in this application, have an interest *qua* employees.

[42] SAMWU has a responsibility to ensure that its members' employer avails itself to all legally cognisable dispute resolution mechanisms that would cushion against a municipality being rendered unable to have the financial means to perform basic municipal services as a result of its banking account being subjected to an attachment that is not subjected to a process of engagement between the municipality as judgment debtor and Eskom as judgment creditor.

[43] In my view, the debate as to whether there is a basis upon which the execution of a judgment can be subjected to the processes envisaged in IGRFA is not to be determined by this Court at this stage. The only consideration is whether the *prima facie* right of the MEC and SAMWU, are established and if so, whether they are worthy of protection pending the finalisation of the main application.

[44] As indicated *supra*, it is my considered view that the constitutional obligations placed on the provincial government, and executed through the MEC, as well as the direct interest that organised labour have in the affairs of the municipality as an employer, constitute sufficient *prima facie* right which must be protected through the granting of an interim order pending the finalisation of the main application.

- [45] Given the *prima facie* rights of the applicants as alluded to above, it follows that the reasonable apprehension of harm and balance of convenience considerations must also be decided in their favour.
- [46] The MEC contends that Eskom has failed to heed a call to desist from re-issuing a writ of execution after the initial one lapsed. The experiences of how the initial writ of execution was implemented, especially in relation to the attachment of the banking account of the municipality, is evidence enough entitling the MEC to have a reasonable apprehension that similar conduct would occur, where Eskom will attach and take monies , other than the municipality's own revenue, that are earmarked for other infrastructural projects.
- [47] This experience, in the MEC and SAMWU's view, might also include the attachment and removal of money earmarked for payment of salaries and related service delivery initiatives in future.
- [48] Though Eskom has demonstrated that it made attempts at engaging the municipality and various stakeholders, including the MEC, in discussions to find a solution on the payment of the judgment debt some period after the judgment was granted, it insists that as a judgment creditor, sans any lawful impediment to its right, it has every right to employ execution methods, including attachment of a bank account, to satisfy the judgment debt.
- [49] The contention by Eskom is not without merit. However, seen against the overwhelming public interests brought about by the nature of the services rendered by the municipality, the balance of convenience should tilt in the MEC's favour.
- [50] This is buttressed by the fact that Eskom has an order which none of the applicants seek to assail, and regardless of the outcome of the main application, the municipality will still be obliged to pay the debt as reflected in the court order of June 2021.

- [51] An alternative remedy available to the MEC and SAMWU would have been an application to rescind or vary the court order granted against the municipality.
- [52] However, these parties are of the view that they do not, for any moment, deny or contest the liability of the municipality towards Eskom. They only seek an alternative method , through IGRFA, which may be agreed upon to deal with the modalities of ensuring that the municipality pays its debt towards Eskom.
- [53] On the conspectus of the submissions made on behalf of the applicants, seen against those made on behalf of Eskom, it is my considered view that a case has been made out to stay the execution of the judgment debt, only limited to the attachment of the municipality's banking account, so as to minimise the extent of a temporary encroachment into the right of Eskom , as a judgment creditor, to employ all lawful means of execution.
- [54] It is settled law that execution is part of the Court process and as such, the Court has inherent powers to control its process, including suspending such execution under certain circumstances, mainly where there is real and substantive justice that will be served by such suspension.⁹
- [55] *Mr Du Preez*, for SAMWU, submitted that on the authority of ***Gois t/a Shakespeare's Pub v Van Zyl***¹⁰ this Court should be inclined to grant an order suspending the execution of the writ , relating to the attachment of the bank account, in that a court the requirements for the granting of an interim interdict apply with the same force and effect in determining this aspect.
- [56] On the basis of my findings and conclusions hereinabove, I am inclined to agree with the submission made on behalf of SAMWU on the suspension of the writ of execution. The first applicant has satisfied the requirements of an interim interdict and it follows that there is a proper case following therefrom, for the suspension of the writ of execution, on the limited grounds as more fully appears below.

⁹ *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T) at 260A-I

¹⁰ 2011 (1) SA 148 (LC)

Costs

- [57] It is trite that the determination of costs is a discretionary matter based on the facts of each case. The MEC and SAMWU have succeeded in securing an interim order to the extent detailed below, however, theirs is not an outright victory.
- [58] Eskom's right to execute as a judgment creditor has been limited to a certain extent and for a temporary period pending the finalisation of the main application. This does not in any way dilute the essence of the existing judgment in Eskom's favour.
- [59] In my view, the opposition mounted by Eskom in this application was not malicious or in bad faith. Eskom was entitled to protect its right as a judgment creditor to enable it to render its service to the public.
- [60] Eskom, acting in full appreciation of its role in society and as a partner with relevant stakeholders, made several attempts at reaching out the municipality and the MEC with a view to resolve the dispute relating to how best its judgment was to be implemented. These attempts were shunned at by the municipality and the MEC.
- [61] Similarly, the MEC acts in the public interests and in upholding his/her constitutional obligations towards the municipality and the community it serves. I am inclined to adopt a more benevolent approach to the determination of costs given that the temporary interdict , relating to a limited stay of execution, is a reprieve done in the interests of justice and in the interests of the community served by the municipality.
- [62] On consideration of the above facts, justice will be served by an order directing that each of the parties in this application should bear its own costs, including costs occasioned by the previous postponements of the matter, in

the event that there was no appropriate order relating to costs in those instances.

Order

[63] The following order is made:

1. This application is heard as an urgent application in accordance with Rule 6(12) of the Uniform Rules of Court and the first applicant's non-adherence to the forms and services provided for in the Rules is condoned.
2. Pending the finalisation of the application issued in this Division of the High Court under Case Number 603/2022, Eskom Holdings SOC Limited , the second respondent, is interdicted and restrained from in any way attaching and securing for itself any funds from the bank account of the Renosterberg Local Municipality, the first respondent, held at Standardbank, account number [....].
3. Each party is ordered to bear its own costs, inclusive of costs occasioned by postponement/s of this application in previous occasions, except where an appropriate costs order was then made.

O.K.CHWARO

ACTING JUDGE OF THE HIGH COURT

DATE OF HEARING: 27 May 2022

DATE OF JUDGMENT: 31 May 2022

REPRESENTATIONS:

Counsel for the first applicant: **Adv S Grobler SC**
Instructed by:
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