IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case number: 2719/2020

In the matter between:

MALUTI-A-PHOFUNG MUNICIPALITY Applicant

and

ESKOM HOLDINGS SOC LIMITED 1st Respondent

THE SHERIFF, BLOEMFONTEIN-WEST 2nd Respondent

FIRST NATIONAL BANK 3rd Respondent

JUDGMENT BY: MHLAMBI J,

HEARD ON: Matter disposed of without oral hearing in terms of section

19(a) of the Superior Courts Act 10 of 2013.

<u>DELIEVERED ON:</u> This judgment was handed down electronically by circulation to the parties' legal representatives by email and release to SAFLI. The date and time for hand-down is deemed to have been 10h00 on 15 January 2021.

APPLICATION FOR LEAVE TO APPEAL

MHLAMBI, J

[1] The applicant applies for leave to appeal to the Supreme Court of Appeal in terms of Rule 49 (1) of the Uniform Rules of Court against my judgment delivered on 09 October 2020 in which I ordered that:

> *"1. That the attachment in execution by the first respondent of the applicant's funds in its current bank account with the third respondent, account number: 620 2615 3221, be immediately uplifted;*

2. The third respondent be authorised to release the funds of the applicant held by it on account number 62026153221;

3. First respondent be prohibited, pending the outcome of the intergovernmental relations framework dispute resolution, already in process as per the court order of 22 October 2018, from executing the judgments against the applicant under case numbers 4723/2014 and 5523/2018;

4. No order as to costs."

[2] The grounds for leave to appeal are briefly set out as follows in the notice of application for leave to appeal:

1. The learned judge erred when he found in paragraphs 24; 25 and 27 of the judgment that Eskom's steps in execution of its judgments pending the completion of the work of the Intergovernmental Consultative Committee (hereinafter referred to as ("the ICC"), were premature and that Eskom acted in bad faith and failed in relation to the court order of 22 October 2018;

1.1 to comply with its direction that it should, together with other state organs, resolve the matter relating to the dispute with MAP and make every reasonable effort to settle the dispute as suggested in the court order;

and

1.2 to substantiate why it contended that the work of the intergovernmental consultative committee set up by that order was a total failure.

2. Having found in paragraph 15 that the R1 billion order was not the subject matter of the discussion that led to or was included in the agreement of 30 April 2019, nor part of MAP's claim, the learned judge erred in finding, at paragraph 27, that the R1 billion claim, of which default judgment was obtained on 31 January 2019, formed part of what was envisaged in the October 2018 order.

3. The learned judge erred in refusing Eskom's counter claim and ought to have found that MAP was not entitled to enforce the settlement agreement in the light of its breach of contract in failing to provide letters of support from COGTA and the National Treasury by no later than 30 May 2019.

[3] The application is opposed by both the first respondent and an intervening applicant, SAMWU. The first respondent contended that the appeal should fail on the basis that the order was not appealable[1]as it was an interlocutory order not having the effect of a final judgment[2]. Even if the order were final in nature, it would not be in the interests of justice for the interlocutory relief to be subject to appeal as this would defeat the very purpose of that relief. The intervening applicant contended that as per the order of Van Zyl, J,[3]the order was interim in effect and to show prospects of success, the applicant had to show that exceptional circumstances existed that will obligate the court of appeal to interfere.

[4] In its heads of argument, the applicant sought to show that the judgment appealed against was susceptible to appeal as it was final in effect and met the threshold of the test for leave to

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[1] Zweni v Minister of Law and Order 1993 (1) SA 523 (A); Economic Freedom Fighters v Gordan and Others 2020 (8) BCLR 916 (CC);Mathale v Linda and Others 2016 (2) SA 461 (CC).

[2] Old Mutual Ltd and Others v Moyo and Another (2019/22791) [2020] ZAGPJHC 315 (6 September 2020); Cronshaw and another v Coin Security Group(Pty)Ltd [1996] 2 All SA 435 (A).

[3] Granted on 9 November 2020 declaring "that the totality of the order issued on 9 October 2020 under case number 2719/2020 by Mhlambi,J is an order as contemplated by the provisions of section 18(2) of the Superior Courts Act, 10 of 2013, and that the filing of an application for leave to appeal does not suspend the operation of the said order.

appeal.[4] The pillars upon which the appeal is based are: i) the efficacy of the 22 October 2018 order; ii) improper enforcement of the 30 April 2019 settlement agreement and iii) the compliance with section 41 of the constitution.

Efficacy of the 22 October 2018 order

[5] The applicant contended that the finding in paragraph 25 of the judgment,[5] failed to address that the regime created by the order of 22 October 2018 stipulated a 60-day period from 22 October, within which a recovery plan was to be presented and another 15

[4] Applicant's heads of argument: para 13.

[5] Which reads as follows:

"Eskom, by failing to hold back the writ of execution issued on 2 October 2018 despite the court order of 22 October 2018, was not bona fide. The Intergovernmental Consultative Committee commenced with its duties during November 2018. The judicial attachment took place during March 2019 and the settlement agreement was concluded and signed on 30 April 2019[5]. The aim of the agreement was to ensure that the movable assets were returned to the Municipality. It is obvious therefore, that the agreement came about to address an ad hoc situation which was brought about by Eskom when it executed against the movable property in respect of the R 2.4 billion claim, soon after the court order of 22 October 2018. Eskom failed to appreciate or refused to accept that it was directed, as per that court, together with the other respondents, to resolve the matter relating to the dispute with MAP and make every reasonable effort to settle the dispute as suggested in that court order[5].

Section 41 of the Constitution reads as follows…."'

days from the expiry of that period for the consideration and approval of the recovery plan by the other stake holders, none of which happened some two years after the order was granted.[6]It was therefore, not contemplated that the timeframe should endure beyond 8 February 2019 and that during July 2019[7], when the attachment in execution was given effect to, the efficacy of the regime of the 22 October 2018 order had accordingly run its full course.[8]There was no basis for the finding that the applicant failed to comply with its cooperative governance obligations or attachment steps in execution beyond 8 February 2019.[9]

[6] It was contended furthermore, that the rationale for a financial recovery plan contemplated by the 2018 court order, was to enable the first respondent to meet its financial obligations. That order restricted the applicant only from implementing interruptions of electricity supply but did not and was incapable of a construction precluding the applicant from recovering debt due

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[6] Applicant's heads, para 33.
[7] Should be July 2020-see para 11 of the judgment.
[8] Para 35: Applicant's heads of argument.
[9] Ibid 36.

to it.[10] It was therefore unnecessary to substantiate why the ICC[11] was a total failure as the facts spoke for themselves. It was common cause between the applicant and the first respondent that neither a repayment nor a recovery plan resulted from the work of the ICC within the time frames mandated by the 22 October 2018 order.[12]

[7] In paragraphs 24 and 25 of the judgment, it is stated that it was common cause between the applicant and the first respondent that as at 21 May 2019, the ICC was still busy with its work and the applicant had raised no complaint or dissatisfaction with its work. All court orders obtained against the first respondent were by *consensus* either in an endeavour to assist the first respondent with the resolution of its financial woes or to comply with the provisions of section 41 of the Constitution. The applicant was fully aware that the applicant was *"insolvent, mismanaged and no steps taken by both the Provincial Government and the first respondent itself to implement the mandatory intervention by either the provincial or national government."*[13] The applicant was, as at the time of the filing of the

[10] Ibid 37.1.
[11] Intergovernmental Consultative Committee
[12] Ibid 39.
[13] Para 18 of the judgment and para 5 of the answering affidavit.

answering affidavit,[14] fully aware that the mandatory intervention in terms of section 139(5) of the Constitution and 139(1) of the MFMA was suspended subject to the establishment of the ICC.[15]The applicant realised that the parlous state in which the first respondent was, warranted the intervention by either the provincial government or the national government.

[8] The applicant was not prepared to wait for the process to unfold as it issued writs of execution in rapid succession for the recovery of the outstanding debts. As stated in the judgment :

"The fact that Eskom participated in the agreement of 30 April 2019 with such principals confirms its acceptance of MAP's incapacity to meet its obligations and that MAP's problems could only be addressed through its principals. It was incumbent on Eskom to return to MAP's principals in the event of the latter's default of payment or in the event of its dissatisfaction with the progress made by the intergovernmental consultative committee."[16]

The question that arises is whether section 41 of the Constitution is applicable in these circumstances, especially when viewed in the light of the applicant's contentions and the over-arching question raised in its heads of argument, namely, whether the discharge of cooperative governance obligations is, or should

[14] See ft note 12 above.
[15] Para 20 of the judgment.
[16] Para 31.

be, a prerequisite to the execution of extant court orders.[17] In fact, the applicant contended that another court would not support the judgment of this court in that it impelled the applicability of the provisions of section 41 of the constitution, which, read together with the provisions of IRFA,[18] are intended to apply prior to the institution of judicial proceedings.[19]

[9] In *Eskom Holdings SOC v Resilient Properties (Pty) Ltd* and Others,[20] one of the principal issues for adjudication was whether the contractual and constitutional disputes relating to the moneys owed to Eskom and, in particular, the manner in which Eskom sought to recover them constituted intergovernmental disputes as contemplated in section 41 of the Constitution and section 40 of the IRFA. The subsidiary issue was whether, if section 41 of the Constitution and section 40 of the IRFA are found to apply, whether Eskom failed first to exhaust the alternative avenues contemplated in sections 41 and 40, respectively. The court

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[17] Para 27.

[18] Intergovernmental Relations Framework Act 13 of 2005.

[19] Para 53: applicant's heads of argument.

[20] Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others (663/2019; 664/2019; 583/2019) [2020] ZASCA 185 (29 December 2020) para 38(a).

stated that IRFA is the legislative measure contemplated in section 41(2) of the Constitution.[21]

[10] In paragraph 67 of the judgment, the court expressed itself as follows in respect of IRFA: *" Both s 40 and s 41 make plain that an organ of state, as Eskom is, has a constitutional and statutory duty to avoid judicial proceedings before a genuine attempt has been made to settle the dispute. To that end, state organs must make every reasonable effort, in good faith, to settle the dispute without recourse to litigation. Moreover, where a dispute is of a financial nature, as in these proceedings, Eskom, and the ELM and the TCLM were required to promptly take all reasonable steps necessary to resolve the dispute. To this end, organs of state have a statutory duty to report the matter to the National Treasury for the latter to mediate the dispute."* The court went on to state that *" The real disputes concerned the manner in which these two municipalities could be enabled or empowered to pay their debts to Eskom and thus whether it was appropriate in the circumstances to interrupt the supply of electricity to exact payment from them. It was in relation to these disputes that Eskom and the affected municipalities, in collaboration with the other state role players, were constitutionally obliged to make 'every reasonable effort' to avoid or settle, but failed to do so."*

[21] Para 63.

[11] It was therefore not enough for the applicant to say that its compliance with the provisions of section 41 of the Constitution, as mandated by the 22 October 2018 court order, ceased with the end of the efficacy of that court order and that no case was made out that the applicant did not comply with its obligations up to and including 8 February 2029. The applicant wanted to force the first respondent to pay the arrear debt when it knew that this purpose could not be achieved. The applicant knew prior to 2018 that the first respondent was unable to pay its debts but failed to suspend the writ issued in October 2018 [22]and proceeded in January 2019 to take default judgment[23] against the first respondent unbeknown to it. These actions failed to address the underlying reasons for the inability to pay both the arrear and current debt. The decisions taken by the applicant failed to take into account relevant considerations that should have informed those decisions.[24]The applicant should have complied with section 41(3) of the Constitution and made every reasonable effort to settle the dispute.

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[22] Case number 4723/2014.
[23] Case number 5523/18.
[24] Eskom, supra, para 91.

Improper enforcement of 30 April 2019 Settlement Agreement

[12] The applicant contended that as it was expressly found that the first respondent's claim was predicated only on the R2.4 billion under case number 4723/2014 and the settlement agreement of 30 May 2019 and that this claim was unrelated to the R1 billion order or judgment under case number 5523/2018, another court would find that the latter order or judgment was singularly perfectly capable of sustaining the attachment.[25]To hold that the judgment under case number 5523/2018 was subsumed by the regime created by the October 2018 court order was an error as that order did not supersede the efficacy of the R2.4 billion order and did not preclude the applicant from recovering debt due to it.[26]

[13] The writs of execution under case numbers 4723/2014 and 5523/2018 were re-issued during July 2020 leading to the attachment of the funds in the first respondent's bank account on 22 July 2020, which gave rise to the urgent application of 24 July 2020. Undertakings to settle the applicant's debt in monthly

[25] Para 44: Applicant's heads of argument.
[26] Ibid 42.

instalments and meetings to find a lasting solution to the financial crisis came to naught and were insufficient for compliance with the precepts of section 41 of the Constitution and sections 40 and 41 of the IRFA.[27]

Compliance with section 41 of the Constitution

[14] The applicant conceded that the compliance with the provisions of section 41 of the Constitution was mandated by the 22 October 2018 court order.[28]It contended that the writs of execution were issued after the work of the ICC was overdue and that the settlement agreement of 30 April 2019 was concluded without prejudice to its rights to execute further. This argument has already been properly dealt with above. In *Eskom v Resilient* the following passage is appropriate in this regard: *" A situation where Eskom, as an organ of state, is driven to resorting to all manner of ways to coerce municipalities which are a critical sphere of government in the constitutional scheme, to pay when they are unable to do so is plainly undesirable. This dire situation obliges the national and provincial*

[2727] Eskom, supra, para 82.

[28] Para 49 of its heads of argument.

governments to intervene, consonant with the letter and spirit of the constitutional[59] and statutory prescripts to which reference has been made in this judgment."[29]

[15] I agree with the submissions of the first respondent's counsel that although the applicant sought an order declaring that the agreement had lapsed because of non-compliance with what it contended was a condition precedent, it did not make out a case as contended for.[30]The applicant sought to have the agreement declared invalid and of no force and effect when it failed to take the necessary steps to cancel the agreement for the alleged breach. There was therefore no cause of action to found the counterclaim.

[16] Section 17(1)(a) of the Superior Courts Act, 10 of 2013 provides that leave to appeal may only be given where the judge or judges concerned are of the opinion that the appeal would have a reasonable prospect of success or there is some other compelling reason why the appeal should be heard, including conflicting

[29] Supra, para 97.
[30] Para 38.3: heads of argument.

judgments on the matter under consideration. This application is predicated on both sections 17(1)(a)(i) and (ii). In *The Mont Chevaux Trust v Tina Goosen and 18 Others*[31] it was stated that the use of the word "would" in the statute indicated a measure of certainty that another court would differ from the court which judgment is sought to be appealed against. The court, on deciding whether there is a compelling reason why the appeal should be heard, should give careful and proper consideration to the reason advanced before categorising it as compelling. Section 17(1)(a)(ii) should not be invoked for flimsy reasons.[32] I am therefore not persuaded that in the circumstances a rational basis exists for the conclusion that the appellant has prospects of success on appeal and that there is a compelling reason that the appeal should be heard. The appeal falls to be dismissed.

[17] It is trite that the successful party is entitled to a costs order. The dismissal of the applicant's appeal must carry with it a costs order against the applicant.

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[31] Land Claims Court of South Africa Case number LCC 14R/2014 (unreported); Acting National Director of Public Prosecutions and Others v Democratic Alliance, in re: Democratic Alliance v Acting National Director of Public Prosecutions and Others (19577/09) [2016] ZAGPPHC 489 (24 June 2016)

[32] School Governing Body Grey College, Bloemfontein v Scheepers and Others (South African Teachers Union Intervening) (2612/2018)[2019] ZAFSHC 25 (17 January 2019)

[18] In the result, I make the following order:

The application for leave to appeal is dismissed with costs.

JJ MHLAMBI, J

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