

**In the High Court of South Africa
KwaZulu-Natal Division, Pietermaritzburg**

Case No. 7349/19P

In the matter between:

NEWCASTLE MUNICIPALITY

First Applicant

**MEC, KZN, FOR THE DEPARTMENT
OF CO-OPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS (COGTA)**

Second Applicant

and

ESKOM SOC LTD

Respondent

JUDGMENT

Delivered on: 8 October 2019

BEZUIDENHOUT J

1] Applicants brought an urgent application on 29 September 2019 to interdict respondent from disconnecting the electricity supply to first applicant pending finalisation of an application for the review of respondent's decision to disconnect the electricity supply. The matter was then adjourned to 03 October 2019 for respondent to file an answering affidavit and also the filing of a replying affidavit.

2] On 03 October 2019 I was informed that a date had been obtained on the opposed roll on 06 December 2019 for the hearing of the said application. The only issue at this stage is whether interim relief should be granted preventing the disconnection of the electricity supply. Mr Shangisa, on behalf of respondent,

opposed the granting of such relief. Mr Pretorius appeared on behalf of a company Lanxeso Cisa (Pty) Ltd, a chrome plant in Newcastle, KwaZulu-Natal, requesting leave to intervene. First and second applicant did not oppose such application and respondent indicated that it would abide the decision of the court.

3] Lanxeso Cisa (Pty) Ltd does have an interest in this matter as the disconnection of the electricity supply and even the interruption thereof will severely affect its operation. Accordingly, it is just and equitable that Lanxeso Cisa (Pty) Ltd be granted leave to intervene. In the circumstances it may be prudent to allow them to be joined as second respondent. The issue to be decided is whether a disconnection or even an interruption of the electricity supply to first applicant should be interdicted pending the finalization of the application.

4] It was submitted on behalf of respondent that first applicant generates a profit of approximately R200million a year from the sale of electricity to consumers and therefore must have sufficient funds to pay respondent. It is common cause that a substantial amount is owing to respondent by first applicant for electricity. First applicant is not unique as it appears to be a position facing many municipalities within the country. It is however incorrect that R200million profit is generated. This fails to take into account the operating expenses of maintaining the electrical supply network, the upkeep thereof and

breakages that may occur as well as the salaries etc with regard thereto. It was submitted on behalf of respondent that in terms of section 27(i) of the Electricity Regulations Act 2006 (“ERA”) that first applicant must “*ring fence*” the electricity money that it collects from rate payers to pay respondent. A reading of section 27(i) of ERA does not support this submission. Section 27 deals with the duties of Municipalities and does not require that such money must be kept for the payment of respondent. Section 27(i) requires the keeping of separate financial statements including a balance sheet of the reticulation business. This in no way refers to the payments which are to be made to respondent.

5] In the founding papers, first applicant indicated that a payment of R20million per month would be made to respondent and during argument it was submitted that this amount can be increased to R30million per month. Respondent however rejected this payment as insufficient. There has been various demands from respondent to first applicant to pay the arrear amounts. Agreement was also reached as to amounts which would be paid by first applicant on a monthly basis. First applicant failed to comply therewith. Second applicant intervened and meetings between the parties were held and a further meeting was to be held on 30 September 2019. However, before this respondent indicated that it would either disconnect the electricity supply or interrupt the electricity supply to various areas of the Municipality at specific times, times

when the usage of electricity would have been required both by households as well the large industrial area of Newcastle.

6] It has been held in *Resilient Properties (Pty) Ltd v Eskom Holdings (SOC) Ltd and Others* 2019 (2) SA 577 (GJ) and *Cape Gate (Pty) Ltd and others v Eskom Holdings (SOC) Ltd and others* 2019 (4) SA 14 (GJ) that the decision by respondent to disconnect electricity was indeed an administrative action and reviewable in terms of PAJA. In the present case it is in dispute if notice thereof was given. First applicant's municipal manager contends he only saw such a notice in a newspaper. Accordingly, there are grounds for review of the decision of respondent to either disconnect or interrupt the electricity supply. This is not an issue to be decided at this stage. That would be in issue at the hearing of this application on 06 December 2019. The only issue now is whether interim relief should be granted preventing the electricity supply being disconnected or interrupted.

7] It was submitted on behalf of first applicant that during August 2019 it had paid approximately R50million to respondent. First applicant submitted that its municipal manager had only on Sunday 29 September 2019 noticed in a newspaper that respondent was to interrupt or disconnect the electricity supply to first applicant. It was submitted on behalf of second applicant that no formal notice was given that the electricity supply was to be interrupted or disconnected.

There was no time to bring the application earlier because it was only once such a decision had been made that it became reviewable. It was submitted that if the electricity was disconnected or interrupted the effect thereof would be catastrophic and that it would severely affect the residents and businesses of Newcastle.

8] It is not disputed that respondent is entitled to payment for the electricity supplied to first applicant and that first applicant must make such payments. It is also not disputed that if there is non-payment respondent is legally entitled to disrupt the electricity supply. However, the situation is not that simple. Respondent is the only electricity supplier to municipalities in the country. It is also not the non-payment for electricity of a specific entity but of a municipality. It must be considered what the effect would be to the residents and businesses if the electricity supply is interrupted at the crucial hours which respondent contemplates or disconnected. There are industrial areas in Newcastle depended on the electricity supply as well as various businesses, households and government departments etc. If the electricity supply is disconnected or disrupted at crucial hours it would have a catastrophic effect not only on all the residents and business but on the whole economy of the town. This will also not assist respondent in recovering money owing as it would result in the failure of businesses and large factories in the area causing great job losses in a country

where it is common knowledge that the economy is struggling and high rates of unemployment is found in various areas of the country.

9] I have already alluded to the injury which would be caused to the community and industry of Newcastle in the event of the electricity supply being disconnected or interrupted. The prejudice to respondent is indeed less than that which it would be to first applicant and the community of Newcastle if the supply is disconnected. If the electricity supply is to continue pending the finalization of this application, respondent can still continue operating and will also receive some income from first applicant. However, there would be irreparable harm to first applicant and the inhabitants of Newcastle if the interim relief is not granted. It would result in the total collapse of the economy of Newcastle and would severely affect the citizens of the town who pay for their electricity, require electricity for various reasons and who in certain circumstances would be unable to survive without it.

10] The balance of convenience accordingly favours the granting of the interim relief. I am also satisfied that first applicant has no other remedy than the present to ensure there is electricity supply pending finalisation of this matter. Conditions can be imposed in the granting of interim relief and first applicant has indicated that an amount of R30million per month would be paid to respondent by the 15th of each month. In deciding whether to grant interim relief the court can

also take into account the prejudice to third parties and the general public. Applicants had established urgency a prima facie case and the balance of convenience favours the granting of the interim relief.

The following order is made:

1. A rule nisi is granted in terms of paragraphs 1, 1.1, 1.2 and 3 of the notice of motion. The date in paragraph 1 to be 6 December 2019;
2. The matter is to be set down on the opposed roll on 6 December 2019;
3. Lanxeso Cisa (Pty) Ltd is granted leave to intervene and is joined as second respondent in these proceedings;
4. Second respondent is to file its answering affidavit by 18 October 2019;
5. All parties are granted leave to file supplementary papers by 29 October 2019;
6. Pending finalisation of this application first applicant is to make a minimum monthly payment to respondent (Eskom) in the sum of R30million (thirty million rand) per month by no later than the 15th of each month commencing on 15 October 2019.
7. Cost are reserved.

DATE OF HEARING : 3 October 2019

DATE OF JUDGMENT : 8 October 2019

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