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IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

CASE NO: 99984/2015

DATE: 2017-01-05

(1) REPORTABLE: ~~YES~~ NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ NO
(3) REVISED.

22/2/17
DATE

SIGNATURE

In the matter between

AFRIFORUM NPC + 3 — Applicants

and

ESKOM HOLDINGS PLUS OTHERS — Respondents

J U D G M E N T

FABRICIUS J: The Applicants in this urgent application, seek the joinder of the 14th to the 27th Respondents in the main application, which will be heard by this Court on 22 and 23 March of this year, and obviously, they seek a joinder in the present application as well. These Respondents are all municipalities and their manager in the Free State. Applicants seek an order that the First Respondent be interdicted and restrained from terminating the electricity supply to these Respondents, pending the finalisation of the main application which could, of course, also involve appeals in that application.

The Third- and Fourth Applicants play no role in the present proceedings before me. In essence, the Applicant's case is that Eskom's intended termination of services on 5 January of this year will cause innocent consumers of electricity irreparable harm inasmuch as they have a constitutional right to electricity, and that Eskom's intended termination of electricity to the relevant municipalities is unlawful.

Eskom disputes that this application is urgent. It denies that the Applicants have *locus standi* in these proceedings and furthermore state that it is acting lawfully in terms of the Electricity Regulations Act 4 of 2006, and also in terms of various written agreements for the supply of electricity entered into with a number of the Respondents, or intended Respondents.

Furthermore, it states that it has given sufficient notice of its intention and has also, although it is not obliged to do so, followed the least intrusive route vis-á-vis the public in that it has structured the interruption of electricity from 06h00 in the mornings to 08h00 and 17h00 in the afternoon to 19:30 during the week, and during weekends from 08h30 until 11h00 and 15h00 to 17h30. No review of this decision has been launched. It is also common cause that no provisions of the Bill of Rights have been raised in these proceedings. The relief sought in the main application is of importance. As I have said, this would be heard in March and it is the following:

1. "Prayer 1. It is declared that the First Respondent is not entitled as a debt collection and credit control measure, to interrupt

electricity supply to any local authority, resulting in the interruption of electricity supply to the towns and/or points of electricity supply between the jurisdiction areas of the local authority. I may just add at this stage that I am quoting from the Notice of Motion.

2. Prayer 2. That it is declared that the First Respondent is obliged to submit its disputes regarding non-payment of bulk electricity supply of local authorities, to arbitration. Alternatively, mediation in front of the Eighth Respondent. I may just add, the Eighth Respondent is a National Energy Regulator.
3. Prayer 3. That the final interdict be granted in terms whereof the First Respondent be interdicted and restrained for interrupting the electricity supply to the Second Respondent (resulting in the interruption of electricity supply to the towns and/or points of electricity supply within the jurisdiction area of the Second Respondent) as a debt collecting and credit controller.
4. Prayer 4. That the final interdict be granted in terms whereof the First Respondent be interdicted and restrained from interrupting the electricity supply to any local authority (apart from the Second Respondent), resulting in the interruption of electricity supply to the towns and/or points of electricity supply within the jurisdiction area of any local authority (apart from the Second Respondent), as a debt collection and credit control measure."

It is clear that, in the main application, this Court will have to decide whether or not the Applicants have the necessary *locus standi* to act on behalf of the affected consumers, and whether First Respondent was acting lawfully in terminating services of a municipality or limiting such. It is undesirable that I make any findings in this regard at this stage. It is, however, common cause that no consumer has any contract with Eskom, but would have a contractual relationship with a municipality. Eskom, in turn, has written agreements in place with the municipalities which entitle it to terminate the supply of electricity, upon non-payment of charges. It does not supply electricity to any individual member of the public, referred to in these proceedings.

As in all other proceedings, it is necessary to keep the proper and accurate context in mind. Eskom, in his Answering Affidavit, sets out the objective facts relating to the issuing of the main application on 15 December 2015 and the subsequent urgent application of 29 January 2016 which coincidentally, also served before me.

I will read from paragraph 26 to 33, and 36 of the Answering Affidavit.

26.1 "The Applicants' case is predicated on the pending hearing of the application (declarator application) they launched on 15 December 2015 under case 99924/15. This was against the background that almost 90% of the municipalities were in arrears with the electricity bill to Eskom.

27. In that application, they sought, *inter alia*, a declarator as at Eskom;

27.1 Who was not entitled as a debt collection and credit control measure, to interrupt the electricity supply to any local authority and;

27.2 Was obliged to submit, as this is, regarding non-payment of electricity supply by local authorities, to arbitration, or alternatively, mediation to the National Energy Regulator.

28. Whilst this matter was pending and before the filing of papers was completed on 29 January 2016, the Applicants launched an urgent application to interdict Eskom from interrupting power supply to Kamiesberg in Thembalethu Local Municipalities, pending the hearing of the urgent application.

29. The order that the Court granted then was that Eskom was to file its Answering Affidavit to the urgent application, by 14h00 on 2 February 2016. The Applicants then to file a reply by 14h00, 3 February 2016. The Court went further to note that Eskom had undertaken not to disconnect the aforesaid municipalities between 29 January 2016 and the date of filing its Answering Affidavit to the urgent application. That application was postponed *sine die*. It is clear from the actual Court Order that was made on 29 January 2016 that the undertaking that was given in respect of the particular Respondents, was only of effect between now – that was that particular date – and the filing of the

Answering Affidavit. There was obviously no undertaking in respect of any of the Respondents that electricity would not be connected at any stage, or for any reason.

30. The urgent application was not proceeded with.

31. Instead, Eskom filed its Answering Affidavit to the declarator application on 17 February 2016. The Applicants filed their Replying Affidavit to the declarator application and the joinder application of further Applicants and Respondents on 15 March 2016. I may just add at this stage – as I pointed out during argument – that I am now faced, on an urgent basis, with another application for joinder.

32. The Applicants' Heads of Argument were only concluded on 5 August 2016 and received sometime between on or about 8 August 2016, close to five months after the filing of the Applicants' Replying Affidavit.

33. Eskom's Heads of Argument were filed during the week ending 9 September 2016, four weeks after receipt of the Applicants' Heads of Argument. The facts contained in these paragraphs, are not disputed and they do point one in the direction of the question whether or not these proceedings are urgent.

I will leave that there for a moment and continue to read paragraph 36 of the Answering Affidavit.

36. This eventually resulted in the fixing of the current hearing dates of 22 to 23 March 2017."

Eskom's case is also referred to in some detail in the Answering Affidavit and it is convenient to me for present purposes, to read from these paragraphs and I read from paragraph 38:

38.1 Eskom's case. Eskom is authorised by the Electricity Regulation Act 4 of 2006 to reduce and/or terminate the supply of electricity to a customer like a municipality, if that customer contravenes its payment conditions to Eskom.

38.2 The payment conditions which echo the provisions of Section 21(5) of the Act and the terms relating to them, are contained in various written agreements for their supply of electricity entered into by Eskom, with each of the 14th, 16th, 18th, 20th, 22nd, 24th and 26th Respondents, all duly represented. It is a material term in each of these contracts that, in the event of non-payment of electricity charges, by any municipality, after the expiry of a period of 14 days from receipt of a written notice of demand, Eskom would require the right to terminate the supply, of electricity.

38.3 It is Eskom's intention initially to implement what the term 'scheduled interruption of electricity supply to the affected municipalities between the hours that I have already mentioned.

38.4 The proposed planned interruption of electricity, despite Eskom's rights to completely terminate the supply is, in my view -

and that, of course, the author of the Answering Affidavit -

38.4 less burdensome to the communities of the municipality and other affected municipalities. It was further planned in such a way that people affected will schedule their lives, taking into account the five hours out of 24 when there would be no electricity while minimising the rate at which the debt of the municipality escalates, without making it impossible for the municipalities to meet their obligations in the future. In so saying, Eskom has not abandoned its rights in terminating the supply of electricity supplied totally, where circumstances so require.

38.5 The Applicants' constitutional rights to access to electricity, which are only enforceable against the municipality, are to the extent that Eskom is involved in the supply of electricity to the municipality, limited by the contract the municipality entered into with Eskom and also via Section 21(5) of the act above-mentioned.

38.6 It appears from paragraphs 26 to 34 of the Founding Affidavit to the declarator application, that applicants knew of the failure by various municipalities to pay their Eskom account and/or Eskom's intent to terminate the supply of electricity for non-payment, at least since April 2015, and yet they failed to take any actions to either review Eskom's proposed decision, or seek appropriate relief against the municipalities, in terms of the Act, or by them taking a mandamus that it complies with its obligations to pay to Eskom its electricity account."

That is the end of the reference to the Answering Affidavit. I continue with my judgment. Eskom also describes its role in the national economy in some detail and it is again necessary for a proper appreciation of my order in these proceedings and I am referring to paragraphs 48 to 55 and 57 to 61 of the Answering Affidavit. I proceed from paragraph 48.

48. " Eskom is a major public entity and an organ of state provided for in Schedule 2 of the Public Finance Management Act 1 of 1999. Its main source of business is the generation, transmission and distribution of electricity in bulk within the Republic of South Africa and neighbouring

countries. It conducts this business under authority of licences granted by the National Electricity Regulator of South Africa.

49. It needs mention that the licenced condition stipulate that Eskom shall only supply to the class of customers within a designated area and charge such customers and/or end users' tariffs and prices that are approved by the Regulator. In addition, the Regulator, in setting and/or approving the aforesaid prices, charges and tariffs, makes provisions that the licensee will operate on an efficient basis and be able to cover the full costs of its licenced activities within a reasonable margin, or return. Eskom thereafter concludes electricity supply agreements with its customers, whose form and content are required to have been preapproved by the regulator in terms of the Act.

50. Eskom is also legally bound by Sections 51(1)(b)(i) of the Public Finance Management Act, to take effective and appropriate steps to collect all revenue due to them. In the event of non-payment of the amounts of electricity supplied, Eskom has a residual right in terms of the agreements and Section 51(5) of the Act, to terminate the supply of electricity to a defaulting municipality, subject to

compliance with the procedural fairness."

Paragraphs 51 to 61 read as follows:

"The 14th, 16th, 18th, 20th, 22nd, 24th and 26th Respondents are local municipalities established in terms of Section 2 read with Section 3(d) of the Local Government Municipal Systems Act 32 of 2000. In terms of Section 152(1) of the Constitution, municipalities must ensure the provision of services to the communities within their areas of jurisdiction, in a sustainable manner. They must also strive within their financial administrative capacity, to achieve their objectives set out in Section 152(1) of the Constitution. This Section provides as follows:

The municipality, like the Respondents, must structure and manage its administration and budgeting and planning processes, to give priority to the basic needs of the community and to promote the social and economic development of the community and to participate in national and provincial development programs."

60. Section 4(2) of the Systems Act is registered with content to the various constitutional communities of the municipalities, by setting out the duties of municipal councils, which exercise the executive

and legislative authority and municipal burden. In particular, Section (4)(2)(f) provides as follows:

"The council of a municipality within the municipality's financial and administrative capacity and having a large and practical consideration, has the duty to give members of the local community equitable access to the municipal services to which they are entitled."

The further content to this general duty to provide municipal services is found in Section 73 of the Systems Act. It obliges the Respondent municipalities to give priority to the basic needs of the local community, promote its development and to ensure that all members of the local community have access to, at least, the minimal level of basic municipal services which include electricity."

The duties of the municipalities are important in the present context and I also refer to in some detail again the Answering Affidavit, and I have referred to the most important ones. It is also not an issue that Eskom has engaged with various municipalities and other stakeholders since 2011, in an attempt to recover what is due to it. During April to May 2015 and again in February 2016, various Respondents, or intended Respondents, signed acknowledgment of debts and agreed upon a repayment plan. It was also agreed that, in the event of a default, disconnection of the supply of electricity could result. Applicants were aware of the default, but took no action against any municipality.

On 31 October 2016, Eskom placed the municipalities on terms and also issued notices to the public on 14 November. It received representations and on 22 December 2016, published notices of its intention to interrupt the supply of electricity by way of a specified structure that I have already referred to. It states that its intention behind this load shedding was to conserve electricity. Absent a decision to complete the shutdown of electricity, the planned interruption is rational and the least invasive.

Applicant's Counsel, Mr A. Louw SC, nevertheless submitted that its decision remained irrational and and would serve no purpose. As I have said, there is no review of its decision based on irrationality. Mr. Louw added that, absent any solution, all that was left was 'inconvenience'. I agree that there will be inconvenience and Eskom admits this and in fact refers to this topic in its notices to the public.

I must weigh up this submitted inconvenience versus Eskom's statutory obligations and the national economic interest that I have referred to. Billions of rands are due to them. There are 10 municipalities which owe about R10 billion. The top 20 owe R7.4 billion. 74 of them are overdue by more than R10 million each and 99 are overdue by more than R500 000. In this context, Eskom puts its provision as follows, and it is again convenient to refer to the Answering Affidavit and the facts given therein and I proceed from paragraph 93 of the Answering Affidavit:

> "Eskom borrows money to fund capital projects necessary to ensure the realisation of the right to electricity at a huge cost. Were it unable to

continue to recover electricity charges, there will be an ongoing need to borrow additional money at an unaffordable cost, to fund operational costs. Operational costs should ideally be funded by revenue from electricity charges. Not RA's. RA money at no cost, to fund operation or requirements, would not be sustainable in the short-, medium-, and long term and could increase the cost of generating electricity exponentially to the detriment of the general populus."

I quote from paragraph 94.

"Eskom's inability to recover electricity charges would also mean that Eskom is faced with the risk of having to write off an additional R1.2 billion by the end of this financial year. This, coupled with the current low recovery rate, will have a negative impact on Eskom's financial performance. A good credit-standing is a prerequisite to accessing much sought after financial markets for funding, especially now that Eskom intends to go the nuclear route."

The requirements for an urgent interim interdict have been fully debated in Courts, over decades, and were again fully dealt with in another application involving the Applicants, and therefore I presume they would have knowledge of what was said there. I refer to Afri-Sake v City of Tshwane and others 74129/2013, delivered on 14 March 2014 and the case law referred to therein in some detail.

For present purposes I should again repeat that the Applicants must show the right to which, if not protected by an interdict, irreparable harm would ensue. None of the Applicants' own rights are affected. The rights of consumers, assuming that they exist vis-á-vis Eskom, cannot rise above those of the relevant national interest. Eskom has exercised its legislative rights and the question of whether this is lawful, will be decided by this court in March of this year. A strong case must be made out when an interdict is sought against the exercise, or statutory powers. This is not the case here. It is also not in issue that the Court has a discretion whether or not to grant the interdict when all the requirements are present. See the Afri-Sake *supra* paragraph 10.

On that basis also, in the light of the considerations that I have referred to in some detail, and especially the role of Eskom in the national economy, I exercise my discretion against the Applicants. The municipalities ought to be held accountable, in my opinion, but this Court will finally decide that issue in March of this year.

It is noted that, during the argument, Eskom undertook not to limit services as envisaged in these proceedings, until 9 January 2017.

The following is the result:

The application is dismissed with costs, including costs of two Counsel.

Thank you. Court adjourns.

COURT ADJOURNS [10:06]

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