

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case No: 4723/2014

In the matter between

ESKOM HOLDINGS SOC LIMITED

Applicant

and

MALUTI-A-PHOFUNG MUNICIPALITY

1st Respondent

**THE MEMBER OF THE EXECUTIVE COUNCIL
CO-OPERATIVE GOVERNANCE, TRADITIONAL
AFFAIRS AND HUMAN SETTLEMENTS
FREE STATE PROVINCE**

2nd Respondent

**MEMBER OF THE EXECUTIVE COUNCIL,
FINANCE FREE STATE PROVINCE**

3rd Respondent

MINISTER OF PUBLIC ENTERPRISES

4th Respondent

MINISTER OF ENERGY

5th Respondent

In re

MALUTI-A-PHOFUNG MUNICIPALITY

Applicant

And

ESKOM HOLDINGS SOC LIMITED

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CO-OPERATIVE GOVERNANCE, TRADITIONAL
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**MEMBER OF THE EXECUTIVE COUNCIL,
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4th Respondent

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5th Respondent

CORAM:

NAIDOO, J

JUDGMENT:

NAIDOO, J

HEARD ON: 4 JUNE 2015

DELIVERED ON: 10 SEPTEMBER 2015

- [1] This is an application for condonation of the first respondent's non-compliance with a court order dated 12 March 2015. Mr A Burger represented the first respondent (applicant in this matter - MAP) and Mr M Khoza, with Mr N Moloto, represented the applicant (first respondent in this matter – Eskom). From the outset, the other respondents have not appeared or featured in this matter.
- [2] On 3 October 2014, MAP and others came before court (Jordaan J presiding), in separate applications, urgently seeking to interdict Eskom from terminating their electricity supply. It seems that only MAP and Eskom appeared at the hearing. By agreement, the parties handed up a draft order which was made an order of court in the following terms:
- "1 The applications be postponed to 3 and 4 December 2014;
 - 2 Eskom Holdings SOC Ltd undertakes not to disconnect the electricity supply to any of the applicant municipalities pending the finalisation of the applications;
 - 3 The applicants, should they so wish, are to supplement their papers by not later than 24 October 2014;
 - 4 Eskom Holdings SOC Ltd, should it wish, shall file any counter application by not later than 24 October 2014;
 - 5 Answering affidavits to the main applications and counter applications are to be filed by not later than 7 November 2014;
 - 6 Replying Affidavits shall be filed by not later than 14 November 2014;

- 7 Heads of argument shall be filed by the parties in accordance with the practice directives of the above Honourable Court during the week of 17 to 21 November 2014;
- 8 The applicant municipalities are, pending the finalisation of the applications, to pay over to Eskom Holdings SOC Ltd, all amounts recovered in respect of electricity;
- 9 Costs to stand over."

[3] It appears that as a result of MAP's application being served on Eskom's Bloemfontein offices, instead of its attorneys' offices, Eskom was unable to file its papers as envisaged in the court order of 3 October 2014. Consequently when the matter came before court again on 3 December 2014, the parties agreed to new timelines for the exchange of documents and the matter was postponed to 12 March 2015.

[4] The matter was argued before me on 12 March 2015, after Eskom indicated that it wished to raise MAP's contempt of court (in respect of the court order dated 3 October 2014) as a point *in limine*. After arguments were heard, the parties then agreed on an order, and they presented a draft order, which was made an order of court in the following terms:

- "1 The applicant, represented by the Municipal Manager, is directed to file an affidavit in which he reports on whether or not the applicant has complied with the court order dated 3 October 2014, and specifically:
 - 1.1 whether or not, it has, pending the finalisation of the applications, paid over to Eskom Holdings SOC Ltd all amounts, if any, recovered in respect of electricity.
- 2 The applicant, as represented by the Municipal Manager, is further called upon to provide the following information:

- 2.1 The total amount billed for electricity usage by the Maluti-A-Phofung community from 3 October 2014 to date, in respect of:
 - a. Conventional meters;
 - b. Pre-paid Meters;
 - c. Time of Use Meters
 - d. Any other meters
- 2.2 The total amount recovered for electricity usage as set out in 2.1 above, if any.
- 2.3 The amounts, if any, received from National and/or Provincial Treasury in terms of the equitable share allocation since October 2014 to date.
- 2.4 How much of the amount set out in 2.3 above was earmarked for electricity usage by indigent people.
3. In the event that the applicant has not paid, in accordance with the court order dated 3 October 2014, to the respondent monies recovered in respect of electricity, the Municipal Manager is required to give reasons why:
 - 3.1 the applicant and/or the Municipal Manager should not be held in contempt of court for failing to comply with the court order;
 - 3.2 its application should not be dismissed; and/or
 - 3.3 the Municipal Manager should not be sentenced to a period of imprisonment following the finding of contempt;
 - 3.4 the applicant should not be ordered to pay the money recovered in terms of paragraph 2.2 above to Eskom within 15 days of the hearing of the contempt application.
4. The applicant, as represented by the Municipal Manager, must include such reasons, if any, and information required in paragraphs 1, 2 and 3 above, in the

affidavit referred to in paragraph 1 above and which affidavit must be served and filed no later than 21 days after the date of this order.

5. Eskom is to reply within 10 days of service of the applicant's explanatory affidavit, referred to in paragraph 4 above.
6. The application is postponed to 4 June 2015.
7. Costs to stand over."

[5] On 4 June 2015, being the date to which the matter was postponed on 12 March 2015, the matter came before me once again. MAP filed an affidavit purportedly in compliance with the court order of 12 March 2015, together with an application for condonation, as the affidavit was filed outside the 21 day period stipulated in the order. MAP alleged that, barring the late filing of the affidavit, it has complied or substantially complied with the court order of 12 March 2015. The application for condonation was opposed by Eskom. I note from the documents filed in the court file, that neither the founding affidavit in the condonation application nor the affidavit in response to the court order dated 12 March 2015 bears a date when such affidavits were attested to. The commissioner of oaths, one Banathi Olwethu Masoka, did not take the trouble to ensure that he and the deponent completed the date when these affidavits were signed. The deponent alleges that after he consulted with his legal representatives on 27 May 2015, the affidavits were finalised. Both affidavits were served on the respondents on 29 May 2015, and as the affidavits have the month of May printed in the attestation clause, one can only assume they were signed between 27 and 29 May 2015.

[6] Rule 27(1) of the Uniform Rules of Court provides:

“In the absence of agreement between the parties, the court may upon application on notice and on good cause shown, make an order extending or abridging any time prescribed by these rules or by an order of court or fixed by an order extending or abridging any time for doing any act or taking any step in connection with any proceedings of any nature whatsoever upon such terms as to it seems meet”

The requirement of “good cause” to be shown is repeated in sub-rule (3) which provides that “The court may, on good cause shown, condone any non-compliance with these rules”.

These two sub-rules of Rule 27 provide the court with a wide discretion to condone non-compliance with the Rules. It is clear, however, that an important safe guard is that good cause must be shown.

[7] I proceed to examine the explanation given by the deponent to the founding affidavit in this application, Tomo Charles Taetsane, who (at least up 2 June 2015) was MAP's Municipal Manager. He alleges that he was unaware of the court order dated 3 October 2014, as it appears in the form of a draft order and was not served on him or MAP. Prior to this he sketches a background in an attempt to explain his inaction. He alleges that on 16 March 2015, he was advised that he would be removed from his position as Municipal Manager and redeployed as Director of Community Services. Due to this uncertainty brought about by his imminent redeployment, he did not feel at ease or comfortable to depose to an affidavit in his capacity as Municipal Manager. He was called, during the week of 16 March 2015, to a consultation with his legal representatives in connection with the court order, but clearly did not respond. He also received a copy of the court order dated 12 March 2015 during that week, from which he learned of the court order dated 3 October 2015. It seems that he only reacted approximately five weeks

later, on 21 April 2015, when he attended a consultation with his legal representatives. He asserts that it was only during this consultation that he became aware of the content of the October 2014 court order, because it was never served on him or MAP. He does not explain why it took another five weeks to finalise the affidavits now before me.

- [8] In his argument before me in this matter, Mr Burger appears to adopt the stance that the draft order is not an order of court, alternatively that it was not made an order of court. While I am mindful that the matter before me is an application for condonation, it bears mention that when I heard the matter on 12 March 2015, the parties asked for a short adjournment to clarify the situation regarding paragraph 8 of the October court order. When the matter resumed, I was advised that they agreed that it was the order made by the court. Common sense dictates that if there was agreement that paragraph 8 was an order of court, then there must have been agreement that there was a court order in place. The existence of the court order was never in dispute. The fact that it may not have been typed in the usual form that court orders are typed in this Division could simply point to an administrative oversight, which certainly does not affect the existence or validity of such an order. As I indicated, that order (on 3 October 2014) was made by agreement between the parties, and I have no doubt that an examination of the Bench Book of Jordaan J, who heard this matter on that day will confirm this. I understand that Mr Burger appeared for MAP on 3 October 2014. Mr Burger also represented MAP on 12 March 2015, and a representative from the firm attorneys instructing him was also present in court. I agree with Mr Khoza that it is opportunistic to argue that the form of the order (that is to say, a draft order) justifies the presumption that there was no onus on the Municipal Manager or MAP to act thereon. They must surely have been advised by their legal representatives of the fact that a court

order was made, by agreement between the parties, on 3 October 2014. This would have been within the knowledge of Mr Burger and his instructing attorney.

- [9] This brings me to another disturbing feature of Mr Burger's argument. It has always been accepted that a legal representative obtains instructions from his/her client before agreeing to any order that binds such a client. Mr Burger categorically stated that in concluding the agreement which culminated in the court order of 3 October 2014, MAP's legal representatives (which can only refer to himself and his instructing attorney) were acting without instructions. This would mean that they took no steps to advise their client (MAP) on 3 October 2014 or shortly thereafter, that they acted without instructions, and that they agreed to a court order which places a heavy burden on the client. It would also mean that they took instructions for, drafted and settled the application papers, which were served on 24 October 2014, without advising their client of the existence and import of the October court order. I find this incredible, and in my view this could well be a matter that merits the attention of the Law Society and/or the Bar Council.
- [10] Turning to the conduct of and explanations by the Municipal Manager, his conduct is indicative of someone who has a lackadaisical attitude to his position and the great responsibilities that come with such a position. The application on 3 October was moved urgently (and I understand without papers) in an attempt to prevent Eskom from disconnecting the electricity supply to the area of MAP's jurisdiction. As the responsible officer, that application could only (or ought to) have been moved on his instructions and with his knowledge. Yet he alleges that he was not in Bloemfontein at the relevant time, he was not present when the agreement was entered into and he had no knowledge that an order of

court was made. He only gained knowledge of the agreement on 21 April 2015. This is clearly a matter that has serious consequences for the municipality and yet its chief accounting officer professes to be clueless about it, and made no attempt to find out exactly what the status of the application was so that he, on behalf of the municipality, could have acted accordingly. It is little wonder, therefore, that the financial affairs of the municipality are in such an alarmingly bad state.

- [11] Having said that, this court must consider whether it can exercise its discretion in favour of Map and condone the late filing of the relevant affidavit in this matter. The factors to consider are the prejudice to each party, and whether such prejudice can be addressed by an appropriate costs order. The explanation given by the party applying for the indulgence, and the strength of his defence are also factors to be considered. It is not in dispute that MAP owes a phenomenal amount of money (about R700 million) to Eskom, and that it is paying little or nothing in reduction of this debt. To my mind, it appears, on the face of it, that this situation has arisen due to incompetence and mismanagement on the part of the functionaries of the municipality. This needs to be interrogated. While my view is that the explanations given by the Municipal Manager for the default in this matter are thin and unconvincing, I have to look at his explanations in the light of the submissions made by Mr Burger. If a combination of laxity on the part of the Municipal Manager and the failure of his legal representatives to have acted as they ought to, has caused the delay in filing the affidavit in this matter, then it is the community that MAP serves that must bear the consequences of such delay, should the court refuse to condone the late filing of the affidavit. That Eskom is also suffering great prejudice is without doubt, but this court has the difficult task of balancing the financial interests of a corporate entity with those of a community placed

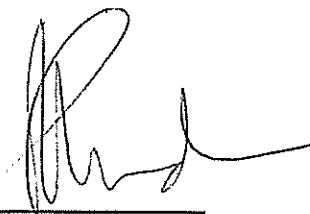
in a precarious position through no wrongdoing on its part, a community that is faced with disconnection of a basic and essential service. My view is that if condonation is granted, allowing the affidavit to be filed, the contempt of court application that was intended to have been heard on 12 March 2015 can now be properly ventilated. The contents of the affidavit can then be properly scrutinised and an appropriate decision arrived at.

[12] In the circumstances, I make the following order:

12.1 The application for condonation is granted

12.2 The applicant (Maluti-a- Phofung Municipality) is ordered to pay the first respondent's (Eskom's) costs, on an attorney and client scale;

12.2 The Registrar of this Court is directed to bring this judgment to the attention of the Law Society and the Bar Council, for their perusal and such action, if any, they may deem appropriate.



S. NAIDOO, J

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