

IN THE HIGH COURT OF SOUTH AFRICA



GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2024-048808

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED. YES
	
In the matter between:	20/6/2024
SIGNATURE	DATE

In the matter between:

ESKOM HOLDINGS SOC LTD

Applicant

and

**THE CITY OF JOHANNESBURG METROPOLITAN
MUNICIPALITY**

First Respondent

CITY POWER JOHANNESBURG SOC LTD

Second Respondent

**THE NATIONAL ENERGY REGULATOR OF
SOUTH AFRICA**

Third Respondent

NATIONAL TREASURY

Fourth Respondent

Coram: Maenetje AJ

This judgment was handed down electronically by circulation to the parties' legal representatives by email and uploading on Caselines. The date and time for handdown is deemed to be 10h00 on 20 June 2024.

JUDGMENT

Maenetje AJ:

Introduction

- [1] The applicant (**Eskom**) brings this urgent application to hold the first respondent (**the COJ**) to its obligations to pay Eskom's electricity accounts as and when they fall due. When the application was launched the COJ owed Eskom an amount of R1 073 593 894,34 for an unpaid electricity account due for payment on 28 and 29 April 2024. The amount relates to bulk electricity that Eskom supplied to the COJ. The bulk electricity supply is in terms of Electricity Supply Agreements binding between Eskom and the COJ.
- [2] By the time that the application was heard, there was a further amount of over R1 billion for the month of May 2024 that remained unpaid by the COJ. The COJ has decided to withhold these payments from Eskom because it alleges that Eskom owes it an amount in excess of R3,4 billion in respect of previous over-billing. The COJ contends that the April and May 2024 payments to Eskom are set off against the amount of over R3,4 billion owed to it by Eskom for previous overbilling. The exact amount allegedly owed by Eskom from the alleged overbilling is R3 416 383 079,00.

[3] In response to Eskom's application, the COJ and the second respondent (**City Power**) brought a counter application to be heard as an urgent application at the same time as Eskom's application. That counter application is based on the contention that Eskom is indebted to the COJ and City Power in the amount of over R3,4 billion for overbilling. They contend that this amount of R3,4 billion is due and payable by Eskom and is set-off against the April and May 2024 accounts from Eskom. On this approach of the COJ and City Power, they will withhold all payments to Eskom for electricity supply up to the amount of over R3,4 billion in respect of previous overbilling.

[4] In addition to the usual order for urgency, the specific relief that Eskom seeks is as follows:

- "2. That the first and/or second respondents' failure to pay Eskom's electricity accounts as and when the accounts fall due be declared unlawful and unconstitutional.*
- 3. That the first respondent alternatively, the second respondent, further alternatively, the first and second respondents jointly and severally, the one paying the other to be absorbed be ordered to pay Eskom the sum of R1 073 593 894,38.*
- 4. That the first respondent alternatively, the second respondent, further alternatively, the first and second respondents jointly and severally, the one paying the other to be absolved are liable to pay interest on the aforesaid sum of R1 073 593 894,38 at a rate per annum equal to the prevailing prime rate charged by the First National Bank of Southern Africa Ltd, plus 2½% alternatively, at a rate prescribed in terms of the Prescribed Rate of Interest Act 55 of 1975 calculated from date the application is served until date of final payment.*
- 5. That NERSA be directed to immediately investigate, consult and identify remedial measures to address and possibly overcome the first and/or second respondents' failure to pay Eskom for the bulk electricity it supplies.*

6. *That NERSA produce a report within 30 days from the date of this order or within any other period the Court deems appropriate, which reflects the following:*
 - 6.1. *NERSA's findings regarding the cause of the first and/or second respondents' inability to pay Eskom for the bulk electricity it supplies.*
 - 6.2. *The remedial steps which NERSA proposes to address and overcome (if possible), the first and/or second respondents' failure to pay Eskom for the bulk electricity it supplies.*
 - 6.3. *NERSA's recommendations regarding the timeframes required to introduce, implement and finalise the remedial measures proposed by NERSA to address and overcome the first and/or second respondents' failure to pay Eskom for the bulk electricity it supplies.*
7. *That pending the implementation and finalisation of remedial measures proposed by NERSA:*
 - 7.1. *That on or before the 14th day of every month after this order is granted, the first and/or second respondents must serve on Eskom and file with the Registrar of this [Court] a signed statement which reflects the following:*
 - 7.1.1. *The previous month's electricity sales.*
 - 7.1.2. *The previous month's income generated through electricity sales.*
 - 7.1.3. *The previous month's expenses incurred in respect to its electricity business.*
 - 7.1.4. *The revenue minus expenses generated by the electricity business of the first and/or second respondents' electricity business."*

[5] In their counter application, the COJ and City Power seek the following substantive relief:

"2. *That it be declared that:*

2.1. as at 25 February 2024, the Applicant (hereinafter referred to as "Eskom") was indebted to the CoJ in the sum of R3 416 383 079.00 inclusive of VAT ("the Eskom debt") for over – billing of bulk electricity;

2.2. the whole debt claimed by Eskom for bulk electricity supplied to the CoJ for the month of March 2024 in the sum of R1 073 593 894.38 was discharged by set-off.

3. *Eskom is interdicted from interrupting the bulk electricity supply to CoJ on the pretext of alleged non-payment by CoJ of Eskom's invoices for the supply of bulk electricity.*

4. *In the alternative to paragraphs 2 – 3 above:*

4.1 Eskom's (main) application is stayed in terms of Section 6(2) of the Arbitration Act, 42 of 1965;

4.2. The disputes, differences or questions arising on the papers filed of record are referred for determination in accordance with the arbitration agreement between Eskom and COJ;

4.3. The Chairperson of the Arbitration Foundation of Southern Africa (or his successor or nominee) ["the Chairperson"] is requested to appoint a suitably qualified tribunal for the arbitration as the Chairperson may deem appropriate for the just and expeditious determination thereof (including a right of appeal to an appeal panel constituted by three suitably qualified panelists as directed by the Chairperson);

4.4. Eskom is interdicted, pending the final determination of the arbitration proceedings described above, from interrupting the bulk electricity supply to CoJ on the pretext of alleged non-payment by CoJ of Eskom's invoices for the supply of bulk electricity."

[6] Due to the existence of disputes of fact that cannot be resolved on the papers, the COJ and City Power do not persist with the relief sought in prayers 2.1 and 2.2 of the notice of counter application.

[7] Each of the parties contests the urgency of the other's application. I must therefore decide the question of urgency first.

Urgency

- [8] Eskom addresses the question of urgency in its founding affidavit. It sets out its well documented financial difficulties. It states that its inability to collect debts presents a material risk of potentially catastrophic consequences, not just to it but also to the South African economy. It sets out in detail why such consequences may materialise if it is not able to collect debts when they fall due. It is not necessary to repeat the details that it sets out in this regard. Eskom's centrality to the South African economy is well documented. The same applies to its financial difficulties.
- [9] The amounts that Eskom alleges the COJ and City Power owes it are significant. The amounts are also significant in the light of the alleged set-off. The COJ and City Power will withhold up to R3,4 billion and above in payments to Eskom on their case for set-off. Failure to collect such big amounts, if they are indeed due and payable, would have a significant impact on Eskom's financial position. In these circumstances, I accept the contention that Eskom cannot be expected to wait to obtain substantial redress in due course in respect of the claim for the payments of accounts. The impact on the public interest in the meantime would be significant.
- [10] The same does not apply to the relief that Eskom seeks in prayers 2, 5 to 7.1.4 of its notice of motion. There is no valid reason why such relief

cannot be obtained in due course in the event of ongoing disputes between the parties.

[11] For their part, the COJ and City Power contend that there is a threat that Eskom may interrupt the supply of bulk electricity to them if it does not obtain urgent relief. This would have catastrophic consequences to the residents of the COJ who are supplied electricity by the COJ and City Power. Assuming, but not deciding for purposes of urgency, that this threat exists, the counter application is also urgent. I shall return to the threat when considering the interdictory relief that the COJ and City Power seek. They must meet the requirements for the interdictory relief that they seek.

[12] I therefore conclude that an adequate case has been made out for the Court to exercise its discretion to hear Eskom's main application and the counter application brought against it on an urgent basis.

The merits of Eskom's application

[13] Both the main application and counter application turn on the proper interpretation of the relevant provisions of the Electricity Supply Agreements binding on the parties.

[14] Eskom relies on the terms of the Electricity Supply Agreements for relief. It attaches copies of the Main Agreement and Eskom's Standard Terms and Conditions of Supply which it says constitute parts of the Electricity

Supply Agreements and were applicable at the relevant time. A copy of the Main Agreement is attached as “FA3.1” and a copy of Eskom’s Standard Terms and Conditions of Supply is attached as “FA3.2” to the founding affidavit. These attachments are referenced at paragraph 44 of Eskom’s founding affidavit. Eskom then summarises at paragraph 46 of its founding affidavit what it contends are the material and express terms of the Electricity Supply Agreements on which it relies. It does so as follows:

- a) Eskom shall supply electricity to the COJ at a certain point of delivery at rates determined in Eskom’s list of standard prices subject to approval by NERSA.
- b) Eskom shall take readings of the electricity meters at regular intervals and submit accounts on the last day of each calendar month and the accounts shall become due and payable on the day the account is received by the COJ.
- c) The COJ shall make payment of each electricity account by no later than fifteen calendar days from the date the account is received, and should payment not be received by the due date, Eskom may forthwith and without further notice, discontinue the supply of electricity to the COJ and/or terminate the agreement.

- d) The COJ must pay its electricity accounts even if it disputes the accounts, provided that the account will be corrected if it is later revealed that there was an error on the account.

[15] In their replying affidavits, the COJ and City Power admit that the Electricity Supply Agreements remain in force. They also admit the material terms of the Electricity Supply Agreements as alleged in paragraphs 44 to 46 of Eskom's founding affidavit to the extent that those terms as summarised are consistent with the terms of annexures FA3.1 and FA3.2 to the founding affidavit.

[16] In the founding affidavit, Eskom does not identify the specific clauses of the Electricity Supply Agreements that it relies upon. In answer to the COJ and City Power's counter-application, and in reply to the COJ and City Power's answering affidavit to its application, it makes it clear that it relies on clause 9(c) of Eskom's Standard Terms and Conditions of Supply. Eskom contends that this clause does not permit set-off. It requires the COJ to pay its electricity accounts even if it disputes the accounts, provided that the account will be corrected if it is later revealed that there was an error on the account. This is an allegation that it already made in its founding affidavit as indicated above, but without specifying the relevant clauses of the Electricity Supply Agreements.

[17] Annexure FA3.2 to the founding affidavit is headed Standard Conditions for Supply of Electricity in Bulk. It is common cause that it does not contain clause 9(c) on which Eskom relies. It actually does not contain a

clause dealing with the payment of accounts. Eskom attaches annexure RA3 to its answering affidavit to the counter application and replying affidavit to the answering affidavit filed by the COJ and City Power. This annexure contains Eskom's Standard Terms and Conditions of Supply, which in turn contain clause 9(c). The case for Eskom is that this clause of Eskom's Standard Terms and Conditions of Supply was omitted from annexure FA3.2. It explains this in paragraph 31 of its answering affidavit to the counter application and replying affidavit to the COJ and City Power's answering affidavit to its founding affidavit. The COJ and City Power dispute that RA3 is part of FA3.2. They say it is a separate and distinct document from annexure FA3.2. They made a number of submissions in oral argument to support this contention. This dispute is ultimately immaterial because I conclude that clause 9(c) is not applicable on the common cause facts.

- [18] Eskom alleges that the COJ is in breach of the Electricity Supply Agreements by withholding payments due in April 2024. On the other hand, the COJ and City Power contend that set-off operates to the extent of the alleged over-billing in the amount of over R3,4 billion. Other than for the contention regarding set-off, the COJ and City Power do not dispute the account and that it would otherwise have been due and payable in the absence of a claim for set-off. In other words, no genuine dispute of fact arises in the absence of the alleged set-off. This robust approach is justified on the facts as pleaded.

- [19] Eskom advanced three arguments on why automatic set-off does not operate under the Electricity Supply Agreements.
- [20] The first argument is that under clause 9(c) set-off does not apply. The COJ and City Power are required to continue to pay accounts even when these are disputed. The accounts that Eskom submits are not final. They are subject to adjustments should errors with the accounts be discovered later.
- [21] The second argument is that on 27 February 2024 the parties agreed on the same process as envisaged in clause 9(c).
- [22] The third argument is that the COJ and City Power have failed to make out a prima facie case that set-off automatically applies for purposes of a referral to arbitration. Under clause 9(c) the parties explicitly or tacitly agreed that set-off would not automatically apply.
- [23] The COJ and City Power advanced four arguments in answer to the case for Eskom.
- [24] The first argument is that the agreement attached to the founding affidavit, i.e., FA3.2, is not the correct version of the contract between the parties. It does not contain clause 9(c). The contract that contains clause 9(c) is attached to Eskom's replying affidavit, as RA3. RA3 is not an extract from FA3.2. It is distinct from annexure FA3.2. Eskom was required to make out its case in its founding affidavit.

- [25] The second argument is that the alleged oral agreement of 27 February 2024 is only pleaded in the replying affidavit and not in the founding affidavit. Eskom was required to make out its case in the founding affidavit. In any event, the alleged oral agreement of 27 February 2024 predates the letter of 12 March 2024 in which the COJ declared a dispute. The COJ would not have declared the dispute if it had allegedly concluded the oral agreement of 27 February 2024.
- [26] The third argument is that clause 9(c) does not exclude automatic set-off. It also does not apply to the present case because the COJ and City Power do not dispute the accounts due in April and May 2024. They acknowledge the accounts but contend that the amounts billed are automatically set-off against part of the over R3,4 billion owed by Eskom to them in overbilling.
- [27] The fourth is that the constitutional relief is not urgent. I have already accepted this argument.
- [28] I turn to the proper interpretation of clause 9(c). In *Capitec*,¹ the SCA again summarised the proper approach to interpretation. Referencing *Endumeni*,² it said:

“Endumeni simply gives expression to the view that the words and concepts used in a contract and their relationship to the external world are not self-defining. The case and its progeny emphasise

¹ *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 (SCA).

² *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18.

that the meaning of a contested term of a contract (or provision in a statute) is properly understood not simply by selecting standard definitions of particular words, often taken from dictionaries, but by understanding the words and sentences that comprise the contested term as they fit into the larger structure of the agreement, its context and purpose. Meaning is ultimately the most compelling and coherent account the interpreter can provide, making use of these sources of interpretation. It is not a partial selection of interpretational materials directed at a predetermined result.”³ (emphasis added)

- [29] The starting point is the language used in the provision.
- [30] Clause 9(c) falls under a section of the Standard Conditions for Supply of Electricity in Bulk headed “*PAYMENT OF ACCOUNTS*”. The full section states the following:
- “(a) *Accounts for all charges payable under this Agreement shall be made up in respect of each month and shall be delivered to the Consumer as soon as possible after the end of each month in respect of which the charges are payable, and the accounts shall be due and payable when rendered.*
 - (b) *Should payment not be made within a period of 15 (fifteen) days from the billing date, the amount outstanding shall bear interest from due date to date of payment at a rate per annum equal to the prime overdraft rate, this being defined as the ruling discount rate as determined by the South African Reserve Bank plus $2\frac{1}{2}$ (two and one half per centum).*
 - (c) *Should the Consumer dispute an account, he shall not be entitled to defer payment thereof beyond the due date; but such account shall thereafter be adjusted if necessary.”*

- [31] The wording of clause 9(c) is clear. It applies in the event that a consumer, in this case the COJ, disputes an account. In that event the consumer is required to pay the account when it falls due. But the account may thereafter be adjusted. It would clearly be adjusted if the

³ At para 50.

consumer was correct in disputing the account – for instance, if the consumer contends that it is being overcharged. There is nothing in the purposes of the Electricity Supply Agreements or the context in which the clause appears to find otherwise.

[32] Eskom does not allege in its founding affidavit that the COJ disputes the account that fell due for payment in April 2024. The correspondence between the parties that Eskom attaches to the founding affidavit shows clearly that the COJ has always accepted its indebtedness to Eskom in the amounts reflected in the relevant accounts. Counsel for the COJ and City Power confirmed this position when he submitted that his clients do not dispute any of the accounts in issue and therefore clause 9(c) does not apply. They contend only that the indebtedness has been extinguished by automatic set-off. In my view, clause 9(c) does not apply to the present case. It would apply if the COJ and City Power's defence for their failure to pay was that they dispute the relevant accounts. But this is not their case, nor is it the case that Eskom has pleaded in its founding affidavit.

[33] This means that the COJ and City Power accept that the relevant account fell due in April 2024. I have already found that the COJ and City Power do not raise a genuine dispute of fact in this regard. The account is due and payable on the terms alleged by Eskom in its founding affidavit which the COJ and City Power admitted in their answering affidavit. Had clause 9(a) been specifically referred to in the

founding affidavit, the April 2024 account would have been payable on the basis of that clause. It is not necessary to resolve the issues regarding annexure RA3 because the COJ and City Power have not properly placed in dispute the alleged material terms of the Electricity Supply Agreements as pleaded by Eskom in paragraph 46 of its founding affidavit. They have also not properly placed in dispute that, absent set-off, the March 2024 account was due on 28 and 29 April 2024 as Eskom alleges in its founding affidavit.

- [34] Because of the conclusion that I have reached, I do not have to consider the two additional arguments that Eskom has advanced in support of its claim. I need only turn to the defence of set-off raised by the COJ and City Power. I consider this under the counter application below.

The counter application

- [35] Counsel for the COJ and City Power confirmed that these parties no longer persist with prayers 2.1 and 2.2 of the notice of counter application. They did so because of the existence of disputes of fact that cannot be resolved on the papers regarding the alleged over-billing and the amounts allegedly owed to them by Eskom as a result of the alleged over-billing. This concession was correctly made and this relief was correctly abandoned in the urgent motion proceedings.

- [36] The abandonment of prayers 2.1 and 2.2 in the notice of counter application means I cannot find on the papers that:

a) as at 25 February 2024, Eskom was indebted to the COJ in the sum of R3 416 383 079,00 inclusive of VAT for over-billing of bulk electricity; and

b) the whole debt claimed by Eskom for bulk electricity supplied to the COJ for the month of March 2024 in the sum of R1 073 593 894,38 was discharged by set-off.

[37] On the common cause facts then, the only defence to Eskom's claim by the COJ and City Power, being automatic set-off, cannot be determined in these proceedings. This means that the COJ and City Power do not have a valid defence against Eskom's claim on the common cause facts.

[38] I do not have to determine the relief in prayer 4 of the notice of counter application. There is no basis for me to stay Eskom's main application given that there is no dispute that the debt is due and payable since I cannot determine the case on set-off. The COJ and City Power are free under the Electricity Supply Agreements to refer a dispute to arbitration regarding their claim for set-off or for payment by Eskom to them of the amount of over R3,4 billion. I do not have to compel them to refer the dispute to arbitration and prescribe the rest of the conditions in prayer 4 of the notice of counter application.

[39] I turn to the interdictory relief in the counter application. Eskom made it clear that it preferred to institute these urgent proceedings instead of exercising its powers to interrupt electricity supply to the COJ and City

Power. The COJ and City Power contended that if the urgent application does not succeed Eskom may make good on a threat to interrupt the supply of electricity to them. It was on this basis that they sought the interdictory relief in prayer 3 of the notice of counter application. Once the Court grants Eskom relief, there would be no basis upon which the COJ and City Power could reasonably apprehend that Eskom would interrupt electricity supply to them. They would not satisfy the requirements for the final interdict that they seek.⁴

[40] In conclusion then, it is common cause that the March 2024 account was due and payable in April 2024 to Eskom by the COJ if I cannot find that the amount due was automatically set-off. Since it is accepted that I cannot determine the alleged set-off and grant the relief sought in prayers 2.1 and 2.2 of the notice of counter application, there is no real defence to Eskom's claim. I have already found that the relief sought by Eskom in prayers 2, 5 to 7 of the notice of motion are not urgent.

[41] Eskom does not in the founding affidavit allege facts to support the claim for interest at the rate sought in prayer 4 of Eskom's notice of motion. I therefore have no basis upon which to order the COJ and City Power to pay interest at the rate sought in prayer 4 of Eskom's notice of motion.

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

⁴ See *Pilane and Another v Pilane and Another* 2013 (4) BCLR 431 (CC) para 39 on requirements for a final interdict.

- (1) The first respondent, alternatively the second respondent, further alternatively the first and second respondents jointly and severally, the one paying the other to be absolved, are ordered to pay the applicant the sum of R1 073 593 894,38.
- (2) The first respondent, alternatively the second respondent, further alternatively the first and second respondents jointly and severally, the one paying the other to be absolved, are ordered to pay interest on the amount of R1 073 593 894,38 at a rate prescribed in terms of the Prescribed Rate of Interest Act, 55 of 1975 calculated from the date the application was served on the first and second respondents until date of final payment.
- (3) The first respondent, alternatively the second respondent, further alternatively the first and second respondents jointly and severally, the one paying the other to be absolved, are ordered to pay the applicant's costs of the application.
- (4) The first and second respondents' counter application is dismissed with costs.



NH MAENETJE
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Date of hearing : 7 June 2024

Date of judgment : 20 June 2024

For the applicant: L Uys

Instructed by GMI Attorneys

For the first and second respondents: CHJ Badenhorst SC
PJ Kok

Instructed by Kunene Ramapala Inc