

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case No. 104254 / 2024

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: NO

(3) REVISED: YES

DATE 11 November 2024

SIGNATURE

In the matter between:

EMFULENI LOCAL MUNICIPALITY

First Applicant

THE MUNICIPAL MANAGER

Second Applicant

and

ESKOM HOLDINGS SOC LTD

First Respondent

NATIONAL ENERGY REGULATOR

Second Respondent

OF SOUTH AFRICA

NATIONAL TREASURY

Third Respondent

THE PREMIER, GAUTENG PROVINCIAL

Fourth Respondent

GOVERNMENT

MEC OF COOPERATIVE GOVERNANCE AND

Fifth Respondent

TRADITIONAL AFFAIRS

FIRST RAND BANK LTD

Sixth Respondent

JUDGMENT

NEUKIRCHER, J

[1] This application was originally brought by way of urgency and was heard in the urgent court on 19 September 2024 when I reserved judgment. As I was busy with that, the applicant (Emfuleni) filed a supplementary affidavit dealing with an issue that it argues is determinative of the relief sought and that would put an end to the first respondent (Eskom's) defence and opposition to Part A of the application. I afforded Eskom an opportunity to file a response, which it did on 30 September 2024. I called the parties to a further hearing which was scheduled for 18 October 2024. This judgment follows as a result of both hearings and in consequence of certain undertakings given by Eskom vis-à-vis the payments Emfuleni must make monthly to its creditors.

The Relief Sought

- [2] Emfuleni brought its application in two parts:
- a) in Part A it sought to set aside, alternatively to stay or suspend, the Writ of attachment dated 2 September 2024 (the Writ) in terms of which its ten First National Bank (FNB) bank accounts were attached;
 - b) in Part B, Emfuleni seeks a declarator that "the first respondents perpetual attachment of the applicant's bank account and its conduct impeding the applicants from complying with its statutory and constitutional obligations is unconstitutional, unlawful and invalid."

[3] It is only Part A that was set down for hearing before me.

Background

[4] This is not the first time that Emfuleni and Eskom have locked swords in our courts. Their bitter disputes have been ongoing for many years. In July 2018, Eskom decided to interrupt its bulk electricity supply to Emfuleni. That decision was challenged by the Large Power Users (LPU's), who operate within Emfuleni, in an urgent application which was ultimately heard by a Full Court in Johannesburg.

[5] The result of that hearing was that on 8 November 2018, the full court delivered judgment. The case is reported as *Cape Gate (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Others*¹ (Cape Gate) and the order granted was, inter alia, that:

- a) the dispute between (inter alia) Eskom and Emfuleni was referred back to Eskom for resolution in terms of s41(3)² of the Constitution;
- b) that, in the event that the dispute was not resolved within six months of the court order, Part B may be set down for hearing;
- c) Eskom was interdicted from implementing interruptions in electricity supply to Emfuleni pending the resolution of the dispute within six months of date of the order or, if the dispute is not resolved, pending the outcome of the final determination of Part B of the application, whichever is the earlier;
- d) for as long as the interim order was pending, the LPU's could pay Eskom directly for the electricity supply distributed to them by Emfuleni.

[6] Part B of *Cape Gate* has not been enrolled, nor does it appear that there has been any attempt to do so despite the very obvious impasse and dispute that continues to dog the relationship between Emfuleni and Eskom. Instead, in 2021³

¹ 2019 (4) SA 14 (GJ)

² Section 41(3) "An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."

³ The order was granted on 21 August 2021 and the application for leave to appeal was unsuccessful

Eskom successfully sued Emfuleni for R1 326 797 399-75 and a further R25 million for the outstanding amount owing in respect of the bulk electricity it supplied (the August 2021 judgment). Of this, it appears from the wording of the Writ, Emfuleni paid an amount of R467 837 402-34 towards this judgment debt.

[7] Be that as it may, this urgent application was precipitated by Eskom attaching Emfuleni's bank account at FNB on 5 September 2024. As a result although Emfuleni can receive payments, it can make no disbursements. This effectively means that employees, contractors, service providers and legislated creditors such as SARS cannot be paid, nor can Emfuleni make any payments in regard to statutorily required benefits and deductions. These amount to R159 million monthly and include:

- a) salaries of R55 million;
- b) SARS PAYE of R21 828 594-57;
- c) employee pension fund contribution of R27 923 293-87;
- d) employee medical aid contribution of R15 million;
- e) Department of Labour (UIF), Rand Water;
- f) VAT, fuel, insurance.

[8] As stated, Emfuleni's bank accounts were attached on 5 September 2024. The following day Emfuleni's attorney of record sought an undertaking that the Writ would be uplifted and withdrawn. The reason for this is because Emfuleni alleges that on 30 June 2023, National Treasury (Treasury) had granted it permission to participate in a National Debt Relief Program (the Program). In accordance with the rules of the Program, all court processes pending between the parties were to be put in abeyance pending the duration thereof⁴. Emfuleni alleges that it has not yet been

⁴ Per the Municipal Finance Management Act Circular No 124 (the Circular)

removed from the Program and that as a result, Eskom was not entitled to attach its FNB accounts. Emfuleni, however, admits that it has not complied in full with the terms of the Circular.

[9] And that is precisely the issue: Eskom argues that as a result it was automatically entitled to attach Emfuleni's account as, in terms of the Circular, Emfuleni has lost the benefit of participating in the Program. Eskom alleges that no confirmation of this is required by Treasury as the terms of the Circular are quite clear. Emfuleni, however, argues that only Treasury can remove it from the Program, and that until that occurs Eskom is not entitled to enforce any historical judgments (which is what it did by attaching Emfuleni's bank accounts on 2 September 2024).

[10] The Program, in broad terms, was implemented

“1.4 ... to resolve Eskom's financial and debt crisis which requires a solution to nonpayment for electricity consumption by municipalities. In parallel, the challenge of defaulting municipalities cannot be separated from a consumer culture to not pay for services. Without universally restoring debt collection, the debt will immediately start accumulating anew.

“1.5 Government's debt relief package for Eskom is intended to improve the utilities balance sheet and facilitates this proposal that Eskom write off the municipal debt under strict conditions and with the guidance of the National Treasury. Government in this way is using its Eskom debt relief to bring about critical changes in the energy sector and simultaneously address a behavioral change in the municipal defaulters by requiring them to meet certain conditions and in return (as an incentive) relieve their gridlocked financial crisis of historic area Eskom debt. There are several conditions, all essentially aimed to restore a set of basic minimum financial management best practices in municipalities owing Eskom and changed the municipal culture of not paying bulk suppliers and in municipal and Eskom culture to not collect revenue.”

[11] Thus, Eskom – in consultation with Treasury and only after the Municipality has met⁵ a set of conditions to Treasury’s satisfaction – would write off one third of the municipality’s debt annually over three financial years. The municipality had to meet certain conditions for twelve consecutive months to qualify for debt write-off. The most important of these was that, once approved, the municipality had to pay and maintain its Eskom bulk current account within thirty days of receipt of the invoice.

[12] On 1 July 2024 Gauteng Provincial Treasury sent what it termed a “Certificate of Compliance – MFMA Circular No. 124 – May 2024 (Emfuleni Local Municipality)” (the Certificate) to Emfuleni. The Certificate records the following:

- a) that Emfuleni achieved 88% average compliance with the Circular during May 2024, which was up from 59% during April 2024;
- b) that, “considering its overall debt relief performance since 1 June 2023, and that the conditions carry equal weighing, municipality has a slight chance to qualify for the one-third ($\frac{1}{3}$) debt write-off at the end of its first relief compliance cycle on 31 May 2024 and should indicate how it plans to address the non-compliance issues.”;
- c) Emfuleni was given thirty days to address the non-compliance.

[13] The above is important as paragraph 5 of the Circular provides that if Emfuleni fails to comply with the conditions of the Program:

- a) the benefits will immediately cease;
- b) Eskom would “be obliged” to implement its credit control and debt management policy and Emfuleni would have to immediately start repaying its Eskom arrears, interest and penalties;

⁵ The word used in paragraph 6.3.1 of the Circular is “must”.

- c) Eskom may resume any legal proceedings relating to the arrears debt, interest and penalties, including attaching the municipal bank account.

[14] On 5 July 2023 this court handed down an order pursuant to a contempt application issued out by Eskom against Emfuleni⁶ (the July 2023 order). It held that both Emfuleni and its Municipal Manager were in contempt of the Full Court order of 18 November 2018 (the *Cape Gate* order) and ordered a just and equitable remedy pending Part B of the application. The salient parts of the order provide, inter alia, that:

- a) Emfuleni must appoint Eskom as its service delivery agent and provider to perform all functions and provide all services relating to Emfuleni's electricity business on behalf of Emfuleni and as service delivery agent and provider;
- b) Eskom shall be entitled to collect all revenues due to the employee and respect of the electricity distribution function and ensure that the funds are paid into a separate ringfenced account to be opened in the name of Emfuleni;
- c) Eskom and Emfuleni, subject to appropriate oversight from NERSA, must finalize the terms of an agreement established by the order within six months, which agreement shall contain certain provisions stipulated in the court order as well as details and dates regarding how the electricity business of Emfuleni will be handed over to Eskom to enable Eskom to perform its functions as delivery agent of Emfuleni;
- d) in the event that Eskom and Emfuleni are unable to finalise the terms of the agreement within six months then:
 - (i) Eskom and Emfuleni will file a report to the court within fourteen days of the expiry of the six month period which sets out the

⁶ *Eskom Holdings SOC Limited v Emfuleni Municipality and Others* [2023] ZAGPPHC 497; 94248/2019 (5 July 2023)

steps to conclude the agreement pursuant to the order, the aspects in respect of which there are agreements and the aspects in respect of which they are disagreements;

(ii) following the filing of the report, any party is permitted to file a supplementary affidavit and to set the application down before the court for appropriate relief of not less than 14 days' notice to the other parties.

[15] It should come as no surprise that the parties have been unable to finalise the terms of the agreement and have also not finalized the application as envisaged by the July 2023 order.

[16] The point of the facts set out supra, is that it is common cause that Emfuleni had failed to comply with paragraph 6.3 of the Program since September 2023⁷. The next that happened was that:

- a) on 2 February 2024 Eskom informed both Emfuleni and National Treasury that Emfuleni no longer enjoyed the benefits of the Program and Eskom intended to take steps to enforce payment;
- b) on 2 April 2024 National Treasury directed correspondence to Emfuleni. It is titled "Impending Termination – Municipal Debt Relief Approval of the GT421 Emfuleni Local Municipality". In essence, the letter serves to confirm that Emfuleni has not complied with several key factors of the Program⁸. It ends as follows:

"Should council, the municipal manager and/or acting CFO fail to confirm the municipality's commitment to debt relief as per the above re-submission required on/before Friday, 26 April (15:00) and/or the Gauteng Provincial Treasury fail to make good its debt relief reporting omission(s) this letter serves as a confirmation of the termination of the

⁷ Emfuleni admitted this is the application and in argument

⁸ For example a signed proposed repayment plan between Eskom and Emfuleni; weekly cash flow monitory; cost containment issues; Eskom repayment plan

National Treasury's conditional debt relief approval of the municipality's application with effect 30 April 2024 – and based on the municipality's failure to comply with the conditions of the approval as per the approval letter."

[17] Thus it is clear that as at 2 April 2024, Treasury was still of the view that Emfuleni enjoyed the benefits of the Program – this despite Eskom's stance as evinced in its letter of 2 February 2024.

[18] When Emfuleni failed to comply with the terms of Treasury's letter of 2 April 2024, Eskom took up the stance that as Emfuleni was non-compliant and that, in terms of Treasury's Letter of 2 April 2024, Emfuleni's participation in the Program was automatically terminated as of 30 April 2024. As a result, Eskom's stance was that it was entitled to continue with its debt payment enforcement processes. This then saw it attaching Emfuleni's bank accounts on 2 September 2024.

[19] Emfuleni has argued throughout that it is only Treasury that can terminate its participation in the Program and that its termination is not an automatic consequence of non-compliance. It held the view that as Treasury had yet to speak on the issue, it remained part of the Program.

[20] Whilst this was the burning issue when the matter was originally argued, Emfuleni now argues that the issue was put to bed by the email received from one Sadesh Ramjathan⁹ on 23 September 2024 which states:

"The municipality is still on the municipal debt relief programme. No decision has been taken to remove them as yet."

[21] According to Eskom however, Ramjathan's opinion about the matter is "irrelevant" as the letter of 2 April 2024 makes it clear that were Emfuleni to fail to comply with the conditions of the Program, its participation would automatically terminate on 30 April 2024.

⁹ Of Revenue Management, Local Government Budget Analysis, Intergovernmental Relations at National Treasury.

[22] At the hearing of 18 October 2024, Eskom urged that a decision was required as to whether or not Emfuleni's participation in the Program had automatically terminated. But, in my view that is neither appropriate nor necessary at this stage given the email of 23 September 2024. If Treasury has formed the view that Emfuleni is still a participant then that decision stands and has legal consequences that cannot be ignored.

[23] In *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*¹⁰ (*Oudekraal*) the court stated:

“For those reasons it is clear, in our view, that the Administrator's permission was unlawful and invalid at the outset. Whether he thereafter also exceeded his powers in granting extensions for the lodgement of the general plan thus takes the matter no further. But the question that arises is what consequences follow from the conclusion that the Administrator acted unlawfully. Is the permission that was granted by the Administrator simply to be disregarded as if it had never existed? In other words, was the Cape Metropolitan Council entitled to disregard the Administrator's approval and all its consequences merely because it believed that they were invalid provided that its belief was correct? In our view it was not. Until the Administrator's approval (and thus also the consequences of the approval) is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked. The proper functioning of a modern state would be considerably compromised if all administrative acts could be given effect to or ignored depending upon the view the subject takes of the validity of the act in question. No doubt it is for this reason that our law has always recognized that even an unlawful administrative act is capable of producing legally valid consequences for so long as the unlawful act is not set aside.”

[24] Similarly, in both *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*¹¹ and *Merafong City v AngloGold*

¹⁰ 2004 (6) SA 222 (SCA) par 26

*Ashanti Ltd*¹² and *Department of Transport and Others v Tasima (Pty) Ltd*¹³ that principle was emphasized. In the present context it simply means that Eskom cannot treat Treasury's view as though it does not exist.¹⁴

[25] This being so, it is not for me to decide whether Emfuleni's participation in the Program is valid or not – Treasury has stated that it is still a participant.

[26] The question is then whether Emfuleni has made out a case for the final relief sought in paragraph 2 of the Notice of Motion, or the interim relief pending finalization of Part B.

[27] Eskom argues that no matter whether on the main relief or the alternative relief, Emfuleni has failed to make out a case:

a) the main relief, to set aside the Writ, is founded on the argument that Emfuleni is still a participant in the Program. As it is not, the Writ is competent and cannot be set aside;

b) the alternative relief, that the Writ be stayed pending Part B, is incompetent because Part B is founded in the argument that Eskom's conduct in seeking continual enforcement of its historical debt is to the detriment of Emfuleni's customers and other creditors and is unconstitutional. As the argument in Part B is completely divorced from the argument of whether or not Emfuleni is still a participant in the Program, it must fail as the two parts of the Notice of Motion are not connected in fact or argument and the one cannot be used to found the other.

[28] But Eskom's argument, in my view, does not appear to be quite correct. Emfuleni's case is that because it is part of the Program, Eskom's constant and continual harassment causes an impediment to it and prevents it from complying with its statutory and constitutional obligations. It argues that this conduct is unlawful, unconstitutional and invalid and it seeks a declarator in those terms in Part B. It

¹¹ 2014 (3) SA 481 (CC)

¹² 2017 (2) SA 211 (CC)

¹³ 2017 (2) SA 622 (CC)

¹⁴ Kirland at par 100

appears to me that the argument and its foundation has some merit – if at least *prima facie* although open to some doubt.

[29] Eskom urged that a determination must be made at this stage as to whether or not Emfuleni is still a participant in the Program. The argument was that this issue needs a judgment so that Eskom knows where it stands vis-à-vis all the Municipalities that have been granted this status.

[30] But only Emfuleni is before me. I cannot determine the status of any other entity as each set of facts would be unique to that Municipality and whether it is compliant with the terms and conditions of the Program or not.

[31] Insofar as Emfuleni is concerned, and as already stated *supra*, Treasury has spoken and therefore Eskom's position vis-à-vis Emfuleni is – until this application is finalized – clear.

[32] And this then leads me to the issue of whether the Writ should be set aside or suspended pending Part B.

[33] In *Gois t/a Shakespeare's Pub v Van Zyl and Others*¹⁵, Waglay J framed the test to be applied as follows:

“[32] Normally this court will favourably consider the stay of a writ of execution when real and substantial justice requires such a stay or, put differently, where injustice would otherwise result.

[33] In *Erasmus v Sentraalwes Koöperasie Bpk* [1997] 4 All SA 303 (O) at 307D - H it was held that the requirements for an interim interdict could be taken into account in determining whether or not to grant a stay. This test was found not to be entirely appropriate, especially where an applicant is not asserting a right, but seeks an indulgence on the grounds that execution may

¹⁵ 2011 (1) SA 148 (LC) par 32 - 35

result in an injustice. In *Road Accident Fund v Strydom* 2001 (1) SA 292 (C) at 304G - H the court held that –

'at the heart of the enquiry relative to the exercise of the Court's discretion is whether it has been shown by the applicant that there is a well-grounded apprehension of execution of the order taking place at the instance of respondent and of injustice being done to the applicant by way of irreparable harm being caused to applicant if execution is not suspended'.

[34] Furthermore, in considering whether or not to exercise its discretion to grant a stay of execution, a court is not required to take the merits of the underlying attack on the *causa* of the writ into account. In *Strime v Strime* 1983 (4) SA 850 (C) the applicant applied for a stay in execution pending the outcome of a variation of a maintenance order which he had sought. The court there said -

'whether or not the applicant is likely to succeed in obtaining a cancellation or variation of the maintenance order is not for this Court to determine. It would also be unwise to express any view because of the pending maintenance court application.' [At 852H.]

[35] The above decision is in line with the finding in *Le Roux v Yskor Landgoed (Edms) Bpk en Andere* 1984 (4) SA 252 (T), to the effect that a stay of execution will be granted where the underlying *causa* is the subject-matter of an ongoing dispute between the parties. It is therefore sufficient that there is a possibility that the *causa* underlying the writ may be ultimately removed. The applicant is therefore not required to satisfy this court as to his prospects of success in the principal dispute.”

[34] Although the above case deals with a writ of execution, in my view, the sentiments expressed are equally applicable to writs of attachment. What this means in the context of the present case is the following:

- a) it is clear that Treasury's view is that Emfuleni's participation in the Program is extant;

- b) thus Eskom is not entitled to enforce historical debt processes;
- c) the Writ was issued, served and executed to enforce historical debt – this is common cause;
- d) Emfuleni is unable to comply with its statutory and contractual obligations because of the attachment – it and its other creditors and employees thus suffer ongoing irreparable harm;
- e) it is clear that the dispute between Eskom and Emfuleni is an ongoing one;
- f) the present dispute is the subject of litigation which will be determined in Part B of this application.

[35] In my view, all the above factors point to an ongoing real and substantial injustice resulting were this court not to grant a stay of the Writ until Part B is finalized.

Costs

[36] Both Counsel were *ad idem* that costs should follow the result. They are in agreement that costs should be taxed in accordance with Scale C. The matter is a complex one and Scale C is appropriate. The employment by Emfuleni of two counsel given the complexity of the matter and importance to it, is also appropriate.

Order:

1. The Writ of Attachment of the Applicant's FNB Bank Accounts, Branch Code 210-554 set out in paragraph 2 below, is stayed pending finalization of Part B of the application.
2. The FNB Bank accounts affected by the Writ of Attachment are the following:
 - a) 6[...]
 - b) 6[...]

- c) 6[...]
- d) 6[...]
- e) 6[...]
- f) 6[...]
- g) 6[...]
- h) 6[...]
- i) 6[...]
- j) 6[...]

As well as any and all Bank Accounts of the applicant held with the sixth respondent.

3. The first respondent is ordered to pay applicant's costs of Part A, including costs of two counsel of which one is Senior Counsel, to be taxed in accordance with Scale C.

B NEUKIRCHER
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

This judgment was prepared and authored by the judge whose name is reflected, and is handed down electronically by circulation to the parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 November 2024.

For the Applicants	:	Adv WR Mokhare SC with Adv MJS Langa
Instructed by	:	Seleka Attorneys Inc
For the First Respondent	:	Adv PL Uys
Instructed by	:	Gildenhuis Malatji Inc
Matter heard on	:	19 September 2024 and 18 October 2024
Judgment date	:	11 November 2024