

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. <i>yes</i>
<i>12/8/2024</i>	
DATE	SIGNATURE <i>y</i>

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 12 August 2024.

JUDGMENT

Maenetje AJ:

Introduction

[1] There are two applications before this Court. The first is an application for leave to appeal against the judgment and order handed down on 20 June 2024. The second is a conditional application for an order in terms of section 18(1) and (3) of the Superior Courts Act, 10 of 2013 to carry into effect the order granted in favour of Eskom pending the finalisation of the COJ's¹ appeal. The application in terms of section 18(1) and (3) of the Superior Courts Act is conditional on leave to appeal being granted.

[2] I granted the following order in favour of Eskom in the urgent proceedings:

- (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*

¹ I used COJ to refer to both the City of Johannesburg Metropolitan Municipality and City Power Johannesburg SOC Ltd.

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."*

Leave to appeal

[3] In finding for Eskom, I reasoned in essence that it was common cause (i.e., that there was no genuine dispute of fact) that payment by the COJ of the invoiced amount of just over R1 billion would have been due in April 2024 if it were not for automatic set-off that the COJ claimed.² The COJ based the automatic set-off on an alleged over-billing by Eskom in the amount of R3,4 billion in previous months. Eskom disputed the overbilling and the alleged debt of R3,4 billion to the COJ.

[4] The COJ raised automatic set-off as a defence to Eskom's claim and also as a basis for its counter application. The COJ sought the following orders in its notice of counter application:

"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:

² Judgment paras 18 and 33.

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."

[5] Due to the existence of disputes of fact that could not be resolved on the papers, the COJ did not persist with the relief sought in prayers 2.1 and 2.2 of its notice of counter application. Based on this, I stated that prayers 2.1 and 2.2 of the COJ's notice of counter application were abandoned in the urgent motion proceedings.³ I concluded that the abandonment of those prayers in the urgent motion proceedings meant that I could not find 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

³ Judgment paras 6 and 35.

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.

[6] I proceeded to conclude that on the common facts then, the only defence to Eskom's claim by the COJ, being automatic-set-off, could not be determined in the urgent motion proceedings. In other words, albeit not stated in the judgment, the requisites for automatic set-off could not be determined to have been met.⁴ I concluded that this meant that the COJ did not have a valid defence against Eskom's claim on the common cause facts.⁵

[7] In the application for leave to appeal, the COJ says this was a fundamental error – in fact stating the position more highly than this. It says that the Court ought to have assessed the defence of set-off against Eskom's application applying the *Plascon Evans* rule. Had that been done, the conclusion would have been that the COJ had a genuine defence to Eskom's claim and that Eskom's claim and the COJ's defence ought to be referred to arbitration as prayed for in the COJ's counter

⁴ That is, that the R3,4 billion was due and payable by Eskom and was a liquidated amount, i.e., that its ascertainment was a mere matter of calculation and not dependant on the leading of oral evidence and cross-examination. See, for instance, *Siltek Holdings (Pty) Ltd (in liquidation) t/a Workgroup v Business Connexion Solutions (Pty) Ltd* [2009] 1 All SA 571 (SCA) para 6; *Blakes Maphanga Incorporated v Outsurance Insurance Company Ltd* [2010] 3 All SA 383 (SCA) para 15; *Potgieter v Norman and others* [2001] JOL 8198 (SE).

⁵ Judgment para 37.

application. The Court should not have reached the conclusion in paragraphs 38 and 40 of the judgment.

[8] I accept that this contention by the COJ discloses a sound rational basis which supports the contention that there are reasonable prospects that the appeal court would find differently.

[9] The COJ raises other grounds of appeal which I believe do not bear reasonable prospects of success on appeal. The first of these grounds of appeal is that the Court failed to apply the provisions of the Intergovernmental Relations Framework Act, 2005 (**IRFA**). The COJ did not present any argument on this contention in the main hearing. Had it done so, Eskom may have relied on evidence in the affidavits reflecting engagements between the parties which may satisfy the requirements of IRFA. It is also doubtful that where the Court concluded that Eskom's application was urgent, it could have non-suited Eskom because of the provisions of IFRA. The second of these grounds is that the Court erred in dismissing the COJ's counter application. It is clear from the judgment that the Court did not finally determine prayers 2.1 and 2.2 of the COJ's notice of counter application. On a proper interpretation of the Court's order, the dismissal of the counter application relates to prayers 3 to 4.4 of the COJ's notice of counter application. But the Court did not state this in the order granted.

- [10] In light of my conclusion on the findings regarding the application of the *Plascon Evans* rule and a reference to arbitration, I believe that leave to appeal should be granted.

Conditional application in terms of section 18(1)

- [11] The relevant parts of section 18 of the Superior Courts Act provide as follows:

“(1) *Subject to subsections (2) and (3), and unless the court under exceptional circumstances orders otherwise, the operation and execution of a decision which is the subject of an application for leave to appeal or of an appeal, is suspended pending the decision of the application or appeal.*

(2) ...

(3) *A court may only order otherwise as contemplated in subsection (1) or (2), if the party who applied to the court to order otherwise, in addition proves on a balance of probabilities that he or she will suffer irreparable harm if the court does not so order and that the other party will not suffer irreparable harm if the court so orders.* (emphasis added)

- [12] Thus, Eskom must satisfy each of three requirements for an order permitting the immediate execution of the order granted in its favour by the Court, namely:

- a) exceptional circumstances;
- b) that it (Eskom) will suffer irreparable harm if the order is not made;
- and

c) that the COJ will not suffer irreparable harm if the order is made.

[13] I find that Eskom has not established on a balance of probabilities that the COJ will not suffer irreparable harm if the order for immediate execution is granted to Eskom. The SCA explained that, unlike the common law position, this requirement does not involve a balancing exercise between the two, i.e., harm to Eskom versus harm to the COJ, but both requirements must be separately established on a balance of probabilities. If Eskom cannot show that the COJ will not suffer irreparable harm by the grant of the execution order, that is fatal.⁶

[14] In the affidavit filed in support of the application, Eskom contends in essence that the COJ will not suffer irreparable harm because it has admitted indebtedness to Eskom in the amount of just over R1 billion. That if the COJ succeeds in its counter claim in arbitration proceedings for the alleged over payment in an amount of R3,4 billion it will be able to set off the proven claims against invoices for future supply of bulk electricity. Eskom says the alleged over payment would be covered by set off against future invoices for three months' bulk supply of electricity by Eskom. It says the COJ will not suffer any harm if it has to wait to apply set-off only once arbitration proceedings are finalised. In any event, the COJ has allegedly accumulated the over payments over a

⁶ *Knoop and Another NNO v Gupta (Tayob Intervening)* (115/2020) [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) (19 November 2020) para 48. See also *Ntlemenza v Helen Suzman Foundation and Another* 2017 (5) SA 402 (SCA) para 10 and *Incubeta Holdings and Another v Ellis and Another* 2014 (3) SA 189 (GSJ)(*Incubeta*) para 24.

long period of time. It has not acted with any expedition to refer its claims to arbitration.

- [15] In response to the alleged absence of irreparable harm to it, the COJ states the following in its answering affidavit:

“CoJ stands to suffer irreparable harm if this court grants the section 18(1) order in that:

- 19.1. If the CoJ’s set-off defense ultimately succeeds on appeal, Eskom is unlikely to be able to repay the R1,073,593,894.38 it would have received from CoJ (if the norm of preserving the status quo pending appeal, was departed from).*
- 19.2. This likelihood is apparent in Eskom’s founding affidavit supporting this application wherein it is alleged that Eskom is facing dire financial circumstances. Eskom is hopelessly bankrupt and is kept afloat by lifeboats provided by the State.*
- 19.3. The CoJ considered this to be harm that cannot be repaid at a later stage when the appeal court hands down its judgment in the CoJ’s favour.*
- 19.4. Furthermore, the CoJ has a contractual right to refer the dispute to arbitration. If the order is granted in favour of Eskom in this application, the CoJ will have been deprived of an important contractual remedy.”*

- [16] I have to accept the COJ’s response above on the prospect of irreparable harm to itself. The facts that Eskom alleges in its founding affidavit supporting the application under section 18(1) and (3) of the Superior Courts Act give rise to the COJ’s anxiety about its ability to obtain the repayment of the amount of over R1 billion should it ultimately succeed. Eskom has not given an undertaking that if the COJ succeeds with its counter claim, i.e., the claim for set-off, it would reimburse the COJ for the payment that the COJ was ordered to pay to Eskom. It only says

that the COJ would be able to set-off that amount against invoices for future bulk supply of electricity. This means that the COJ may have to wait for future invoices to set the amount paid against those invoices as opposed to obtaining immediate repayment.

[17] I therefore find that there is no proof on a balance of probabilities as section 18(3) requires that if the order for immediate execution is granted, the COJ will not suffer irreparable harm at all.

[18] I have also already found that there is a sound rational basis that the COJ's ground of appeal based on the application of the *Plascon Evans* rule and a referral to arbitration enjoys reasonable prospects of success. Prospects of success are also a relevant consideration for the Court to take into account when deciding whether to order immediate execution of the Court's order pending appeal.⁷

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

- a) Leave to appeal is granted to the full court in this division;
- b) Costs in the application for leave to appeal shall be costs in the appeal;

⁷ *Knoop and Another NNO v Gupta (Tayob Intervening)* (115/2020) [2020] ZASCA 149; [2021] 1 All SA 17 (SCA); 2021 (3) SA 135 (SCA) (19 November 2020) para 49.

- c) Eskom's application in terms of section 18(1) and (3) of the Superior Courts Act is dismissed with costs, including the costs of two counsel.



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

Date of hearing : 23 July 2024

Date of judgment : 12 August 2024

For the applicant: L Uys

Instructed by GMI Attorneys

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

Instructed by Kunene Ramapala Inc