IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 2024-084695

(1) REPORTABLE: ~~YES~~/NO

(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO

(3) REVISED.

DATE 04 MARCH 2026

SIGNATURE

In the matter between:

NICOLAAS JOHANNES DANIEL BURGER

t/a NICOUTER BOERDERY

(IDENTITY NUMBER: 5[...]) Applicant

and

ESKOM HOLDINGS SOC LIMITED First Respondent

THE MINISTER OF POLICE N.O. Second Respondent

JUDGMENT

LABUSCHAGNE J

[1] This matter commenced as an urgent spoliation application dated 30 July 2024 in terms of which the applicant applied for the restoration of the electricity supply to his farm. The original notice of motion also sought various other interdicts. As the police were involved in cutting the electricity supply, the Minister of Police was a party.

[2] The application served before Holland-Muter J, who made an order on 07 August 2024 directing Eskom to restore the electricity, which order would stand as an interim order pending final adjudication of the application. The matter was re-enrolled on the urgent roll and served before Millar J, who gave an order on 13 Auguust 2024 pertaining to the underlying disputed electricity bill. He gave an order in the following terms:

> "1. The first respondent (Eskom) shall provide the applicant with his monthly statements for the past four years dating from August 2024 and annexure B to the Electricity Supply Agreement within 14 calendar days from the date of this order. In the event of annexure B not being available, the first respondent must provide written confirmation and give an undertaking when the requested document will be made available, in the event the document becomes available.
>
> 2. The parties shall thereafter conduct a debatement of the applicant's account within 20 calendar days from the date when the applicant is provided with the statements mentioned in

paragraph 1 above. The venue, time and date shall be arranged by the parties' respective attorneys of record.

3. The applicant shall make an upfront payment to the first respondent of R25 000.00 within 14 calendar days from the date of this order.

4. It is contended by the first respondent that the current arrears amount is R244 496.41, this excludes R154 849.40 which is specifically disputed by the applicant at this stage. Insofar as the current arrears and disputed amount are concerned, the applicant contends that the statement and debatement referred to in paragraphs 1 and 2 must be completed in order to determine the due amounts in respect of both – if any.

5. If the debatement is not concluded by 30 September 2024 the applicant shall nevertheless commence paying an amount of R15 000.00 per month from 01 October 2024 until the outstanding arrears and disputed amount (if any) as determined at the conclusion of the debatement is paid in full. It is recorded that in the event of any overpayment by the applicant, this shall be refunded to the applicant within 21 calendar days.

6. In the event of a dispute surviving the debatement, the applicant shall still be required to continue making payment of R15 000.00 together with his monthly electricity account in full and by agreement the aggrieved party is permitted to re-enrol the matter

for hearing, after having filed supplementary papers and the other party having answered thereto.

7. The applicant shall continue to make payment of his future monthly electricity current account in full, on receipt of monthly invoices, as and when they become due and payable.

8. Costs are reserved."

[3] In the supplementary notice of motion dated 04 March 2025 the applicant seeks the following relief:

"1. Declaring that the first respondent was to charge the rate for electricity to the applicant in terms of the tariff applicable in 1994 for the duration of the agreement between the parties.

2. That the first respondent be ordered to reconcile its accounts from 1994 to date within 30 days of date of this order.

3. That the first respondent be ordered to charge in terms of paragraph 1 herein aforesaid from date of this order unless a further agreement is reached between the parties pertaining to the cost of electricity consumption.

4. That the first respondent is ordered to pay the costs of this application on the attorney and client scale, to be on Scale C.

5. Further and/or alternative relief."

[4] In the supplementary founding affidavit, the applicant refers to the order of Millar J which provides for the supplementation of papers by the applicant following the statement and debatement referred to in the order. The applicant contends that he has complied with the terms of the order. Arrears were paid under protest, but the account arrears were extinguished by the time the matter was heard.

[5] The statement and debatement was held on 10 October 2024 without any agreement being concluded.

[6] The applicant complains about a randomised balance that was brought forward on the invoice of October 2023.

[7] He records that Eskom has not provided the actual Annexure B referred to in the order of Millar J.

[8] The applicant's core contention is that the relationship between the applicant and Eskom is contractual and in terms thereof, the agreement makes no provision for increases to the electricity charges other than those included therein.

[9] The applicant contends that Eskom's decision to alter the electricity tariffs was unilateral and in breach of the contract. It is further contended that the prescripts of the Promotion of Administrative Justice Act, 3 of 2000 apply. The upshot of this contention is that Eskom is required to provide notice of its proposed administrative action (increases), the applicant must have an opportunity to make representations, the applicant must be provided with a

clear statement of the administrative action to be taken, he must be advised of his rights to any internal appeal or review.

[10] The applicant contends that he was not provided with notice of tariff increases and he was not advised of his rights.

[11] The applicant contends that the continued supply of electricity to the property is ancillary to the property.

ESKOM'S RESPONSE

[12] The deponent for Eskom is Mr Gideon Tshivase, employed by Eskom as Senior Legal Advisor.

[13] Eskom confirms that the order granted by Millar J was an order concluded by agreement between the parties.

[14] With reference to the agreement concluded on 28 December 1994 between the applicant and Eskom, a copy is attached.

[15] Clause 12.1 of the agreement provides that the prices to be charged by Eskom for the supply of electricity to the customer are the prices set out in the applicable tariff specified in the Eskom list of standard prices, as adjusted or amended from time to time; provided that Eskom's prices are subject to the provisions of the Eskom Act, 1987 as amended from time to time, were *inter alia* it is stipulated that Eskom may amend its prices for the supply of electricity.

[16] If the customer disputes an account, it does not have the right to reduce its debts or to make payment thereof until after the concession period permitted in terms of sub-clause 13.2.

[17] Eskom refers to section 4 of the Electricity Regulation Act, which compels NERSA to set prices and tariffs for Eskom. Eskom is a licensee who submits its application for price and tariff increases to NERSA. Eskom makes a decision on whether a tariff increase is permissible or not and determines the percentage increase to which Eskom is entitled.

[18] Section 14(1) of the Electricity Regulation Act provides that NERSA may make any license subject to conditions relating to:

> "(d) the setting and approval of prices, charges, rates and tariffs charged by licensees;
>
> (e) the methodology to be used in the determination of rates and tariffs which must be imposed by licensees."

[19] The principle pertaining to increases is regulated by section 15 of the ERA. It requires the insertion of a license condition which enables an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return (section 15(1)(a) of the ERA).

[20] In terms of section 15(2) of the ERA a licensee may not charge a customer any other tariff and to make use of provisions in agreements other than that

determined or approved by the Regulator as part of its licensing conditions (section 15(2)).

[21] Eskom's defence is therefore that clause 12.1 of the existing agreement envisages amendments to the tariffs. Further, section 4(a)(ii) of the ERA provides that NERSA must regulate prices and tariffs.

[22] Section 15(2) of the ERA provides that a licensee (such as Eskom) may not charge a customer any other tariff that make use of provisions and agreements other than that determined or approved by the Regulator (NERSA) as part of its licensing conditions.

[23] Clause 5.2.4 of Eskom's distribution license, issued by NERSA, provides:

> "The National Electricity Regulator shall determine the prices at which the licensee shall supply electricity to its consumer."

[24] Eskom points out that the applicant has not made use of an internal remedy provided for in sections 30 and 32 of the Electricity Regulation Act, 2006. This provides for an approach by an aggrieved party to NERSA.

[25] Eskom contends that its tariffs are determined by Eskom and Eskom does not offer special or individual tariff prices to individual customers.

[26] In the replying affidavit the applicant has not taken the matter any further.

ISSUES FOR DETERMINATION

[27] The applicant identified four issues for determination in supplementary heads. The first issue is whether the applicant made out a case for the mandament van spolie, alternatively interdictory urgent relief in the initial application. This issue has, however, been disposed of by Holland Muter J and is no longer a live issue.

[28] The second issue is whether Eskom is contractually bound by the tariff structure specified in the 1994 Electricity Supply Agreement, including the tariffs specified in its Annexure B.

[29] The third issue identified by the applicant is whether the Electricity Regulation Act, 4 of 2000 and the NERSA licensing framework empowers Eskom to unilaterally override specific existing contractual tariff agreements.

[30] The forth issue so identified is whether Eskom's decision to increase tariffs constitutes administrative action subject to PAJA. This issue has in the meantime been settled by the Supreme Court of Appeal (see *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Limited* [2021] 1 All SA 668(SCA)).

DISCUSSION

[31] There are only two issues remaining on the papers presented to court.

[32] When the matter was heard new counsel appeared for the applicant. He quite correctly pointed out that two of the issues had been resolved.

However, he argued that the debatement of the account did not resolve the disputes as far as the account is concerned, and that that this dispute needed to be referred to oral evidence. The only linchpin for this contention is Prayer 2 of the supplementary notice of motion. This prayer however does not echo the submissions in favour of a referral to trial or evidence. It merely seeks an order directing Eskom to reconcile its accounts from 1994. Even if such an order were granted, it would not resolve the disputes pertaining to the account.

[33] Counsel for the applicant contends that the dismissal of the application would constitute res judicata in respect of the unresolved disputes. I disagree. Counsel for Eskom echoed this position.

[34] Prayer 6 of the order of Millar J provides for papers to be supplemented and set down for determination in respect of disputes that remain after the debatement of the account. The fact is that the applicant has not sought to crystallise remaining disputes in supplemented papers, other than the continued applicability of the 1994 tariffs. Reference was made to the report, in respect of the debatement, of irrational billing by Eskom, which it attributed to the billing system. These issues have not been formulated and are not before me.

[35] I have had regard to the proposed order the applicant seeks in respect of a referral, and to the ESKOM response to it. The proposal is intermingled with the applicability of the 1994 tariffs, an issue to which I turn below.

[36] The only issue before me is the continued applicability, or not, of tariffs agreed in 1994 in the Electricity Supply Agreement. The two remaining disputes referred to above are flipsides of this central question.

DO THE 1994 TARIFFS APPLY AT PRESENT?

[37] The answer is no. The reasons are manifest. Clause 12.1 of the very 1994 agreement (ESA) between the parties envisages that the tariffs would be subject to amendment and change. The tariffs in Annexure B to the ESA would be those applying in the first year.

[38] Eskom tariffs are not determined by negotiation between Eskom and an end user like the applicant. Eskom tariffs are determined annually by NERSA as Regulator in terms of section 15(1) of the ERA. And Eskom is not permitted to charge a tariff other than a tariff determined by NERSA (section 15(2) of the ERA). This applies to Eskom bulk sales to municipalities and to end users. It also applies to the tariff charged by individual municipalities to residents (i.e. a NERSA approved surcharge on the NERSA approved tariff for bulk sales).

[39] The implication is that tariffs are not consensual. They are determined by NERSA in a statutory proses involving Eskom, municipalities and the public.

[40] In the premises the applicant has been under a misapprehension as to the law applicable to Eskom tariffs.

COSTS

[41] The costs of the urgent proceedings have not been decided. The applicant succeeded before Holland-Muter J in his spoliation application. As the applicant was successful costs would follow the result. The costs of the proceedings before Holland-Muter J are to be paid by Eskom on Scale B.

[42] The costs before Millar J are part of an accounting and debatement process which has yet to be concluded. The applicant is afforded an opportunity to supplement its papers in terms of paragraph 6 of the order of Millar J and Eskom has the right to answer thereto.

[43] As far as the issues before me are concerned, the applicant cannot succeed in his attempt to enforce tariffs that applied in 1994.

ORDER

[44] In the premises I make the following order:

1. Prayers 1, 2 and 3 of the supplementary notice of motion are dismissed with costs, such costs to include the costs of two counsel on Scale C.

2. Eskom is directed to pay the costs of the spoliation application before Holland-Muter J on Scale B.

3. The applicant is directed to file his supplemented affidavits on remaining billing disputes, subsequent to the unsuccessful accounting

and debatement of October 2024, in terms of paragraph 6 of the order of Millar J, within 30 days hereof, and Eskom is directed to answer thereto, if so advised, within 15 days thereafter. The Uniform Rules shall apply to such further proceedings including set down.

4. Should the applicant fail to supplement his papers, the applicant is to pay the costs of the proceedings before Millar J and the subsequent accounting and debatement, such costs to include the costs of two counsel on Scale C.

____

LABUSCHAGNE J
JUDGE OF THE HIGH COURT

APPEARANCES:

COUNSEL FOR APPLICANT : ADV COETSEE
INSTRUCTED BY : ELLIOT ATTORNEYS INC

COUNSEL FOR RESPONDENT : MALEBYE MOTAUNG MTEMBU ATTORNEYS
INSTRUCTED BY : ADV SHANGISA SC
ADV KUNENE