FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No: 4425/2014

In the matter between:

NGWATHE LOCAL MUNICIPALITY	Applicant
and	
ESKOM HOLDINGS SOC LTD	1st Respondent
MEMBER OF THE EXECUTIVE COUNCIL, CO-OPERATIVE GOVERNMENTS, TRADITIONAL AFFAIRS AND HUMAN SETTLEMENTS, FREE STATE PROVINCE	2nd Respondent
MEMBER OF EXECUTIVE COUNCIL, FINANCE, FREE STATE GOVERNMENT	3rd Respondent

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CORAM: JORDAAN, J

JUDGMENT BY: JORDAAN, J

HEARD ON: 28 APRIL 2015

DELIVERED ON: 28 MAY 2015

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[1] The applicant, a local municipality, under whose jurisdiction the towns of Parys, Edenvale, Heilbron, Koppies and Vredefort in the Free State falls, brought an urgent application against first respondent with the purpose of interdicting first respondent from disconnecting the bulk

electricity supply to the applicant pending the finalisation of the application. It also sought an order compelling first respondent to resume negotiations which were allegedly commenced with the applicant on the 31st of July 2014, for purposes of striving to reach consensus on the repayment of arrears owing by the applicant to the first respondent for the supply of the aforesaid electricity. The prayers also foresaw the possibility of consensus not being reached in which event it was proposed that the parties appear before court for purposes of a structured interdict regulating payment of arrears. In paragraph 2.4 of the Notice of Motion the applicant asks for an order that, pending consensus between the parties in regard to the repayment of the arrears, the applicant be ordered to ensure that its current account with first respondent is paid promptly and that it will effect payments in accordance with a payment plan sanctioned by the applicant's council on the 30th September 2014. The matter was enrolled to be heard on the 3rd of October 2014.

[2] At the hearing of the matter first respondent appeared and the parties then, by agreement, reached an interim understanding which was made an order of court. The interim agreement was to the effect that the first respondent (herein later called Eskom) undertook not to disconnect the electricity supply to the applicant pending finalisation of the application, the applicant be allowed to file supplementary affidavits and Eskom allowed to file a counter application if

so advised. Paragraph 8 of the aforesaid agreement and order of court read as follows:

> "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 to the maximum amount billed by Eskom Holdings SOC Ltd."

(It needs to be mentioned that the plural was used because there were a few other similar applications enrolled for the same date. The interim agreement applied to all those applications.)

[3] In terms of the interim ruling affidavits were filed as well as a counter application on behalf of Eskom and the matter postponed to a further date and again postponed twice until it was finally heard on the 31st of April of this year.

HISTORICAL BACKGROUND

[4] The background history leading to the said application is not in dispute and indeed common cause. Like most, if not all other municipalities in the country, the applicant buys bulk electricity from Eskom in terms of a written agreement between the parties. Payment for electricity so bought and supplied during a specific month has to be paid in the month following upon the month it was supplied. The applicant started to fall in arrears in paying its account with Eskom so that in January 2009 it was in arrear in the

amount of R6,3 million, a year later in January 2010 the arrears amounted to R10,6 million, in 2011 it amounted to R30 million, in January 2012 amounted to R61 million, in 2013 R113 million, in January 2014 R194,7 million and in September 2014 the amount of R274,8 million.

[5] During the aforesaid period the parties negotiated with a view of reaching consensus as to the payment of arrears and keeping the account up to date. *Inter alia* the applicant submitted a payment plan on the 21nd of November 2013 according to which the applicant undertook to keep the current account fully paid and to make payments towards arrears so that the amount of arrears would, according to the payment plan be reduced to R109 million as at April 2014. When the payment plan was submitted the arrears amounted to R169 million. The payment plan foresaw that the arrears would be fully paid by November 2014.

[6] In actual fact however, the applicant still did not pay its current account in full causing the arrears to escalate so that, in April 2014 when it should have been R109 million according to the payment plan, it escalated to an arrear amount of R216 million. That led Eskom to give notice to the applicant that it intended discontinuing the supply of electricity, which notice was dated the 8th May 2014. Eskom's intention to do that was also published in newspapers for comment on the 6th of June 2014. The public notice published intimated that Eskom intends

discontinuing the supply of electricity to the applicant on the 21nd of July 2014, it invites submissions and comments to be delivered on or before the 27th of June 2014 and it further indicates that Eskom would, after consideration of the aforesaid, publish its final decision in a notice on the 14th of July 2014.

[7] The applicant then alleges that Eskom indeed published a notice during July 2014 to the effect that the supply of electricity will be disconnected to the applicant on the 4th of August 2014.

[8] The officials of the applicant then became involved in negotiations with Eskom again and also involved the second and third respondents in those negotiations. The purpose of the negotiations obviously was to reach agreement as to an acceptable payment plan to pay off the arrears and the current account with Eskom. Eskom in the meantime undertook to suspend its decision to discontinue supply pending the outcome of the negotiations. It remained however adamant that the notice of intention to discontinue was only suspended and not withdrawn so that Eskom could, if need be, continue with the discontinuation of the supply in terms of the notices.

[9] As aforesaid, various other municipalities were involved in the same problem at that stage and it was agreed that all those municipalities would provide a payment plan to

Eskom for the latter's approval. In view of that a payment plan on behalf of the applicant was submitted to Eskom before the end of August 2014, which Eskom did not find acceptable and informed the third respondent, who was involved in negotiations on behalf of the municipalities, as such. Eskom proposed some changes to the payment plans by means of a letter dated the 18th of September 2014 to be approved by the council of the applicant and again submitted to Eskom by the 30th September 2014. The applicant did not submit a revised payment plan by the 30th of September as requested by Eskom. As a result of that Eskom addressed a letter dated the 1st of October 2014 to the applicant in which the following appears:

> "It is unacceptable to Eskom that the payment plans have to date not been agreed on and in addition the current accounts are not being paid in full and on time resulting in escalation of the municipal arrear debt to R258 million as of 30 September 2014. ... As you are aware, on the 31st of July 2014 we agreed in a meeting held at Megawatt Park, Johannesburg to suspend the disconnection of electricity supply to the municipality, scheduled for 4 August 2014 to 31 August 2014 but that the disconnection notice will, however, remain in effect. ... The current situation cannot be sustained at the expense of Eskom's financial and operational sustainability and we advise you that the electricity supply to the Ngwathe Municipality will be disconnected on 3 October 2014 at about 12H00."

That led to the urgent application by the applicant brought to be heard on the 3rd of October 2014.

[10] In a letter by the 3rd respondent following upon the meeting of the 14th of July 2014 to resolve the problem, 3rd respondent confirmed that the interim arrangement would be that the municipalities (which includes applicant) will in the meantime keep their current account up to date. It is clear that the applicant did not even comply with that requirement so that, for instance, of the current account of October 2014 in the amount of R10,3 million, the applicant only paid around R500 000,00. It is also common cause that the applicant did not even keep to the interim arrangement reached between the parties and made an order of court on the 3rd of October 2014 according to which the applicant was obliged to pay over to Eskom all moneys recovered and collected in respect of electricity by the applicant.

COUNTER APPLICATION

[11] Before the hearing of the matter Eskom applied for an amendment to the prayers in the counter application which was unopposed and I will deal with the counter application as envisaged in the amendment.

[12] The counter application as amended prays for declaratory orders, firstly to the effect that the applicant failed to comply with the interim order granted by agreement by not paying

over the debt collected in respect of electricity as envisaged in paragraph 8 of the order. Eskom prays that the applicant be found in contempt of court and the application dismissed on that basis alone, alternatively seeking the original declaratory orders to the effect that it is declared that Eskom complied with all its statutory duties and are indeed entitled to discontinue the supply of electricity to the applicant if sufficient steps are not taken to the satisfaction of Eskom, providing for the payment of the current account and arrears. It also asks for a declaratory order to the effect that, in all the circumstances, the Free State Government is compelled to intervene in the affairs of the applicant as contemplated in section 139 of the Constitution.

APPLICANT'S CONTENTIONS

[13] In broad, the contention on behalf of the applicant is that Eskom did not comply with its statutory duties before deciding on the discontinuing of supply, as informed mainly by section 41 of the Constitution, section 44 of the Local Government, Municipal Finance Management Act 56 of 2003 and sections 35, 40, 41 and 45 of the Inter-Governmental Relations Framework Act 13 of 2005.

[14] Applicant argues that Eskom did not negotiate in good faith, abandoned negotiations before doing everything reasonable and necessary to reach a solution and not participating in the necessary structures to resolve disputes between organs of state.

[15] Applicant contends that Eskom did not negotiate in good faith, did not co-operate in mutual trust to assist and support the applicant and has a duty to secure the wellbeing of the people of the Republic, which will be affected by the discontinuation of supply of electricity. It maintains that Eskom is not entitled to rely on the previous notice since it was negated by the negotiations that followed and at least has to give fresh notice before it can discontinue supply.

[16] The deponent on behalf of applicant, the municipal manager, also alleges that the problem is rather to be laid at the door of Eskom because the latter neglected to enforce its rights and it allowed the applicant to run into excessive arrears and for years allowed the situation to worsen. He also alleges that the applicant has for the past six years not pursued any formal debt collection program which exaggerated the problem to the extent that, at present, the applicants monthly shortfall between income expenditure in general amounts to almost R10 million per month.

APPLICABLE STATUTES

[17] The relevant statutory prescripts on which the applicant and Eskom rely are the following:

1. Section 41 of the Constitution *inter alia* contains the following:

"**41. Principles of co-operative government and inter-governmental relations:**

(1) all spheres of government and all organs of state within each sphere must .... (b) secure the well-being of the people of the Republic ... (e) respect the constitutional status, institutions, powers and functions of government in the other spheres ... (g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere ... (h) co-operate with one another in mutual trust and good faith by - ... (ii) assisting and supporting one another; (iii) informing one another of, and consulting one another on, matters of common interest ... (vi) avoiding legal proceedings against one another. ...

(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.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved."

[18] Section 139 of the Constitution provides in subsection (5):

"If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must - (a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to

provide basic services or its financial commitments, ... (b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue raising measures, necessary to give effect to the recovery plan, ..."

[19] Section 139(7) provides:

"If a provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive."

[20] Section 44 of the Local Government; Municipal Finance Management Act, Nr 56 of 2003 provides:

"Disputes between organs of state

(1) Whenever a dispute of a financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court.

(2) If the National Treasury is not a party to the dispute, the parties-

(a) must report the matter to the National Treasury; and

(b) may request the National Treasury to mediate between the parties or to designate a person to mediate between them.

(3) If the National Treasury accedes to a request in terms of subsection (2), the National Treasury may determine the mediation process.

(4) This section only applies if at least one of the organs of state referred to in subsection (1) is a municipality or municipal entity.

[21] The Inter-governmental Relations Framework Act, Nr 13 of 2005 contains the following relevant provisions; Section 40:

> "**Duty to avoid intergovernmental disputes**
>
> (1) All organs of state must make every reasonable effort-
>
> (a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and
>
> (b) to settle intergovernmental disputes without resorting to judicial proceedings.
>
> (2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute."

[22] Section 41 stipulates:

> "**Declaring disputes as formal intergovernmental disputes**
>
> (1) An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing.
>
> (2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.

[23] Section 45 provides:

"**Judicial proceedings**

(1) No government or organ of state may institute judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful."

DISCUSSION

[24] The applicant heavily relies on the prescripts of section 41(3) and (4) of the Constitution read with section 44 of the Municipal Finance Management Act and sections 40, 41 and 45 of the Inter-governmental Relations Framework Act. Applicant maintains that Eskom failed to co-operate and negotiate in good faith, failed to make every reasonable effort to settle the dispute and failed to exhaust all reasonable other remedies to resolve the dispute as required by section 41 of the Constitution and/or section 44 of the Municipal Finance Management Act. Applicant furthermore contends that Eskom failed in its duty to avoid disputes as prescribed by section 40 of the Inter-governmental Relations Framework Act, has not declared a formal dispute and should not be allowed its day in court because of the fact that no formal dispute has been declared and all efforts to settle such dispute has not been made as required by sections 40, 41 and 45 of the Inter-governmental Relations Framework Act.

[25] The simple answer to applicant's aforesaid contentions is that there are no disputes. Applicant does not dispute the amount of and the fact of its liability towards Eskom. It does not dispute the fact that it is in arrears. It does not dispute that it is obliged to pay such arrears and any current liabilities towards Eskom. Applicant's only real complaint is that Eskom should have been more lenient and accommodating towards efforts aimed at enabling the applicant to pay the undisputed debts.

[26] In my view the aforesaid statutory prescripts in respect of disputes and dispute resolution are all inapplicable. The only relevant statutory prescripts are those aimed at co-operation, assistance and mutual support.

[27] In my view the position of the parties in the present circumstances, as far as statutory prescripts are concerned, are informed by, *inter alia*, section 41(1)(b)(g) and (h) of the Constitution and section 35 of the Inter-governmental Relations Framework Act.

[28] In terms of section 41 of the Constitution the applicant and Eskom is obliged to co-operate with a view of securing the wellbeing of the people of the Republic. In doing that the said parties should exercise their powers in a manner that does not encroach on the functional integrity of the other. They are obliged to co-operate in mutual trust and good faith by assisting and supporting one another, consulting

one another on matters of common interest and avoiding legal proceedings against one another as far as possible.

[29] In terms of section 35 of the Inter-governmental Relations Framework Act the parties should, where the performance of a statutory duty or the provision of a service depends on the participation of organs of state in different governments, co-ordinate their actions *inter alia* by entering into an implementation protocol.

[30] The question then is whether Eskom and/or the applicant complied with the aforesaid duties.

[31] As can been seen from the factual background of the matter above, Eskom has since 2009 been extremely lenient towards the applicant. In fact, the deponent on behalf of the applicant in the counter application states that the Eskom had, for a long time, neglected to enforce its rights and allowed the applicant's account to become long and excessively overdue. It blames Eskom for being too lenient.

[32] The same deponent also alleges that the applicant has for the past 6 years not pursued a formal debt collection programme, which exacerbated the problem. By its own admission the applicant neglected to take the necessary steps to collect debts from its consumers notwithstanding their payment plan proposed to Eskom in November 2013 where they undertook to settle the account in full by

November 2014. According to the applicant it functions as a municipality in circumstances where their liabilities and monthly expenses exceeds their income by R10 million each month.

[33] It is only now when Eskom threatens drastic action to enforce their rights that the applicant starts implementing a proper debt collection system. In view of the applicant's history as far as effective administration and control is concerned, it is questionable whether it is able to effectively implement a proper collection system.

[34] It is clear that it is indeed the applicant that failed in its duties as required by the aforesaid statutory enactments. The applicant's lack of proper administration and debt collection indeed encroaches upon the functional integrity of Eskom as envisaged in section 41(1)(g) of the Constitution. Eskom has the duty to supply electricity to the whole of the Republic and its people. To be able to do that it should have sufficient financial resources. If the accounts of certain municipalities are not paid, it endangers the functionality of Eskom in its duty to secure the wellbeing of the people of the Republic as a whole by being able to supply electricity to all municipalities. As much as the applicant should be able to rely on Eskom's co-operation in trust and good faith and its assistance and support, so should Eskom be able to rely on the applicant's co-operation in good faith, assistance and support.

[35] The result of all this is that I am not convinced that Eskom failed its statutory duties. It is indeed the applicant that failed its statutory duties and has done so for a number of years. I am not convinced that there are sufficient grounds justifying the grant of the relief claimed in the main application.

COUNTER APPLICATION

[36] In the amended counter application Eskom first seeks an order declaring the applicant in contempt of court and dismissing the application on that basis alone. The basis of that is to be found in the order made by agreement on the 3rd of October 2014. It is common cause that the applicant did not comply with that order in failing to pay the current account of Eskom in full for the period since the order was granted.

[37] It is clear that the applicant, although consenting to the aforesaid order, was in fact financially unable to comply with the order. In those circumstances I am not convinced that the applicant's failure to comply with the order was indeed in wilful contempt.

[38] As already stated the counter application also seeks declaratory orders to the effect that Eskom, in the circumstances, is entitled to discontinue the supply of electricity to the applicant and related declaratory orders.

[39] Paragraph 1.7 and 1.8 of the prayers contained in the counter application envisages a 'declaratur' to the effect that the applicant is in breach of its executive obligations to such an extent that the provincial government is compelled to intervene in terms of section 139 of the Constitution.

[40] It appears to be clear that the municipality is in a financial crisis and admits that it is unable to meet its obligations and financial commitments. It therefore clearly complies with the requirements for intervention by the provincial executive. I am however not convinced that such orders can be granted at this stage without the Premier of the province being joined in the proceedings.

[41] As to the rest of the orders sought by Eskom, it appears to have been appropriate at the time when the counter application was brought. However, at this stage it is almost a year later after Eskom started the necessary preliminary proceedings to disconnect the electricity of the applicant. Secondly it is unclear whether Eskom ever published its final decision on the 14th of July as it undertook to do in its notice to the public. Although Eskom alleges that it did, the applicant denies that and alleges that negotiations were resumed before Eskom did that, so that the necessary final decision has never been published. If the orders as sought are granted, it will entitle Eskom to discontinue the supply of electricity with only a week's notice.

[42] In view of the effluxion of the time, the fact that the final decision was most probably never published, all of which may have lured the public into a false sense of security, I am of the view such drastic orders cannot be granted at this stage.

[43] It was emphasised on behalf of the applicant that any orders entitling Eskom to discontinue the supply of electricity to the applicant would lead to serious hardships to the inhabitants of the different towns under the applicant's control and will most probably also lead to riotous uproar in the community. I am acutely aware of those facts and the possible consequences of such an order but, as a court of law, I have to apply the law and cannot be held ransom by threats of violence and unruly criminal activity as a result of that. It is the duty of the applicant, the Provincial and/or the National executive to take the necessary steps to prevent such situations arising. In the mean time, Eskom cannot be compelled to indefinitely continue the supply of electricity without being paid. That will compromise its ability to continue with its national task in supplying electricity to the inhabitants of the Republic as a whole and definitely compromise Eskom's functional integrity.

[44] I am satisfied that Eskom is entitled to some form of relief, which will strike a balance between its right to discontinue

the supply of electricity and the interest of the community in preparing for such an event.

[45] As far as costs are concerned, there appears to be no reason why the unsuccessful applicant in the main application and unsuccessful respondent in the counter application (applicant in the main application) shall not be liable for the costs of both the main and counter applications. However it appears that the postponements on the 3rd of December 2014 as well as the 29th of January 2015 were caused by Eskom filing its papers later than agreed upon and amending its counter application respectively. It should therefore be held liable for the wasted costs occasioned by the postponements on the aforesaid two dates.

[46] In the result the following orders are granted:

A. The main application is dismissed.

B. In the counter application the following orders are granted:

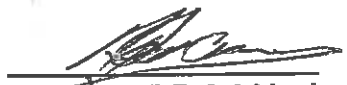
1. Should the applicant fail to pay first respondent the full outstanding amount of its arrear account, including any amount due in respect of its current account, within 14 days of the date of this order, first respondent is entitled to discontinue the electricity supply to the applicant, subject to following:

1.1 Notice of its intention to discontinue the supply of electricity must be given to the applicant and published in a newspaper circulating in the area of the applicant's jurisdiction, calling for representations as to the discontinuation of the supply of electricity, which notice must be published at least 4 weeks prior to the intended date of discontinuation and state the intended date thereof.

1.2 A notice confirming first respondent's final decision must be given to the applicant and published as aforesaid at least 14 days prior to the date of discontinuation, again stating and confirming the date thereof.

C. 1. First respondent is ordered to pay the costs occasioned by the postponement of the applictions on the 3rd of December 2014 and the 29 January 2015, including the costs occasioned by the employment of two counsel, where so employed.

2. The applicant is ordered to pay the costs of the main and counter application, including the costs occasioned by the employment of two counsel, excluding the costs referred to in paragraph (C)(1) above.



A. F. JORDAAN, J

On behalf of applicant:	Adv. F.W.A. Danzfuss SC Assisted by: M. C. Louw Instructed by: Moroka Attorneys BLOEMFONTEIN
On behalf of the first respondent:	Adv. M. Khoza SC Assisted by: N. H. Moloto Instructed by: Phatsoane Henney Attorneys BLOEMFONTEIN

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