IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE LOCAL DIVISION, BHISHO)

CASE NO.: 09/2022

Date of hearing: 17 February 2022

Electronically circulated: 24 March 2022

In the matter between:

MCINGA & COMPANY (PTY) LIMITED T/A
M & C BUSINESS SOLUTIONS Applicant

And

ESKOM HOLDINGS SOC LIMITED Respondent

JUDGMENT

MAJIKI J:

[1] The application was before court on the return day of a *rule nisi* issued on 18 January 2021. The applicant had approached court for an interim urgent order, in the main for the reconnection of electricity supply, by the respondent, to the premises leased by the applicant. The said order was granted and the respondent was also prohibited from disconnecting the electricity supply, pending the finalisation of the matter. The application is opposed by the respondent.

[2] The common cause background to the application is that in December 2018 the applicant occupied erf 1194 Hamburg (the premises) belonging to Ngqushwa Municipality (municipality). At all material times the electricity was supplied by

the respondent in the premises. As will become apparent hereunder, no payments were made for the consumption of the electricity. In fact, neither the municipality nor the applicant was invoiced by the respondent for the electricity supply. According to the respondent as a result of the internal audit, consumption reading and the discovery that the account in respect of the premises was not active, the electricity was disconnected.

[3] Consequent to the disconnection of the electricity, on 27 August 2021 the applicant and the respondent concluded a written electricity supply agreement (the agreement). The terms of the agreement are also common cause.

[4] Both parties are in agreement that when the applicant was invoiced, the account included the consumption in respect of the period prior to the date of the signing of the agreement. According to the applicant the invoice it received was for the period from August 2018 to September 2021. According to the respondent the applicant was billed for the arrears which accrued since December 2018. The invoices sent by the respondent to the applicant are also common cause, they are as follows:

> Invoice NM2 received on 22 September 2021 reflecting R94 955.05
> Invoice NM3 also received that same day reflecting R244 064.11
> Invoice NM4 received on 27 September 2021 reflecting R389 803.74
> Invoice NM6 received on 11 October 2021 reflecting R409 073.64.

[5] On 4 November 2021 the respondent disconnected the electricity supply in the premises.

THE APPLICANT'S CASE

[6] According to the applicant on 27 September 2021 it sent an email to the respondent querying the account and requesting a monthly breakdown of the charges of the account. There was no response.

[7] The applicant avers that the municipality never issued invoices to it, therefore it was wrongful to disconnect the electricity supply on the basis of the arrears, which according to the applicant were accumulated by the municipality. Further, the invoices have discrepancies. Its attempts to resolve the issue with the respondent yielded no results.

[8] The applicant avers that at a later stage the respondent communicated. Among others it identified the amount of R12 901.78 from 22 August 2021 to 21 September 2021, that of R16 212.61 in respect of the period from 21 September 2021 to 21 October 2021. Further, the respondent said the applicant illegally consumed electricity from December 2018 to 23 August 2021, the cost thereof was in the tune of R376 901.96. On 11 January 2022 the applicant responded to the respondent's letter. The applicant denied that the electricity was consumed illegally. It recorded that the right of occupation and use of electricity was granted to it by the municipality, the respondent's client. Therefore, the municipality was liable for the period before the applicant and the respondent concluded the agreement in August 2021.

[9] The applicant stated further that, it was wrongful and unlawful for the respondent to disconnect electricity whilst it had failed to initiate mediation and arbitration process. It was also unlawful for the respondent to disconnect electricity because it had miscalculated its account. It undertook to pay the sums of R12 901.78 and R16 212.61 within fourteen (14) days after the restoration of electricity. According to the applicant it never received invoices reflecting the said amounts for the period August to October 2021.

[10] According to the applicant it is unclear how it would be said it illegally consumed electricity because the respondent supplied electricity to the municipality and failed to invoice the municipality. On 16 August 2021 the respondent's records reflected a balance of R0.00.

[11] The applicant avers that it was suffering on going harm. It had an agreement with the department of transport to accommodate its officials who are working on R72 road project. The agreement would end in February 2022. There are jojo tanks stored in the premises that require electricity in order to pump water to the units. The water is a scarce resource, the premises are located in a rural area.

[12] The applicant avers further that, it first occupied the premises in December 2018. In February 2019 the respondent's technical team responded to the municipality's director of technical service's request to fix a faulty transformer. That indicates that the respondent was always aware of the electricity consumption in the premises. On 4 September 2021 the municipality unlawfully dispossessed the applicant of the premises. The spoliation proceedings it instituted against the municipality had were finalised in the applicant's favour.

[13] The director of the applicant and the deponent herein says her attempts to obtain an invoice were unsuccessful. She says in July 2019 she contacted Mr Reddy, the then respondent's provincial general manager who said the respondent's client was the municipality, she should communicate with the municipality. The municipality said it would give her an invoice once the lease agreement was finalised. In March 2020 Mr Gobingca who was also a provincial general manager, expressed sentiments similar to those of Mr Reddy. According to the respondent, as confirmed by Mr Reddy, in July 2019 he had already left Eastern Cape and had no recollection of the said discussion. As for Mr Gobingca, he left the respondent's

employ, the respondent could not locate him within the time that was available to the respondent, during the preparation of the answering affidavit.

[13] Regarding urgency, the applicant says when it launched the application on 14 January 2022 there had been no electricity since 4 November 2022. A letter from the department of transport dated 12 November 2021 had been delivered to the applicant, giving notice of breach of contract. The department gave notice to the applicant to rectify all the recorded issues within seven days of the notice. Among those, was non-availability of water on the premises. The applicant requested indulgence from the department to resolve the electricity issues and the department gave it limited time. On 14 December 2022 the applicant's attorney tested positive for Covid 19 and came back to office on 4 January 2022 and was able to consult with counsel on 8 January 2022. The applicant says the application was brought on semi-urgent basis.

THE RESPONDENT'S CASE

[15] According to the respondent the non-existence of an agreement with the municipality was an oversight due to an administrative error. No electricity is being claimed from the applicant in respect of a period before the applicant took occupation of the property. The applicant never paid for electricity consumption since the conclusion of the contract, as well. The applicant failed to comply with its material obligation in the terms of the agreement. The respondent therefore is excused from complying with its obligations in terms of the contract, including the obligation to supply electricity.

[16] Further, the applicant only paid part of the R150 000.00 agreed security deposit. The applicant also failed to pay R13 000.00 it had undertaken to pay in terms of the debit order arrangement. The payments were dishonoured due to

insufficient funds. The applicant in reply disputes that it failed to make payment and avers that the respondent only attempted to make deductions on 10 November 2021, after the disconnection. The respondent reported that an error occurred with its loading of the debit order. No deduction was made in September and October. Regarding the deposit, the applicant replied that it negotiated its payment to be over a period of 3 (three) months. That was accepted on condition that R50 000.00 was paid immediately, which was done. Two instalments amounting to R100 000.00 were paid. The last instalment would have been due on 30 November 2021. The attached confirmation of payments reflects:

R50 000.00 on 30 August 2021
R20 000.00 on 27 October 2021
R50 000.00 on 16 November 2021

[17] Furthermore, when invoices were dispatched the applicant was given notice to pay. On the second page of the invoice under the heading LATE PAYMENTS, NON-PAYMENTS AND DISCONNECTION it is recorded that Eskom is entitled to disconnect supply for non-payment. The arrears are in respect of the period from December 2018 when the applicant took occupation. During the hearing Mr Beyleveld, counsel for the respondent, submitted that the applicant was given notice of the disconnection. It is captured in annexure NM3, affording the applicant seven days to avoid further disconnection. Annexure EH2, which is an invoice for January 2021 recorded that overdue accounts must be paid immediately, otherwise the supply may be subject to disconnection without further notice.

[18] Furthermore, the invoices for the period from December 2018 were rendered after the conclusion of the contract, that was why the arrears were shown to be as at sixty (60) days. The billing was backdated, it is in respect of the period 28 December 2018 to 20 December 2019 but billed in September 2021. For the period

21 December 2020 to 20 September 2021 the billing was on 23 September 2021. For the period 21 September 2021 to 20 October 2021 the billing was on 25 October 2021. Finally, for the period 21 October to 20 November 2021 the billing was on 20 November 2021. The contract does not detract from the fact that prior to the conclusion of the agreement the applicant was obliged to pay for electricity consumed from the date it took occupation. The applicant is at least, enriched by the amount of electricity received and the respondent is impoverished by not receiving payment for electricity supplied at applicable tariff.

[19] As a result thereof, according to the respondent the applicant further contravened the respondent's payment conditions as envisaged in terms of section 21(5) of the Electricity Regulations Act 4 of 2006, as amended, (the Act) by failing to pay for consumed electricity. The applicant also contravened section 21(5) of the Act by failing to enter into agreement for the supply of electricity. The applicant has an alternative remedy, that of paying what is owing, and the issues would be resolved. It is not open to the applicant to tender what it considers reasonable or impose conditions for payment. It has to pay for the electricity it has consumed.

[20] According to the respondent it has no obligation to reconnect the electricity. The interim order was granted in its absence. It was only able to instruct attorneys to oppose the matter on 25 January 2022. Further, the respondent avers that there is no genuine dispute between the applicant and the respondent regarding the amount of tariff fees raised. The applicant in its own version has not paid for the period after the conclusion of the contract. The said amount remains unpaid even after the electricity was reconnected.

[21] The respondent strongly disputes that the matter is urgent. It avers that there was no rational reason for the extremely short truncated periods elected by the applicant. The applicant adopted a supine attitude since the disconnection in

November last year, whilst aware of the disconnection since then. The matter cannot even be described as semi-urgent. The application was issued on Friday 14 January 2022, the respondent was to file answering affidavit on or before 18 January 2022 and the hearing for the interim relief was set down for the same day.

[22] The material terms of the contract referred to by the applicant are:

> '6 This Agreement shall come into force on the date of signing hereof and shall remain in force, subject to clauses 26 and 31 or (three) month's written notice of termination by either Party or following the occurrence of an Act of Insolvency in respect of the CUSTOMER which shall entitle ESKOM to immediately terminate this Agreement upon written notice to the CUSTOMER.
>
> 8.2 Should the CUSTOMER authorise payment of its electricity accounts by debit order as set out in Annexure 'K' (Authorisation for Debit Order or Automatic Payment of Electricity Account), ESKOM shall debit the CUSTOMER's bank account with the total amount payable on the Due Date.
>
> 25.1 This Agreement constitutes the sole and entire agreement between the Parties and supersedes all previous negotiations, arrangements or agreements in respect of the subject-matter of this Agreement, other than the Quote, separate agreement or documents relating to rights-of-way and/or servitudes.'

[23] In answer to the submissions on behalf of the applicant Mr Beyleveld submitted firstly that, the non-variation clause does not apply to clauses 7.2 and 9 of the agreement. It provides:

‘7.2.1 The Tariff is the standard tariff as published by ESKOM and prescribed in the Schedule of Standard Prices for the Tariff, subject however to (a) ESKOM’s right to adjust the prices it charges for electricity supplied in accordance with the provisions of the Electricity Regulation Act and with the approval of NERSA, and (b) the CUSTOMER’s obligation to pay any taxes and/or levies which may be imposed in terms of any existing and/or future Law or as approved by NERSA.

9.1 As security for the due payment of the electricity accounts to be rendered in terms of this Agreement, the CUSTOMER shall, prior to the supply being made available in terms of this Agreement, furnish ESKOM an Electricity Accounts Guarantee for an amount equal to the Electricity Account Guarantee Amount as set out in Part A of Annexure ‘D’.

[24] The respondent disputes that the applicant’s letter of demand constitutes a dispute in terms of clause 32 of the agreement. It avers that even if there was a genuine dispute, the applicant has no basis for simply not making payments at all.

Clause 32.7 provides:

‘The Parties agree that while a Dispute is continuing, they shall both continue to perform their respective obligations under this Agreement until the Dispute has been fully and finally resolved in accordance with the provisions of this Clause 32. It being specifically agreed that where the nature of the Dispute precludes compliance (whether in full or in part) with this Clause 32, the Party who is so precluded from performing shall

forthwith notify the remaining Party/ies that it is so unable to perform and the reasons therefor. Any Party receiving notice of an inability to perform in terms of this Clause may dispute the content thereof, which dispute shall in itself be dealt with contemporaneously with the Dispute.'

[25] The issue for the application is whether the applicant has made out a case for the confirmation of the *rule nisi* issued on 18 January 2022.

[26] Firstly, with regard to urgency, the applicant approached court in terms of rule 6(12) of the Uniform rules. The applicant referred to rule 6(12) (a) only in the notice of motion however, in actual fact both rule 6 (12) (a) and (b) are applicable. Rule 6(12) provides:

'(a) In urgent application the court or a Judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to it seems meet.

(b) In every affidavit or petition filed in support of any application under paragraph (a) of this sub rule, the applicant shall set forth explicitly the circumstances which he avers render the matter urgent and the reasons why he claims that he could not be afforded substantial redress at the hearing in due course.'

[26] During the hearing, Mr Mafu, counsel for the applicant, seemed to be under the impression that on the return day the aspects relating to urgency and costs of the application were no longer issues to be dealt with and determined. According to him the court that granted the interim relief disposed of the said issues.

[27] The order was framed as follows:

‘1. The forms and service provided for in the Rules are dispensed with and that the matter is disposed of as one of urgency at the time and place set out herein, in terms of rule 6(12) (a) of the Uniform Rules of Court;

2. A *Rule Nisi* is granted calling upon the respondents to show cause, if any, on Tuesday, 15 February 2022 (the return date) at 09h30 or so soon thereafter as the matter may be heard as to why the following Order should not be made final:

2.1 The respondent is ordered to immediately reconnect the applicant’s electricity supply at Erf 1194, Hamburg (commonly known as Emthonjeni Arts Centre)

2.2 The respondent is prohibited from disconnecting the applicant’s electricity supply at Emthonjeni Art Centre pending the finalisation of the dispute resolution process.

2.3 The costs of the application are to be paid by the respondent on the scale as between attorney and client.

3. Sub paragraphs 2.1 and 2.2 above will operate as an interim order pending the finalisation of the matter.

4. The applicant is granted leave to serve this Order by:

4.1 Serving a copy via Sheriff to the respondent’s chosen address being Megawatt Park, Maxwell Drive, Sunninghill Extension 3, Sandton, Gauteng.

4.2 Emailing a copy of the Order to the respondent's email addresses…'

[28] The order was obtained in the absence of and without the benefit of hearing the respondent. The respondent had not filed the notice to oppose and the answering affidavit in the matter. It had no opportunity to oppose the very issues of urgency and costs. No argument could have occurred in relation to the said issues when the interim order was issued. The only terms of the order the court made a determination that they should operate, in the interim, are contained in paragraph 2.1 to 2.3 of the order.

[28] Regarding urgency, the time line of events is as follows:

4 November 2021	-	the electricity was disconnected
12 November 2021	-	the department of transport wrote to the applicant giving it notice to rectify the water supply issue.
18 November 2021	-	the applicant sent an email to the respondent requesting it to reconnect the electricity.
25 November 2021	-	the applicant sent a letter of demand to the respondent.
14 December 2021	-	the respondent's legal department, responded to the letter of demand.
11 January 2021	-	the respondent responded to the letter of demand, for electricity to be restored by 12 January 2021
14 January 2021	-	the application was launched.

[29] The explanation given by the applicant relates the time lapse from 14 December 2021 to 4 January, when its legal representative was not in office due to having tested positive to Covid 19. There is no explanation why the application was not brought between 5 November 2021 and 13 December, before he tested positive. There is also no explanation of what the applicant did until the letter from the department of transport on 12 November 2021. The first contact by the applicant to the respondent was on 18 November 2021, despite the fact that the applicant had stated that the department gave a limited time to rectify the electricity supply and related issues. Similarly, explanation is lacking as to why the application could not be brought either on 4 or 5 January 2022 and why consultation with counsel could only take place on 8 January 2022.

[30] When the applicant finally brought the application on Friday 14 January 2022 it called on the respondent to file its answering affidavit in about 24 hours or less with the matter enrolled for hearing within the same 24 hours at 10h00 on 18 January 2022. The applicant has not furnished any reason for the very stringent truncated timeframes, after it took so long to launch the application.

[31] At this point reference is made to the judgments of this division in **Malawi v MEC Corporate Governance and Traditional Affairs, Grahamstown Case No. 779/2020** (delivered on 29 June 2020). Therein, the applicant had been removed as a councillor on 18 March 2020. The matter was enrolled for hearing of Part A on 26 March 2020. On that date, significantly, an order was agreed to by the litigants. It incorporated a timetable, including an order for the filing of the record. All affidavits by the applicant, had been filed, including a supplementary affidavit after the filing of the record. The matter was argued in June 2020. In the affidavits the applicant had not addressed the requirement of rule 6(12) (b) of the rules. In argument it was submitted that a municipal by-election was to be held in July 2020. The application was struck of the roll, the court held that the applicant had

unacceptably truncated the timeframes provided for in the rules. The litigants in the present case did not even agree about the next date of hearing.

[32] In **Oos Vrystaat Kaap Operations v De Klerk Grahamstown Case No. 1075/2020** (delivered on 3 July 2020) the applicant had first heard reports of the first respondent's contravention of a restraint of trade agreement on 13 May 2020. He was approached to refrain from his actions. More reports that the first respondent was, on 26 to 28 May 2020 soliciting business came in. A letter of demand was sent on 3 June 2020. Application papers were issued on 8 June. The notice to oppose, answering and replying affidavits were filed on 9, 15, 18 June respectively. The court re-iterated that, deviation from the usual rules should not be taken lightly. It was in exceptional circumstances that the court would deal with applications on urgent basis. The court was not satisfied that the interests of justice outweighed the right of parties to have a considered opportunity to place their case before court, in circumstances where it was speculative if applicant's clients were affected by the contravention.

[33] The applicant has failed to demonstrate that the degree of urgency of the matter justified the very short time frames it afforded the respondent. As intimated during the hearing, the matter was argued in full. I deem it prudent that, instead of striking off the matter from the roll for lack of urgency, the matter must be determined even on the merits.

[34] The submissions on behalf of the applicant regarding the approach to the application are that the application is seeking an interim order pending the finalisation of the process in terms of alternate dispute resolution. According to Mr Beyleveld, the relief sought has a final effect. This distinction impacts on the test to be applied in the determination of the matter. The submissions on behalf of the respondent in this regard, which I agree with, find support in LAWSA Volume 11,

first re-issue at paragraph 314, and **OASIS Group Holdings (Pty) Limited and another** 2006 (4) AllSA 183, paragraph 13. If the relief sought is in the interim in form but final in substance the applicant must prove the requirements for the granting of a final interdict. The requirement of balance of convenience, for instance, does not feature. The applicant has to prove a clear right and absence of alternate remedy, among the requirements.

[35] Regarding the merits, the applicant avers that it disputed the invoices by the respondent. The dispute should be resolved in terms of dispute resolution process in terms of clause 32.1 of the agreement. As for the outstanding amount in the amount of security deposit, the last instalment of the agreed payments was not yet due at the time of the disconnection. Finally, it is the respondent that failed to collect the monthly payments in terms of annexure A.

[36] What emerges from clause 9.1 of the contract is that the applicant was required to pay the security deposit before the supply of electricity was made available. Clauses 8.1 and 8.2 regulate when and how the payments of the electricity account were to be made by the applicant.

[37] The applicant has not shown that the respondent agreed that she should make the payments over 3 (three) months. NM20 was subject to approval. The applicant in terms of the contract was obliged to pay for consumption. To date it has not paid any amount towards the consumption after the date of contract. That amount is not part of any dispute. Further, annexure ‘K’ has no stipulated amount. Even if there was an agreed amount, at least by 20 October 2021, upon receipt of NM18 and especially after the communication of 10 November 2021, the applicant in its own version was aware that the respondent, initially, could not process the debit order and subsequently, in November 2021, no debit order amount had been paid.

[38] Further, the respondent averred that there were insufficient funds in the selected applicant's account. The applicant blames the respondent for the failure to make the deduction for the months of September and October 2021. The applicant also complains about the fact that, the attempt to deduct was on 10 November 2021 before the agreed date of the 15th every month. The applicant does not say, the amount that would have been due for the period September and October 2021, which in terms of debit order arrangement should have been debited on the 15th of the subsequent month, respectively, was available. If that was so, the attempted debit in November 2021 ought to have honoured. Even after reconnection, following the interim order, the said amounts remain outstanding.

[39] Consequently, the applicant is in breach of its contractual obligations in terms of payment, at least, in respect of electricity consumed after the conclusion of the contract and full payment of the security deposit.

[40] Regarding the alternate relief, I agree with the respondent, payment of arrears by the applicant, even in respect of those for the period after the conclusion of the agreement constitutes an alternate relief for the applicant. In terms of clauses 8.4 and 32.7 of the contract, the applicant has to pay the account, even if there was a dispute.

[41] In the circumstances of this case the applicant has failed to make a case for the urgent enrolment of the matter. It has also not met the requirements of a clear right and absence of an alternative relief. Therefore, the *rule nisi* has to be discharged.

In the result, the *Rule Nisi* is hereby discharged and the application is hereby dismissed with costs.

_____

B MAJIKI

JUDGE OF THE HIGH COURT

Counsel for the applicant	:	Mr Mafu
Instructed by	:	Messrs Bax Kaplan Russel Incorporated 126 Alexandra Road **KING WILLIAMS TOWN**
Counsel for the respondent	:	Mr Beyleveld
Instructed by	:	Messrs Lulama Prince Incorporated 184 Cape Road Mill Park Port Elizabeth c/o Hutton & Cook Attorneys 75 Alexandra Road **KING WILLIAM'S TOWN**