IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

24/12/19
DATE

[redacted]
SIGNATURE

Case No: 93301/2019

CASTING, FORGING & MACHINING CLUSTER OF SOUTH AFRICA (NPC) First Applicant

AND NINETEEN OTHERS

and

NATIONAL ENERGY REGULATOR OF SA First Respondent

EKURHULENI METROPOLITAN MUNICIPALITY Second Respondent

AND EIGHT OTHERS

JUDGMENT

D S FOURIE, J:

[1] This is another urgent application which was set down for hearing one week before Christmas. I therefore do not intend to give a lengthy judgment, but to deal only with the main issues.

[2] The applicants apply for an order declaring a valid dispute in terms of section 102 under the Local Government: Municipal Systems Act 32 of 2000 with the second respondent ("Municipality"). In addition thereto, they also apply for an interim interdict, pending the final outcome of the main application to review and set aside the electricity tariff determinations by the first respondent (NERSA), that the respondents concerned be interdicted from interfering with or terminating the supply of electricity to the applicants in any way whatsoever. The application is opposed by the second to tenth respondents.

[3] The background to this dispute is briefly that on 16 August 2019 NERSA, in response to a tariff application submitted by the Municipality, retrospectively announced its approval of the municipal tariff for the Municipality (and other local authorities) for implementation, by publishing a notice to this effect on its website. The Municipality incorporated this decision into its municipal budget and started charging the applicants the increased tariff from 1 July 2019.

[4] Each of the applicants notified the Municipality in writing that they declare a dispute in relation to the Municipality's tariff in terms of section 102 of the Local Government: Municipal Systems Act 32 of 2000 and that they regard the impugned decision of NERSA as unconstitutional, unlawful and unjustifiable. Following a lawful tariff determination by NERSA, they tendered to pay the lawful NERSA tariff. The Municipality responded on 23 August 2019 stating, *inter alia*, that the applicants should continue to pay the full amount as invoiced (as opposed to the amount tendered) in order to avoid the unnecessary inconvenience in case *"we exercise our credit control measures because of your non-payment of our invoices"*. The Municipality then undertook to issue a fourteen day written

disconnection notice prior to an impending disconnect of electricity. On 27 September 2019 the Municipality issued termination notices to some of the applicants. Thereafter, on 26 November 2019, the Municipality notified the applicants' attorneys of record that it will proceed with the delivery of electricity pre-termination notices. These notices were then given in respect of various of the applicants indicating the termination of the electricity supply by 19 December 2019.

[5] The letter in terms of which a dispute was declared with the Municipality records *inter alia* the following:

(a) it serves to notify the Municipality of a dispute in terms of section 102(2) of the Systems Act;

(b) as the Tariff was approved by NERSA in terms of an administrative process, the applicants are obliged to take issue with NERSA in relation to the Tariff and the approval thereof;

(c) as the dispute in relation to the Tariff relates to a decision by NERSA and not the Municipality, it is neither competent nor capable to resolve this dispute by engaging the Municipality through any available internal dispute resolution mechanism;

(d) the very nature of the effect of the unlawful determination by NERSA is to force the applicants to pay a Tariff to the

Municipality that substantially exceeds that which they consider to be lawful;

(e) by virtue of the unlawfulness of the decision by NERSA, the applicants hold the view that the Municipality is not entitled to enforce the Tariff.

[6] It is then contended by the applicants that they have a clear right under section 102(2) of the Systems Act not to have their electricity supply terminated.

[7] The grounds of review in the main application are not set out in the founding affidavit of this application. However, the following explanation has been given in this regard:

> *"The basis upon which the applicants contend that the impugned decision is unlawful is set out in detail in the founding affidavit to the review. In order not to burden these papers unnecessarily, and in view of the urgency of this matter, I do not intend to repeat these allegations here but ask that the relevant parts of the founding affidavit be deemed incorporated in this affidavit."*

[8] In reply during argument counsel for the applicants attempted to hand up the founding affidavit with annexures in the main application, as it does not form part of the court papers in the application now before me. It appeared to be a voluminous document to which the respondents still have to file an answering affidavit. The request to *"supplement"* the founding affidavit in the application now

before me was refused. I shall indicate the reasons for refusing that request in due course.

DISCUSSION

[9] I now turn to the provisions of section 102 of the Systems Act and to consider whether the dispute raised by the applicants, falls within the ambit of section 102(2). The relevant part of section 102 reads as follows:

> *"Accounts.-*
>
> *(1) A municipality may –*
>
> *(a) consolidate any separate accounts of persons liable for payments to the municipality;*
>
> *(b) credit a payment by such a person against any account of that person; and*
>
> *(c) implement any of the debt collection and credit control measures provided for in this Chapter in relation to any arrears on any of the accounts of such a person.*
>
> *(2) Sub-section (1) does not apply where there is a dispute between the municipality and a person referred to in that sub-section concerning any specific amount claimed by the municipality from the person."*

[10] In *Cool Ideas v Hubberd* 2014 (4) SA 474 (CC) at 484E-485B the Constitutional Court said the following with regard to the interpretation of statutes:

"A fundamental tenet of a statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity."

[11] Section 102 is part of Chapter 9 of the Act. This chapter deals with credit control and debt collection. Section 95 makes provision for certain procedures to be followed by a municipality in relation to the levying of rates and other taxes and the charging of fees in connection therewith. In terms thereof a municipality must, within its financial and administrative capacity, *inter alia*:

(a) where the consumption of services has to be measured, take reasonable steps to ensure that the consumption by individual users of services is measured through accurate and verifiable metering systems;

(b) ensure that persons liable for payments, receive regular and accurate accounts that indicate the basis for calculating the amounts due;

(c) provide accessible mechanisms for those persons to query or verify accounts and metered consumption, and appeal procedures which allow such persons to receive prompt redress for inaccurate accounts;

(d) provide accessible mechanisms for dealing with complaints from such persons, together with prompt replies and corrective action by the municipality.

[12] When this management system and mechanisms are being considered, it appears that the operative words are *"measured through accurate and verifiable metering systems"* together with *"accurate accounts"* as well as *"accessible mechanisms ... to verify accounts and metered consumption"* and, finally, to provide accessible mechanisms *"with prompt replies and corrective action by the municipality"*.

[13] It therefore appears that this management system and mechanisms are introduced to address a dispute between the Municipality and a consumer with regard to metered consumption by individual users of services and the calculation of the amounts due. It further provides for accessible mechanisms for dealing with these complaints, such as corrective action by the Municipality and appeal procedures which should allow such persons prompt redress *"for inaccurate accounts"*.

[14] Section 96 makes provision for debt collection as one of the responsibilities of a municipality. It provides that a municipality must collect all

money that is due and payable to it, subject to this Act and any other applicable legislation. Section 97 makes provision for a credit control and debt collection policy whereas section 98 stipulates that a municipality must adopt by-laws to give effect to the municipality's credit control and debt collection policy, its implementation and the enforcement thereof.

[15] The dispute between the parties and the interpretation of section 102(2) must now be considered against these provisions of the Systems Act. As a starting point, it is important to point out that there is a third party involved in this dispute, i.e. NERSA. This entity is not a municipality. It is the National Energy Regulator established in terms of section 3 of the National Energy Regulator Act 40 of 2004. It is common cause that it has, as the Energy Regulator, approved the municipal tariffs for the 2019/20 financial year for implementation from 1 July 2019. It is this tariff which is the prime target of the applicants. The applicants do not complain about the consumption of electricity which has been incorrectly measured or about inaccurate accounts. They maintain that the tariff as approved by NERSA, is unlawful. This dispute forms part of the main application.

[16] This dispute between the applicants and NERSA is obviously not capable of being resolved in terms of any of the provisions of the Municipal Systems Act, more particularly the established mechanisms provided for in section 95 of this Act. More specifically, it also appears that this dispute is not capable of being resolved between the applicants and the Municipality, for instance, by implementing corrective action by the Municipality or in terms of appeal procedures referred to in section 95.

[17] In Ekurhuleni Metropolitan Municipality v Ergo Mining (Pty) Ltd 2017 JDR 1860 (GJ) the Full Bench of the Gauteng Local Division, Johannesburg also considered the interpretation of section 102(2) of the Municipal Systems Act. In that decision it was decided (par [29]) that:

> *"In this context, the word 'dispute' should, in my view, be interpreted as being a dispute relating to an account issue, with reference to a 'specific amount' of consumption of electricity and the tariff at which the electricity was charged. Therefore any dispute outside of this interpretation should not be covered by section 102(2)."*

[18] I agree with this *dictum*, but wish to add a further qualification to clarify this interpretation: having regard to the provisions of Chapter 9 of the Act, section 102(2) is intended to apply to *internal disputes* between a municipality and a consumer relating to, *inter alia*, inaccuracies or mistakes with regard to the metering systems introduced by a municipality, or the consumption of services, or the calculation of the amounts due for such services, or inaccurate accounts, or tariffs incorrectly applied by a municipality, but not with regard to the *external determination* of a municipal tariff in terms of other legislation by an authorised third party, such as NERSA. Such a determination is not, in my view, included under the term *"dispute"* as referred to in section 102(2) of the Act. This is a dispute between the applicants and NERSA and not between them and the municipality with regard to any of the grounds referred to above. This determination by NERSA falls outside the ambit of the Municipal Systems Act and therefore also outside the provisions of section 102.

[19] However, this is not the end of this enquiry. What about the requisites for an interim interdict? The legal principles governing interim interdicts are well-known. The requisites are: a *prima facie* right; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; that the balance of convenience favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy (The Law of South Africa, 2nd Ed, Vol 11, par 403).

[20] As I have already indicated above, the applicants rely, for the purposes of demonstrating a *prima facie* right, not only on the provisions of section 102(2) of the said Act, but also on the grounds of review as set out in the main application. These grounds of review, as far as the factual foundation thereof is concerned, have not been dealt with in the founding affidavit in the application before me. A reference thereto, in another affidavit and in another application, is not acceptable.

[21] The general rule, which has been laid down repeatedly, is that an applicant must stand or fall by his founding affidavit and the facts alleged therein. The founding affidavit is the main foundation of the application, because it contains the facts which the respondent is called upon either to affirm or deny. The applicants have failed to do this with regard to the grounds of review on which they rely. The request in the founding affidavit of the application before me *"that the relevant parts of the founding affidavit be deemed incorporated in this affidavit"* cannot be allowed.

[22] Who must determine what these relevant parts of the founding affidavit are for purposes of this application? Furthermore, the respondents in this

application were unable to address these allegations in this application, as these allegations have not been set out in the founding affidavit in the application before me. I therefore have to conclude that no *prima facie* case has been made out with regard to the grounds of review relied upon by the applicants.

[23] Furthermore, I am also not convinced that the balance of convenience favours the applicants. The impugned decision of NERSA has been taken in terms of existing legislation. The Constitutional Court held in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) at par [44] that where an interim interdict or temporary restraining order is sought to restrain the exercise of statutory powers, such a case is no ordinary application for an interim interdict. It was pointed out that the balance of convenience enquiry must carefully probe whether and to which extent the remaining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm (par [47]). It was further pointed out that the Court must also keep in mind that a temporary restraint against the exercise of a statutory power well ahead of the final adjudication of a claimant's case, may be granted only in the *"clearest of cases"* and after a careful consideration of the separation of powers harm (par [47]).

[24] I am therefore not convinced that the balance of convenience favours the applicants. First, this is certainly not one of the "*clearest of cases*". Second, to interfere by means of an interim interdict would amount to an intrusion into the exclusive terrain of an organ of state as another branch of government. As a matter of fact, the applicants can prevent the termination of electricity supply by

paying the amount charged in terms of the tariff as determined by NERSA, "*under protest*", pending finalisation of the main application. Taking into account all these considerations, I am not convinced that the applicants have shown a *prima facie* right as contended for, or that the balance of convenience favours them. For these reasons, and also when this matter is considered from a holistic viewpoint, I am of the view that the application should be refused.

ORDER:

In the result I grant the following order:

The application is dismissed with costs.

[redacted]

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA 24/12/17