



**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION – MAKHANDA)**

CASE NO.: 1984/2021

Matter heard on: 13 October 2022

Judgement delivered on: 18 October 2022

In the matter between: -

THEUNIS JACOBUS STANDER **1st Applicant**

THEUNIS JACOBUS STANDER N.O. **2nd Applicant**

E M STANDER N.O. **3rd Applicant**

W NIENABER N.O. **4th Applicant**

and

ESKOM HOLDINGS SOC LTD **Respondent**

(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: YES

(3) REVISED.

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Signature

.....

Date

JUDGMENT

SMITH J:

[1] On 27 July 2021, I granted a rule nisi, *inter alia*, restraining the respondent (Eskom) from disconnecting the electricity supply to the applicants' farm, Buffelsvlei, Aliwal North. The rule operated as an interim interdict with immediate effect, pending the outcome of the review proceedings in Part B of their notice of motion. That rule was subsequently confirmed by Malusi J on 1 February 2022.

[2] The applicants seek to review Eskom's decision to terminate the electricity supply to the farm on various grounds, amongst others, that: (a) Eskom did not give them any notice of its intended decision to terminate the electricity supply; (a) it failed to take relevant considerations into account; (c) material and mandatory procedures and conditions prescribed by legislation were not complied with; and (d) the decision to terminate the electricity supply was not rational and was so unreasonable that no reasonable person would have taken it.

[3] In addition to opposing the matter on the merits, Eskom has also taken the point *in limine* that the court is precluded from reviewing the impugned decision because the applicants did not exhaust their internal remedies as required in terms of section 7 of the Promotion of Administrative Justice Act, 3 of 2000 (PAJA).

[4] Section 7(2)(a) of PAJA provides that:

'Subject to paragraph (c) no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.'

[5] Paragraph (c) provides that 'the court may in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interests of justice'.

[6] The Constitutional Court held in *Dengetenge Holdings Pty Ltd v Southern Sphere Mining and Development Company Ltd* 2014 (5) SA 138 (CC), at para 119, that those provisions, in clear and peremptory terms, prohibit courts from reviewing administrative action in terms of the Act, where there is provision for internal

remedies, until such time as the remedies have been exhausted. And, '[s]ince PAJA applies to every administrative action, this means that there can be no review of an administrative action by any court where internal remedies have not been exhausted, unless an exemption has been granted in terms of section 7(2)(c).'

(See also: *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC))

[7] And in *Reed v Master of the High Court* [2005] 2 All SA 429 (E), Plasket J held that an internal remedy, in order to qualify as such, 'must be capable, as a matter of law, of providing what the Constitution terms appropriate relief: it must be an effective remedy'.

[8] Eskom contends that section 30 of the Electricity Regulation Act, 4 of 2006, constitutes such an appropriate and effective internal remedy. In terms of that section the National Energy Regulator (the Regulator), is empowered to settle any dispute, between, *inter alia*, a customer or end user on the one hand and a licensee on the other, on such terms as he or she thinks fit. Eskom contends that the dispute between it and the applicants, pertaining in particular to whether the applicants' electricity account was in arrears, was a dispute envisaged by section 30 and ought to have been referred to the Regulator for resolution.

[9] Ms *Sephton*, who appeared for the applicants, while accepting that: section 30 of the Electricity Regulation Act provides for an internal remedy; the applicants were required to exhaust that remedy before instituting review proceedings; and they have not put up any facts which may constitute exceptional circumstances as envisaged in terms of section 7(2)(c) of PAJA, nevertheless submitted that I have a discretion to postpone the review proceedings in order to allow the applicants opportunity to refer the dispute to the Regulator.

[10] Although I am not unsympathetic to the applicants' dilemma, I agree with Mr *Titus*, who appeared for Eskom, that I do not have a discretion to make such an order. Section 7(2)(b) provides in mandatory and unambiguous terms that if the court is not satisfied that an internal remedy has been exhausted, it must 'direct that the

person concerned must first exhaust such remedy before instituting proceedings in any court or tribunal for judicial review in terms of this Act'. (My underlining)

[11] I am accordingly constrained to dismiss the application on this basis and to direct that the applicants must first exhaust the internal remedy provided for in terms of section 30 of the Electricity Regulation Act before instituting review proceedings in respect of Eskom's decision to terminate the electricity supply to their farm.

[12] In the result the following order issues:

- 1) The application is dismissed with costs.

- 2) The applicants are directed to refer the dispute to the National Energy Regulator in terms of section 30 of the Electricity Regulation Act, 4 of 2006, before instituting proceedings for the review of Eskom's decision to terminate the electricity supply to their farm, Buffelsvlei, Aliwal North.

JE SMITH
JUDGE OF THE HIGH COURT

Appearances:

Counsel for the Applicants : Adv. S Sephton
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