(1) REPORTABLE: NO

(2) OF INTEREST TO OTHER JUDGES: Yes

(3) REVISED. 6/7/2022

....

SIGNATURE **DATE**

RICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: **35921/20**

In the matter between:

CITY OF MATLOSANA LOCAL MUNICIPALITY	Applicant
and	
ESKOM HOLDINGS SOC LIMITED	First Respondent
ABSA BANK LIMITED	Second Respondent
NEDBANK LIMITED	Third Respondent
THE SHERIFF, KLERKSDORP	Fourth Respondent

In re:

ESKOM HOLDINGS SOC LIMITED Applicant

and

CITY OF MATLOSANA LOCAL MUNICIPALITY Respondent

JUDGMENT

<u>GOEDHART AJ:</u>

<u>Introduction</u>

> *"The facts of these appeals graphically illustrate the distressing state of municipal governance in this country, and depict the dysfunctional state of affairs bedevilling local government."*[1]

[1] The facts in this matter constitute yet another chapter in an unedifying history of two dysfunctional state organs; sadly the dysfunction has escalated to the point where the entire country suffers under a plague of continuous load shedding.

[2] On 8 December 2020 a court order was granted by agreement between the applicant, the City of Matlosana Local Municipality

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[1] Per Petse DP in Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd & others ('*Resilient*') (663/2019; 664/2019; 583/2019) [2020] ZASCA 185 (29 December 2020); 2021 (3) SA 47 (SCA); [2021] 1 All SA 668 (SCA) at para 2.

(“the municipality/the Matlosana municipality”) and the respondent, Eskom Holdings SOC Limited (“Eskom”). The 8 December 2020 court order and the subsequent writ issued by Eskom attaching the municipality’s bank accounts form the subject of the current dispute.

<u>Background</u>

[3] It is common cause that the municipality is significantly in arrears with the debt owed by it to Eskom for electricity supplied to it in terms of a written electricity supply agreement.

[4] The municipality acknowledged its indebtedness to Eskom in October and November 2019. As at 21 November 2019 it was indebted to Eskom in an amount of R383 039 746.50.

[5] On 14 August 2020, Gura J had granted a court order, also by agreement between Eskom and the municipality, in the North-West Division, Mahikeng. The pertinent terms of the 14 August 2020 order were:

[5.1] In respect of the “current account” in the amount of R106 614 654.79 which are reflected on the 2 July 2020 invoice of the first respondent [Eskom] (a) an amount of R50 million on/or before 17 August 2020; (b) the remainder of the amount i.e. R55 614 854.79 in three equal monthly payments of R18 871 551.30 payable on the first business day of the months of October 2020, November 2020 and December 2020.

[5.2] The amount of R122 176 822.81 as reflected on the "current account" on the 3 August 2020 invoice of the first respondent on/or before 2 September 2020.

[5.3] The "arrears account" in the amount of R417 901 941.30 which are reflected on the 3 August invoice of the first respondent by means of 48 equal monthly instalments in the amount of R8 706 290.44 commencing from the first business day of January 2021 and monthly thereafter for 47 months until the said "arrear account" debt is extinguished.

[5.4] The first respondent undertakes to supply electricity to the second respondent municipality in the ordinary course, provided that the second respondent municipality complies with this order of court (and accepting load shedding as may be scheduled nationally from time to time).

[5.5] …"

[6] Notwithstanding the acknowledgements of debt of October and November 2019, the repayment plan agreement entered into between the parties and the court order of 14 August 2020, the municipality failed to pay Eskom the current account due on 2 November 2020.

[7] Eskom then gave notice to the municipality that it would terminate its bulk electricity supply. Consequent upon Eskom's notice to terminate the municipality's bulk supply, Pioneer Foods (Pty) Ltd (Pioneer Foods) – a rate payer within the area of jurisdiction of the Matlosana municipality which was up to date with its payments for

electricity usage to the municipality - brought an urgent application on 3 November 2020 against Eskom and the municipality in which it sought to interdict Eskom from terminating the electricity supply to the municipality (and thus to its factory in Klerksdorp), and to review a decision by Eskom to terminate the municipality's bulk electricity supply. It appears that the urgent application was struck from the roll for lack of urgency.

[8] In the initial urgent application brought by Pioneer Foods, Eskom instituted a counter-application against the municipality. The counter-application ultimately culminated in the 8 December 2020 court order granted by Bezuidenhout AJ.

[9] The terms of the 8 December 2020 court order, obtained by agreement between the parties, were as follows:

> *"1) The Municipality (Respondent) shall pay Eskom (Applicant) the amount of R120 000 000.00 (One Hundred and Twenty Million Rand) on/or before 15 December 2020.*
>
> *2) The Municipality shall pay to Eskom an amount of R7.593.038.12 (Seven Million Five Hundred and Ninety-Three Thousand and Thirty-Eight rand, Twelve Cents) every month, for twelve months commencing on 10 January 2021.*
>
> *3) The Municipality shall pay Eskom the amount of R8.706. 290.44 (Eight Million, Seven Hundred and Six Thousand, Two Hundred and Ninety Rand, Forty-Four Cents) every month commencing on 10 January 2021, every month for 48 months.*

4) *From January 2021, the Municipality shall pay Eskom and keep up with its payment obligation to Eskom on the current account, in full that which becomes due and payable, on/or before the 5th day of every month.*

5) *The Municipality shall comply with the payment conditions contained in prayers 1-4 above. Should the Municipality fail to comply with its payment conditions as set out above then, and in that event, the full outstanding amount shall immediately become due and payable on demand by Eskom.*

6) *The Municipality shall pay Eskom for its electricity consumption in line with sec 65(2) of the Municipal Finance Management Act ("MFMA") in 30 days.*

7) *The Municipality shall pay all monies due and payable on its current account to Eskom as set out in the ESA entered into between itself and Eskom ("the parties herein") as set out in the Certificate of Balance issued by Eskom.*

8) *The Municipality shall deliver written notice, on Eskom (through Eskom's attorneys of record) on/or before the 10th day of each month indicating and providing evidence of its compliance with its payment obligations to Eskom.*

9) *The Municipality's manager, Mr Rodger Nkhumise (in his capacity as municipal manager) or his successors in title, shall give effect and ensure compliance with the terms of this order;*

10) *Should the Municipality fail to comply with its reciprocal payment obligations in terms of this order, then Eskom*

may approach this Court on the same papers, duly supplemented, as necessary, to enforce payment.

11) Cost of suit against the Municipality, including the engagement of two counsel."

[10] Once again, the municipality failed to comply with the terms of the court order.

[11] On 18 May 2021, Eskom issued a writ of execution to attach the municipality's movable assets.

[12] On 18 June 2021, Eskom's attorneys of record notified the municipality that it had received instructions to issue a second writ of execution to attach the municipality's bank accounts.

[13] On 23 June 2021, Eskom's attorneys notified the municipality's attorneys that they had received instructions not to proceed with the removal of the attached assets.

[14] On 24 June 2021, the municipality's attorneys advised that the municipality had prepared a "goal specific management plan to address all financial matters" relating to Eskom "in execution and advancement of the IGRFA consultation process".

[15] On 30 June 2021 the municipality's attorneys indicated that they had received a document entitled "Electricity Solution Strategy" which would be used as a "point of departure" for the Intergovernmental Relations Framework Act, 13 of 2005 (IRFA) consultation process between the municipality and Eskom. It was proposed that a meeting take place between 19 to 23 July 2021.

[16] On 2 July 2021, Eskom replied and advised that the IRFA process does not affect the order of 8 December 2020. It stressed that the municipality remained obliged to obey and comply with the court order, and that the IRFA process was not a basis upon which the municipality could avoid its obligations in terms of the agreed court order. On that understanding, Eskom indicated that its representatives were available to meet on 7 July 2021.

[17] Further correspondence was exchanged regarding the proposed meeting between the representatives of Eskom and the municipality. For various reasons, the meeting did not take place.

[18] On 2 August 2021, Eskom issued a writ of execution for the amount of R228 379 535.82 and instructed the sheriff of Klerksdorp, the fourth respondent, to attach and take into execution the municipality's right, title and interest in and to the bank accounts held by it with the second respondent, Absa and with the third respondent, Nedbank.

[19] Towards the end of August 2021 the municipality paid an additional amount of R50 million to Eskom "*in an attempt to show its bona fides to Eskom and hoping that Eskom would uplift the attachment of the municipality's bank accounts and the monies therein*."

[20] On 1 September 2021, Absa notified the municipality and its attorneys that it was obliged to comply with the court order and that the funds attached would be transferred to the sheriff within 48 hours.

[21] On 2 September 2021 the municipality launched an urgent application against Eskom in terms of which it sought to uplift the attachments in execution by Eskom of the funds held by it with

Absa and Nedbank, and an order that the respondent banks release the attached funds. It also sought an interim interdict prohibiting Eskom from proceeding with the execution process, pending the outcome of the IRFA dispute resolution process commenced by the municipality.

[22] The urgent application was initially enrolled for hearing on 3 September 2021 but was removed from the roll by agreement between the parties. The municipality's application was then enrolled as a special motion for hearing on 14 March 2022.

The municipality's application

[23] The municipal manager of the municipality, Mr Nkhumise, deposed to the founding affidavit. The municipality avers that "due to cashflow constraints, a low collection rate as well as the financial impact of Covid-19" it "struggled to affect prompt payment of its current account".

[24] During the period June 2020 to June 2021 it had paid Eskom an amount of R854 287 470.85, but during the same period Eskom had invoiced it for electricity reticulation in a total amount of R667 587 448.07. Given that it had to pay an amount of approximately R60 300 000.00 per month to settle its historical debts, it became increasingly difficult for the municipality to comply with its payment obligations set out in the court order due to cashflow constraints. These difficulties emanated from *inter alia* the struggle to implement credit control measures to collect municipal debts due to the Covid-19 pandemic, and also because various of the municipality's debtors indicated their inability to pay for their municipal accounts as a result of the financial impact that the Covid-19 pandemic had on the economy.

[25] The municipality avers that it is not in wilful default of the 8 December 2020 court order and that the cash flow constraints are not due to a fault on its part.

[26] The execution steps taken by Eskom has resulted in it being unable to pay service providers, its employees, grants to beneficiaries and its day to day running costs. The inability to pay will have an extremely prejudicial effect on the community as a whole and on the municipality's ability to render constitutionally mandated services. Monies held by the municipality in these accounts which had been earmarked in favour of other beneficiaries were also attached.

[27] It avers that, when it breached its payment obligations in terms of the court order of 8 December 2020, it instituted the dispute resolution mechanism contemplated by IRFA. In consultation with the relevant executives of the municipality, an Electricity Solution Strategy was prepared in order to address the municipality's historical debt obligations with Eskom. Despite the attempts to present the Electricity Solution Strategy to Eskom's representatives, Eskom had proceeded to issue a warrant of execution.

[28] In summary, the municipality does not deny that it had breached the terms of the 8 December 2020 court order, but denies being in wilful default and seeks to explain its default and provide reasons why the writs should be uplifted and why Eskom should be precluded from executing the writs pending the IRFA process.

[29] In its founding papers, the municipality does not raise any issue with regard to the interpretation of the terms of the 8 December 2020 court order.

[30] In its replying affidavit, it raised a number of new issues. These are that:

[30.1] the writ was wrongly issued because the amount was incorrect as it was based exclusively on arrear debt;

[30.2] there was a dispute which pre-dates the December 2020 order and therefore the order was not competently granted;

[30.3] the order is against public policy as it affects the municipality for an indefinite period;

[30.4] paragraphs 4 and 7 of the order does not directly or indirectly deal with a *lis* between the parties;

[30.5] the writ was not competently granted as it related to a future debt;

[30.6] Eskom ought to have pursued an order for contempt rather than to issue a writ.

<u>Eskom's answer</u>

[31] Eskom denies that the municipality had commenced any IRFA proceedings, despite pleas by Eskom for it to do so. In its letter of 2 September 2021, Eskom records that it made requests for engagement as early as 10 February 2021 at a stage when the municipality was already in breach of the terms of the court order.

[32] By 2 September 2021, the municipality had not declared a dispute with Eskom as envisaged by IRFA, nor had it furnished Eskom with the financial documents requested to enable it to assess the

inability for the municipality's failure to pay its historical debt and its current account. Without factual knowledge of the municipality's reticulation business, Eskom states that is not able to offer the assistance needed by the municipality to improve the alleged low collection rate.

[33] The obvious consequence of the municipality's failure to pay its current account is that the arrear debt keeps escalating. By the end of August 2021, the municipality failed to pay its current account of R128 855 039,73 with the result that the August unpaid current account became part of the September arrear debt. The municipality's debt at the time that the answering affidavit was deposed to in September 2021 amounted to R814 832 058.65.

[34] Eskom asserts that the municipality deliberately chose to frustrate the court order of 8 December 2020 by paying lip service to the IRFA process.

[35] Eskom alleges that the municipality's application was not brought in good faith *inter alia* because the municipality has ten other bank accounts in its name which it has not disclosed to the court. The failure to make full disclosure includes a failure to fully deal with the manner in which the municipality deals with the funds collected for reticulation services.

[36] Eskom provides details of the efforts made to engage with relevant stakeholders to assist municipalities (including the Matlosana municipality) with the failure to pay its electricity accounts and to run the reticulation part of the municipality's business efficiently. The stakeholders include the Deputy President, the Department of Public Enterprise, the Department of Public Works and Infrastructure, the Department of Co-Operative Governance and

Traditional Affairs (COGTA), the Department of Water and Sanitation, National Treasury, the office of the MEC's, the South African Local Government Association (SALGA) and the National Electricity Regulator of South Africa (NERSA).

[37] Following interventions by the Ministers of COGTA and Finance and Public Enterprise an Inter-Ministerial Task Team ("the Task Team") was formed in February 2017 which is chaired by the Minister of COGTA. Notwithstanding the work of the Task Team and the interventions by it, including the implementation of the concessions recommended by the Task Team, municipal debt owed to Eskom has grown exponentially, as illustrated by the municipality's debt.

[38] In 2018 the Eskom Technical Task Team ("the Technical Task Team") was formed at the request of the Minister of COGTA to address the challenges presented by the ever-escalating municipal debt.

[39] In 2018, the Minister of Department of Energy formed the SALGA/Eskom task team in yet another attempt to address the challenges presented by the municipal debt owed to Eskom.

[40] In a report by the Technical Task Team dated 7 May 2020, Eskom reported that despite concessions implemented by it to assist municipalities, the municipal debt continued to escalate. Eskom had made payment of the current account by municipalities a priority.

[41] A NERSA document on *Status on Compliance to NERSA Regulations by Municipalities and Eskom Engagement* dated 19 February 2021 recorded that 100% of municipalities in the North West Province are not compliant with their electricity licence conditions as issued by NERSA and that there was 0%

improvement. The NERSA document further stipulated that bulk accounts must be paid and maintained as current, and that electricity reticulation businesses must be ringfenced from the rest of the municipal service. Eskom records that only one municipality ringfenced its electricity business and that in others there is cross-subsidisation of municipal services.

[42] In another report entitled "Progress Report on Resolving Municipal Debt to Eskom" dated 28 July 2021, which was a joint presentation by *inter alia* the National Treasury, COGTA, SALGA and Eskom the following was reported:

[42.1] Municipal debt had increased to R35.7 billion by the end of April 2021;

[42.2] Eskom is pursuing the Active Partnership model to ensure that it creates a sustainable distribution industry securing the current account;

[42.3] The Matlosana municipality is in the top 20 of defaulting municipalities;

[42.4] By the end of August 2021 the municipality's debt stood at a staggering amount of R814 832 058.65.

[43] The history set out by Eskom demonstrates that whilst it had made consistent efforts to engage with the municipalities that are in default, which includes the Matlosana municipality, these efforts have not been successful. The interventions described by Eskom in its answering affidavit have not resulted in a significant decrease in the municipal debt owed to Eskom.

[44] It is self-evident that municipal debt has become a national crisis. No service provider can continue to provide services on a sustainable basis without being paid for the services.

The municipality's conduct

[45] In October and November 2019 the Matlosana municipality acknowledged its debt to Eskom, entered into a repayment plan agreement with Eskom and on 14 August 2020 it agreed to the terms of the court order in the Mahikeng High Court. That notwithstanding, it failed to pay Eskom the current account due on 2 November 2020.

[46] It reached agreement with Eskom on the terms of the 8 December 2020 order, pursuant to Eskom's counter-application. Again it reneged. It is only when Eskom commenced with the issue of writs that the municipality started to act.

[47] In terms of Section 165(5) of the Constitution, court orders are binding on everyone, including all state organs.[2] The compliance with court orders is a fundamental cornerstone of a constitutional state based on the rule of law.[3]

[48] In *Nyathi v Member of the Executive Council for the Department of Health, Gauteng and Another*[4] Madala J described the consequences of a failure to adhere to court orders as follows:

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[2] Section 165(5): "*An order or decision issued by a court binds all persons to whom and organs of state to which it applies.*"

[3] Section 1(c) of the Constitution provides that the Republic of South Africa is one, sovereign, democratic state founded on the supremacy of the constitution and the rule of law.

[4] [2008] ZACC 8; 2008 (5) SA 94 (CC); 2008 (9) BCLR 865 at para 80.

"*Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy. That in my view, means at the very least that there should be strict compliance with court orders.*"

[49] The right of access to court includes the right to an effective remedy and the right to enforce that remedy.[5] In particular:

"*The constitutional right of access to courts would remain an illusion unless orders made by the courts are capable of being enforced by those in whose favour such orders were made.*"[6]

[50] The question is whether the municipality can, as it now seeks to do, rely on the dispute resolution process contemplated by IRFA to avoid the consequences of the breach of the 8 December 2020 court order.

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[5] President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd [2005] ZACC 5; 2005 (5) SA 3 (CC); 2005 (8) BCLR 786 (CC) at para 50; Government of the Republic of Zimbabwe v Fick and Others [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) at para 61.

[6] Mjeni v Minister of Health and Welfare, Eastern Cape 2000 (4) SA 446 (TK) at 453C, quoted with approval in Moodley v Kenmont School and others [2019] ZACC 37; 2020 (1) SA 410 (CC); 2020 (1) BCLR 74 (CC) at para 20.

[51] The municipality did not deal with all the requirements for an interim interdict in its founding affidavit.[7] That should be the end of that part of the relief sought. However, given that the municipality sought to rely on the dispute resolution mechanisms contemplated by IRFA as the basis for the interim interdict sought, it is necessary to deal with this issue.

[52] IRFA was enacted to fulfil the requirements of s 41(2) of the Constitution, which provides that an Act of Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

[53] Section 41(3) of the Constitution provides that 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. Section 41(4) of the Constitution stipulates that a court may refer a dispute back to the organs of state involved if it is not satisfied that the requirements of section 41(3) have been met.

[54] Section 40(1) of IRFA provides:

"*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."

[7] Setlogelo v Setlogelo 1914 AD 221 at 227.

[55] Section 41 (1) of IRFA stipulates that an organ of state that is a party to an intergovernmental dispute may declare a dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing. Section 41(2) provides that 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. Section 45(1) prohibits an organ of state from instituting judicial proceedings 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 Chapter 4 of IRFA were unsuccessful.

[56] Viewed against the provisions of IRFA, in this matter a court order was granted by consent on 8 December 2020 between the parties. To the extent that the municipality sought to raise the provisions of IRFA, the appropriate time to have done so was in answer to Eskom's counter-application. The first time the IRFA process was raised in correspondence by the municipality's attorneys was on 24 June 2021, at a time when Eskom had already proceeded to issue writs in execution of the court order obtained. Eskom agreed to engage with the municipality's representatives, but cautioned from the outset the negotiations did not absolve the municipality from compliance with the 8 December 2020 court order. Eskom denies that the municipality formally declared a dispute as contemplated by the provisions of section 41(1) of IRFA.

[57] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others, Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Thaba Chweu Local Muncipality and Others v Sabie Chamber of Commerce and Tourism and others*[8] is

[8] Resilient, footnote 1 above.

not authority for the proposition that the consequences of a validly obtained court order may be circumvented by a belated reliance on section 41 of IRFA. In *Resilient* it was held that Eskom was required to attempt, in good faith, to settle its disputes with the municipalities concerned before deciding to interrupt the supply of electricity to them. The fact that it had not done so meant that a precondition for the valid exercise of its power in terms of section 21(5) of the Electricity Regulation Act 4 of 2006 (ERA) was absent. Section 21(5) of ERA empowers Eskom to reduce or terminate the supply of electricity to a customer without a court's prior authorisation.

[58] It is only where state organs have failed to take all reasonable steps to resolve their intergovernmental disputes that a court may decline to hear the matter until it is satisfied that the parties have exhausted the IRFA processes.[9]

[59] In *Resilient*, there had been no prior court order as between any of the relevant municipalities and Eskom, as is the case here. Further, in this matter Eskom made it clear that it did not intend to interrupt the supply of electricity to the municipality (other than in terms of the national load shedding schedule), but that it sought to exercise its rights in terms of the court order of 8 December 2020 as it is entitled to do.

[60] Eskom is bound, by section 51(1)(b)(i) of the Public Finance Management Act 1 of 1999, to take effective and appropriate steps to collect all the revenue due to it.

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[9] Ibid. See also City of Cape Town v Premier, Western Cape 2008 (6) SA (C) 345 at paras 17 and 18.

[61] On the facts of this matter, Eskom has done what was within its powers to do, and it has given the municipality ample opportunity to comply with its undertakings in terms of the acknowledgements of debt signed in October and November 2019, as well as in terms of the August 2020 and December 2020 court orders. Notwithstanding these efforts, the municipality breached its undertakings in terms of the acknowledgements and in terms of the court orders to which it had agreed and only sought to invoke the IRFA process in a letter once Eskom had proceeded to issue the writs of execution.

[62] It would be inimical to the rule of law if organs of state, such as the municipality, who fail to comply with court orders were able to seek "upliftment" of validly issued writs aimed at enforcement of the court orders, pending an IRFA protracted process. It would mean that court orders ought to revert to the executive branch of government in terms of IRFA. Such a process would be completely inimical to a constitutional state. The IRFA process is not intended to usurp the judicial function.

[63] In *Eskom Holdings SOC Ltd v Letsemeng Local Municipality & others*[10] the Supreme Court of Appeal held, *obiter dictum*, that IRFA provided no defence to the Letsemeng municipality in relation to Eskom's counter-application for payment.

[64] IRFA, and the processes contemplated by it, does not present a basis to frustrate a writ which has been issued in terms of a valid and executable court order.

[65] The municipality, as a bearer of public power sourced in the Constitution, is expected and required to be a role-model and to

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[10] (990/2020) [2022] ZASCA 26 (9 March 2022); [2022] 2 All SA 347 (SCA) ("Letsemeng") at para 24.

conduct itself in an exemplary manner in its dealings with others, including other organs of state.[11]

[66] The attempt to obtain an interim interdict based on IRFA to prevent Eskom from executing the writs issued consequent upon a competent court order to which the municipality had agreed is unacceptable. The failure to adhere to its undertakings and to comply with the court orders to which it agreed is conduct, as described by Plasket JA in *Madibeng Local Municipality v Public Investment Corporation Limited,*[12] which is unbecoming of a state organ and unconscionable.

Lack of resources

[67] The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa. The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government.[13]

[68] The municipality's essential justification is that, if the writs are not uplifted, it will prejudice its ability to provide services within its jurisdiction. It pleads a lack of resources as justification for the failure to comply with the terms of the December 2020 court order to which it had agreed.

11 Letsemeng, footnote 10 above, at para 71.

12 (955/2019); [2020] ZASCA 157 (30 November 2020).

13 Joseph v City of Johannesburg (CCT43/09); [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) (9 October 2009) at para 34.

[69] In *Rail Commuters Action Group v Transnet Limited t/a Metrorail*[14] the Constitutional Court set out the test for the assessment of a plea of budgetary constraints by a public functionary. That test entails an enquiry as to whether the state organ or functionary has shown that it has taken all reasonable measures within its available resources.

[70] The municipality bears the onus to demonstrate that it has taken all reasonable measures within its available resources.[15] This notwithstanding, the municipality failed to provide any details of the actual resources available to it, the steps taken by it to ensure compliance with the court orders to which it had agreed or how it dealt with the funds received by it from National Treasury during the Covid-19 pandemic.[16]

[71] Section 153(a) of the Constitution requires the municipality to structure and manage its administration and budgeting and planning process to give priority to the basic needs of the community, and to promote the social and economic development of the community. Under circumstances where the municipality agreed, presumably on an informed basis, to the 8 December 2020 court order setting out specific payment terms, it is not sufficient to make vague and unsubstantiated allegations of a "lack of funds" arising inter alia from the Covid-19 pandemic which by that stage had been raging since March 2020.

[72] It is inconceivable that the municipality would have consented to the court order and the payment terms set out in the court order knowing that it could not adhere to those terms. However, once the

[14] [2004] ZACC 20 (CC); [2005] JOL 13509 (CC); 2005 (2) SA 359 (CC) ('*Rail Commuters'*).

[15] Rail Commuters at para 88.

[16] The latter is dealt with by Eskom in its answering affidavit.

reality of defaulting became evident, it was incumbent upon the municipality to take proactive steps to avert a failure to comply with the court order.

[73] Eskom argues that it was open to the municipality to request a temporary stay of its financial obligations to its creditors in terms of Section 152 of the Municipal Finance Management Act, 56 of 2003 (the MFMA), and that it could have taken the steps contemplated by sections 138 and 139 of the MFMA.

[74] In *Letsemeng*[17], the SCA held that the Letsemeng municipality's defence on the merits to Eskom's counter-application for payment – that it should not be ordered to pay what it had agreed to pay due to its financial weakness to do so – was not a defence. Further that:

" To the extent that this may amount to the tacit raising of a defence of impossibility of performance, the position is clear: if a person promises to do something that can be done, such as delivering a thing or paying a debt, but which that person cannot do due to circumstances peculiar to themselves, they are nonetheless liable on the contract. The commercial mayhem that would result, if the rule was otherwise, is not difficult to imagine. Contractual obligations are enforced by courts irrespective of whether a defaulting party is able to pay or not. The focus is on the rights of the innocent party, not the means of the defaulting party."[18]

[75] Eskom's developmental role to ensure universal electrification of electricity to the Republic as contemplated in its governing statute, the Eskom Conversion Act 13 of 2001 requires of it to promote universal access to and the provision of affordable electricity taking

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[17] Footnote 10 above.

[18] Ibid, at para 22.

into account the cost of electricity, financial sustainability and the competitiveness of Eskom. It cannot fulfil this role in a sustainable manner if it is not paid for the services which it has rendered and where it is then prevented from executing a writ pursuant to a validly obtained court order, after having done what was within its power to negotiate with the defaulting municipality.

New issues raised in reply

[76] The municipality raised a number of new issues in reply. It is not permitted to make out a case in reply.[19]

[77] The municipality argued that the court should exercise its discretion to permit the new issues in reply with reference to *Shephard v Tuckers Land and Development Corporation (Pty) Ltd*[20] and *Lagoon Beach Hotel (Pty) Ltd v Lehane NO.*[21] In *Lagoon Beach* it was held that a common sense approach must be used and that where an initial application was moved as a matter of urgency, the courts are commonly sympathetic to an applicant in those circumstances and often allow papers to be amplified in reply subject to the respondent's right to file further answering papers.[22] It was contended that the new facts introduced in reply should be met with the same degree of sympathy as was done in *Lagoon Beach*, particularly where the new issue introduced in reply is purely legal in nature.

[78] This matter was ultimately not heard as a matter of urgency on 3 September 2021. There was ample opportunity for the municipality

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[19] Titty's Bar and Bottle Store (Pty) Ltd v ABC Garage (Pty) Ltd 1974 (4) SA 362 (T) at 368H- 369B.

[20] 1978 (1) SA 173 (W) at 177H-178A.

[21] 2016 (3) SA 143 (SCA).

[22] Ibid, para 16.

to amplify its founding affidavit and to seek condonation to do so. In the same vein, Eskom could have delivered further answering papers to deal with the new matter in reply once it became evident that the matter would not proceed on an urgent basis.

[79] Whilst I do not agree that the municipality is deserving of the degree of sympathy consequent upon the urgency with which the application was brought as set out in *Lagoon Beach*, it is so that the issue of the interpretation of the court order of 8 December 2020 is legal in nature. Both parties have dealt with this issue in their heads of argument and it is dispositive of most of the issues raised in reply. New factual issues raised in reply will not be dealt with.

<u>The interpretation of the court order</u>

[80] A court order obtained by agreement between the parties has the same effect as any order granted by the court. It is to be interpreted like any other order.[23]

[81] The municipality argued that paragraphs 4 and 7 of the order of 8 December 2020 could not be used in support of a writ of execution. This is because it was directed *ad factum praestandum*, and not *ad pecuniam solvendam.* On that basis, it is argued that a writ was not competent and Eskom should have proceeded with an application for contempt of court.

[82] Paragraph 4 of the order provides:

> *From January 2021, the Municipality shall pay Eskom and keep up with its payment obligation to Eskom on the current account, in full that which becomes due and payable, on/or before the 5th day of every month.*

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[23] Eke v Parsons 2016 (3) SA 37 (CC); 2015 (11) BCLR 1319 at para 29.

[83] Paragraph 7 provides for a certificate of balance.

[84] In *Engelbrecht and another NNO v Senwes Ltd,*[24] Malan AJA (as he then was) dealt with the terms of a court order which recorded an agreement of settlement between the parties. He reiterated that the basic principles of interpretation of contracts needed to be applied to ascertain the meaning of the agreement. The well-established test is that the intention of the parties is to be ascertained from its contextual setting and in the light of admissible evidence. The facts probably present in the mind of the parties when they contracted are part of the context and explain the genesis of the transaction or its factual matrix.[25] In *Capitec Bank Holdings Ltd and another v Coral Lagoon Investments 194 (Pty) Ltd*[26] Unterhalter AJA cautioned that the triad of text, context and purpose should not be used in a mechanical fashion.[27]

[85] In *Eke v Parsons*[28] Madlanga J held that, for an order to be competent and proper, it must, in the first place, relate directly or indirectly to an issue or lis between the parties.

[86] By the time the court order was agreed to between the municipality and Eskom, the municipality had reneged on two undertakings as well as a court order obtained, also by agreement, in August 2020. In answer to Eskom's counter-application it only filed a notice to argue a point of lack of jurisdiction. It did not file an answering affidavit in answer to the allegations in the counter-application. Thereafter, and whilst legally represented, it reached agreement on the terms of the court order of 8 December 2020 with Eskom.

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[24] 2007 (3) SA 29 (SCA).

[25] Ibid at paras 6 and 7.

[26] 2022 (1) SA 100 (SCA).

[27] Ibid at para 25.

[28] Footnote 23 above, at para 25.

[87] In its urgent application to uplift the attachments, the case made was that it was in breach of the court order, not because it had misunderstood what was required of it or because the writ had been improperly issued, but because of a lack of resources attributable to *inter alia* the Covid19 pandemic and based on the provisions of IRFA.

[88] In my view, the municipality understood what it had agreed to and what was required of it in the order of 8 December 2020. The order is to be read as a whole within the context that gave rise to the order. The order of 8 December 2020 is clear and unambiguous in its terms. The argument that, because paragraph 4 of the order makes no mention of specific amounts which the Municipality has to pay and that it is therefore not readily enforceable with reference to *Lujabe v Maruatona*[29] is without merit.

[89] *Lujabe* dealt with an application for contempt of court after the respondent failed to pay what was described as "his equal share" of a property jointly owned with the applicant. It is distinguishable on the facts.

[90] Paragraph 4 of the order provides that the municipality is required to keep payment of its current account up to date and must pay what is due on its current account on or before the 5th of every month. Paragraph 4 is to be read with paragraph 6. The order is clear and unambiguous.

[91] The argument that the order precludes Eskom from proceeding with a writ and that it should first have approached the court for an order holding the municipality in contempt is similarly without merit.

29 (35730/2012) [2013] ZAGPJHC 66 (15 April 2013); 2013 JDR 0782 (GSJ).

Paragraph 5 of the order sets out what the consequences would be if its terms were not be complied with.

[92] An order of a similar nature was made in *Letsemeng.*[30] There is no basis for the argument that the terms of the order are “contrary to public policy” on the basis that it will endure “ad infinitum”.

[93] The issues raised in reply are contrived.

Conclusion

[94] For these reasons, the municipality’s application must fail.

[95] I make the following order:

[95.1] The application is dismissed with costs, such costs to include the costs of two counsel.

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GOEDHART AJ

ACTING JUDGE OF THE HIGH COURT

Date of hearing: 14 March 2022

Date of judgment: 5 July 2022

(This judgment was handed down electronically by circulation to the parties’ representatives via email.)

For the Applicant: Adv Els

Instructed by: Oosthuizen Du Plooy Attorneys

[30] Footnote 10 above, at paras 27 (2) (a) and (b).

For the Respondent: Adv SL Shangisa SC
Adv L Rakgwale

Instructed by: Ledwaba Mazwai Attorneys