REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 2023 - 062380

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 07 August 2023 WJ du

In the matter between:

BROADBAND INFRACO SOC LIMITED **APPLICANT**

and

ESKOM HOLDINGS SOC LIMITED **RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] Background

[1] The Applicant ("BBI") launched proceedings in two parts, Part A and Part B. This application is for the urgent interim interdictory relief set out in Part A, where BBI seeks an interdict directing the Respondent ("Eskom") to restore services previously provided to BBI in terms of a lease agreement and a maintenance agreement concluded by the parties.

[2] Part B is a review application where BBI wants to set aside several decisions Eskom made relating to certain services provided to BBI. They also seek an order directing Eskom to participate in the dispute resolution process contemplated in part 5 of the Intergovernmental Dispute Preventions and Settlement Practice Guide, promulgated in terms of section 47(1)(f) of the Intergovernmental

Relations Framework Act 13 of 2005 ("IFRA"). Part A thus seeks urgent interim interdictory relief pending the outcome of such a dispute resolution process.

[2] Parties

[3] Both parties are organs of state. BBI is established in terms of the Broadband Infraco Act.[1] BBI operates in the telecommunications sector and provides long-distance national and international backhaul connectivity. It provides wholesale broadband connectivity products to private and public customers across all industries in South Africa. The State provides customers nationwide with affordable access to electronic communication services and electronic communications network services (broadband services). The objects of BBI are set out in s 4 of the BBI Act, with its servitude rights set out in s 6. Its objects are to expand the availability and affordability of access to electronic communications, including underdeveloped and under serviced areas.

[4] Eksom is South Africa's national electricity public utility, responsible for all the electricity in South Africa.

[5] BBI deploys a long-distance telecommunications network spread across the country to meet its aim as laid out in the Act. This is done through a network of about 15 000 km of fibre optic cable, making up various routes on the network. It is here where BBI is in a symbiotic relationship with Eskom. Eskom provides certain services in respect of the fibre optic cables that make up BBI's national long-distance telecommunications network. Only Eskom can provide these crucial services to enable BBI to comply with its statutory obligations.

[6] Eskom is the owner of some of the fibre optic cables making up the routes on the network. BBI requires Eskom to provide the lease services for the cables it owns, and it requires Eskom to maintain and services those cables. Eskom provided these services previously in terms of a written lease agreement and a written maintenance agreement but stopped providing them when BBI fell into arrears, unable to settle its debts.

[7] There were several lease agreements, with the last agreement set to expire on 31 August 2024. However, Eskom disconnected the optic fibres it leased to BBI between 26 – 29 September 2022, and on 18 October 2022, it terminated the lease agreement.

[8] The maintenance agreement expired on 31 October 2021, whereafter Eskom ceased to provide services, resolving that it will not do so until BBI settles the outstanding disputes.

[9] When the agreements were in force and disputes arose, BBI took steps to avoid or settle the disputes, often by engaging informally. Throughout BBI avers, Eskom remained rigid and never formally declared an intergovernmental dispute to initiate the dispute resolution process contemplated by IRFA. Ultimately, on 29 March 2023, Eskom launched an action to recover the debts owed by BBI, and this is in violation of IRFA, BBI argues. Thus the reason for this application.

[10] Eskom opposes this application stating that it is not disputed that BBI owes the respondent monies for services rendered. It says further that Eskom complied with IRFA in that summons were only served after engaging with BBI to find an amicable solution.

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[1] 33 of 2007.

[3] Urgency

[11] What renders the matter semi-urgent, BBI contends, is Eskom's decision to institute action on 29 March 2023[2] to recover the debts. Before then, BBI was trying to comply with its obligations under IRFA.

[12] When Eskom's position hardened, it formally declared an intergovernmental dispute on 11 April 2023. When Eskom's position did not change, BBI sought legal advice in May 2023. After that advice, they prepared this application that they launched on 23 June 2023, requiring a notice of intention to oppose by 30 June 2023 and an answering affidavit by 14 July 2023, with set down in the week of 1 August 2023.

[13] Eskom disputes urgency, stating that the maintenance and lease agreements were not renewed back in October 2021 already. They also suggest that this application is only instituted due to the action proceedings that were instated that deal with essentially the same issue. BBI disagrees, stating that the institution of the action contra IRFA triggers the urgency and the possibility of launching this application.

[14] In my opinion and based on the facts presented, BBI attempted to comply with its IRFA obligations. After it failed, it needed some time to get legal advice. The timelines were not unduly truncated. I, therefore, find that there is urgency, and there was compliance with the necessary rules and directives as far as urgency is concerned.

[4] Merits

[15] BBI's argument can be summarised as follows:

i. It is common cause that there is a dispute between the parties regarding the basis on which Eskom would provide maintenance and lease services to certain infrastructure. However, BBI contends that Eskom failed to exhaust the constitutionally and statutorily mandated dispute resolution mechanism applicable to organs of state, as laid out in Chapter 4 of IFRA. Eskom should have declared an intergovernmental dispute and engaged in the dispute resolution process. Instead, Eskom took coercive action by stating that it would not provide the maintenance and lease services unless BBI paid its historic debts in full. When BBI did not do so, they terminated the lease agreement, disconnected the leased optic fibre lines, and instituted action to recover the debts. BBI contends that these decisions were unlawful and that they are entitled to have them reviewed and set aside. They thus approach this court for interim interdictory relief to restore the

[2] Case number 12662/23.

status *quo*, pending the outcome of the dispute resolution process under IFRA.

ii. In the alternative to (i), they ask for reconnection of the leased optic fibres on the ground that the disconnections constituted actionable spoliations, based on the Broadband Infraco Act 33 of 2007 that creates a statutory servitude in section 6. They argue the quasi-possession precludes Eskom from dispossessing BBI without its consent or a court order.

[16] BBI further argues that it meets the requirements for interim interdictory relief as follows:

i. As for the right, they claim they have a specific right in the relief sought in the review application (part B). They seek to set aside three decisions and claim to have reasonable prospects of success. The three decisions are:

a. Eskom's decision taken on or about 12 October 2021 not to provide maintenance services on any bases until BBI settled its historic debts in full;

b. Eksom's decision on or about 26 September 2022 to disconnect the optic fibre lines leased to BBI in terms of the lease agreement and its decision, taken on or about 18 October 2022, to terminate the lease agreement;

c. Eskom's decision to institute the action.

They argue that these decisions should be reviewed and set aside in terms of section 6 of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), mostly by not considering the relevant considerations, contravening a law and acting irrationally. Most of the arguments rest on Eskom's failure to take its obligations under IRFA into account by exhausting its constitutionally and statutorily mandated dispute resolution process before resorting to litigation. It also rests on the devastating consequences its actions would have on BBI's business and ability to realise a priority of national interest and is therefore irrational. Lastly,

launching an action to recover debts before formally declaring an intergovernmental dispute violated section 45 of IRFA.

In short: BBI contends that it has a right to the dispute resolution process as contemplated in Chapter 4 of IFRA, and also in terms of the provisions of the "Intergovernmental Dispute Prevention and Settlement Practice Guide" as expressly required in their agreement.

Thus, Eskom violated BBI's rights, meaning there is a reasonable prospect of success in the review application that would enable BBI to vindicate its rights. This constitutes a clear right.

ii. Eskom's conduct has harmed BBI's business and led to BBI not being able to fulfil its statutory obligations. As long as Eskom does not provide the service, BBI's network collapse is a real possibility. It is also losing customers due to reduced service levels or no service. This harm is not disputed.

iii. As for the balance of convenience, BBI clarifies that it depends on Eskom for its existence, but Eskom does not rely on BBI for its existence. There is perhaps a financial prejudice on Eskom if this order is granted, but if this order is not granted, BBI will, in all probability, cease to exist. Its strong prospects of success in the review also count in its favour.

iv. BBI has no other remedy, and it was left with no option but to bring the application. It is only a request to restore the status quo while it takes the steps to violate its rights.

[17] Based on this, they argue they have satisfied interim interdictory relief. Eksom disagrees. They say that BBI has no right to lease and maintenance services without payment. They also do not offer to pay for the services. Neither has Eskom acted unlawfully in refusing to renew the agreements, as BBI failed to meet its obligations in terms of its agreements.

[18] The balance of favour also does not favour granting the interim interdict as BBI does not have reasonable prospects of success in the review application. This is because there has been substantive compliance with IFRA based on the extensive negotiations with BBI. Their non-renewal is because BBI failed to meet its obligation in terms of the main agreement and negotiated

agreements. Thus legal proceedings were only instituted after exhausting all the avenues to resolve the dispute without resorting to court proceedings.

[5] The law

[19] Section 41 of the Constitution governs intergovernmental co-operation. It obligates all spheres of government to co-operate in mutual trust and good faith by fostering friendly relations and avoiding legal proceedings against one another.[3] Section 41(2) then provides:

> 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.

[20] Section 239 of the Constitution defines organ of state as any department of state or administration in the national, provincial or local sphere of government; or any other functionary or institution exercising a power or performing a function in terms of the Constitution or a provincial constitution; or exercising a public power or performing a public function in terms of legislation. Eskom and BBI are both organs of state contemplated by this section.

[21] IRFA is the Act passed in terms of s 41(2) of the Constitution, and sets out the legislative framework applicable to all spheres and sectors of government to ensure conduct of intergovernmental relations to comply with the Constitutional obligations. S 5 deals with promoting the objects of IRFA. It requires, amongst other things, that material interests and the budget of other organs of state in other governments must be taken into account when exercising statutory powers or performing statutory functions;[4] that there must be a consultation following formal procedures determined by legislation or as agreed;[5] and participating in efforts to settle intergovernmental disputes.[6] The objective is to avoid intergovernmental disputes, or to settle them. Chapter 4 sets out the mechanisms of how to do it.

[22] S 40 imposes a duty on state organs to avoid intergovernmental disputes and settle them without resorting to judicial proceedings. S 41 requires that organs of state make reasonable efforts to settle disputes, and declare a dispute as a formal governmental dispute after reasonable efforts to avoid the dispute have failed. Ss 42 to 44 deals with the consequences of declaring a formal dispute, and the processes to follow such a formal declaration. S 45(1) concludes by providing that an organ of state is precluded from "instituting judicial proceedings in order to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 and all efforts to settle the dispute in terms of this Chapter were unsuccessful".

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[3] Section 41(1)(h)(I) and (vi).

[4] S 5(a).

[5] S 5(b).

[6] S 5(f)(ii).

[23] The guidelines prescribe how organs of state should deal with conflict management, namely using the Intergovernmental Dispute Prevention and Settlement Practice Guide for Effective Conflict Management. These guidelines repeat the constitutional duty to avoid litigation,[7] set out best practice for conflict management[8] and set out the steps that organs of state must follow in resolving an intergovernmental dispute.[9]

[24] As to Eskom's contention that there is no dispute as BBI acknowledges that it owes the money, *Eskom Holdings SOC Ltd v Lekwa Ratepayers Association NPC*[10] states the following:

> "[29] Although there is no real dispute as to the existence of the debts owed to Eskom by both the Ngwathe and Lekwa municipalities or as to the inability of these recalcitrant and dysfunctional municipalities to make any meaningful payments themselves due to their parlous financial state, disputes between Eskom on the one hand and the […] municipalities on the other, as contemplated in s 41 of the Constitution and inter alia ss 40 and 41 of IRFA, have prima facie arisen in relation to the manner in which the debt would be liquidated, the remedies available to Eskom in the event of default, and the terms upon which Eskom would agree to increase their historically agreed NMD levels to meet their present electricity supply demands.
>
> [30] Those intergovernmental disputes triggered the constitutionally and statutorily required dispute-resolution mechanism for organs of state prescribed in the IRFA, and all efforts to resolve those disputes should have been exhausted in terms of ch 4 of the IRFA. But the dispute resolution mechanisms was prima facie not followed."

[25] Furthermore, in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd*[11] the court stated

> [79] As an organ of state, Eskom bears certain constitutional duties. The relationship between Eskom on the one hand and the [municipalities] on the other is more than merely a contractual one regulated purely in terms of the [agreements] that the parties concluded. […]

[26] As BBI states in its founding affidavit – while access is regulated by agreement, the termination of the agreement did not engage with the mandated processes for intergovernmental disputes. These dispute mechanisms not only focus on the non-payment in terms of the lease between governmental organs – it is also about statutory entitlement and continued access to Eskom's infrastructure where there is a breakdown between the parties on the contractual front,[12] thus finding solutions outside the contract.

[27] The argument that BBI cannot bring this application because there is an action pending where they have raised an exception citing the same issues as the application does not hold. The very institution of the action, possibly contra IRFA, the issue in part B of the application, is the issue here.

[28] In light of the above, I am satisfied that BBI meets the requirements for an interim interdict, having established a prima facie right that the decisions are judicially reviewable and that they

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[7] Part 1 and 2.

[8] Section 3.

[9] Part 5.

[10] 2022 (4) SA 78 (SCA).

[11] 2021 (3) SA 47 (SCA).

[12] FA para 10.

have prospects of success in having them set aside on the basis that they undermine constitutional and statutory imperatives as laid out in IRFA.

[6] Order

[29] I, therefore, make the following order:

1. The ordinary forms and service provided for in the Uniform Rules of Court are dispensed with, and this application is heard and determined on an urgent basis in terms of the provisions of Rule 6(12)(a);

2. Pending the conclusion of the dispute resolution process contemplated in prayer 2 of Part B of this notice of motion:

   2.1. The action instituted by the Respondent against the Applicant out of the above Honourable Court on 30 March 2023 under case number 12662/23, is stayed;

   2.2. The Respondent is directed within 10 (ten) days of this order to:

      2.2.1. reconnect all the disconnected optic fibres it leased to the respondent in terms of the lease agreement concluded between the parties on or about 16 October 2019;

      2.2.2. provide the lease services in accordance with the terms of the lease agreement.

   2.3. The Respondent is directed to:

      2.3.1. resume providing the services contemplated by the maintenance agreement concluded between the parties on 10 May 2018;

      2.3.2. provide the maintenance services in accordance with the terms of the maintenance agreement as and when required by the Respondent.

3. The Respondent is to pay costs of this application.

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Mr AO Cook SC
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Instructed by:	Adams & Adams Attorneys
Counsel the for respondent:	Mr TN Mlambo
Instructed by:	TKN Incorporated
Date of the hearing:	01 August 2023
Date of judgment:	07 August 2023