REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

Case Number: 2024-013800

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

_____ _____

DATE SIGNATURE

In the matter between:

QUIPSELL TRADING 1007 (PTY) LTD T/A ELEPHANT COAST CONVINIENCE CENTRE Applicant

and

ESKOM HOLDINGS SOC LTD Respondent

JUDGMENT

SENYATSI J

Introduction

[1] This is an opposed urgent application for the restoration of electricity to the applicant's premises. The transformer which supplies electricity to the applicant's premises caught fire on 28 December 2023 and the applicant's premises, which it occupies through Permission to Occupy (PTO), has been without power since then.

Background

[2] The applicant's premises is situated in the Nkombose area, within the District of Hlabisa in the KwaZulu-Natal province. The applicant uses the premises as the owner and landlord with key tenants such as Steers, Debonairs, a Filling Station and an OK Mini Mart. Those tenants collectively employ about 75 people. Ordinarily, the application ought to have been brought in the KwaZulu-Natal High Court, however, in terms of the Electricity Supply Agreement concluded between the parties during 2005, the parties agreed to the jurisdiction of the South Gauteng High Court for any urgent matter relating to the dispute on supply of electricity and consequently, the Court agreed to hear the matter. The respondent in this matter will simply be referred to as Eskom.

[3] The transformer that caught fire, is the property of the respondent. It is common cause that the respondent was alerted about the fire and series of communications between the parties ensued to ensure that power was restored. It is also common cause that Eskom conducted the investigation into the cause of fire and found that there were over thirty illegal connections to the transformer. There were only four approved connections to the transformer which included the applicant and according to Eskom, the illegal connections overloaded the transformer's capacity and caused it to burn down.

[4] The applicant has engaged Eskom during December 2023, January and February 2024 to find a solution to the replacement of the transformer and the engagements yielded no positive results despite Eskom sending its engineers to inspect the damaged transformer. The community members were engaged by Eskom but the engagements did not bear the desired outcome.

[5] The engagements culminated in a meeting being held on 19 January 2024 with two "Induna's", a local councillor, Mr. Qwabe of Eskom, and the applicant's representatives to find a solution. It is also common cause that thereafter, between 22 and 24 January 2024, attempts were made on eight occasions by the applicant to have Eskom resolve the power supply by replacing the transformer.

[6] The applicant's representative was informed by Eskom through its employee Magda, that no transformer would be replaced until payment of the fines by the illegal connectors of electricity and until an audit was conducted. On 29 January 2024, Eskom through its manager Mr Mpanza who is based in eMpangeni informed Mr Bott of the applicant that the latter would be contacted by Mr. Sinoyolo Ngeno to find a resolution to the matter. Mr Bott was not contacted as agreed and Mr. Mpanza decided not to get involved any further. This prompted the applicant to issue a letter of demand which was followed by the litigation proceedings.

The Applicant's Contentions

[7] The applicant contends that it requires the intervention of the Court on an urgent basis and basically seeks a *mandamus* order against Eskom to replace the damaged transformer and provide power to its premises because Eskom is contractually and statutorily obliged to do everything within its powers as authorised by the Electricity Regulation Act[1] ("ERA") to ensure uninterrupted power supply if a customer like the applicant meets its contractual obligations to pay for the electricity.

[8] The applicant furthermore submits that Eskom is authorised in terms of section 23(1) of ERA which allows it to enter any premises to which

[1] 4 of 2006.

electricity is or has been supplied in order to inspect the lines, meters, fittings, works and apparatus belonging to it and by extension, this includes conducting audits for the illegal connections.

[9] The applicant contends that failure by Eskom to replace the damaged transformer for the reasons advanced by Eskom is irregular and that for that reason, the applicant is entitled to the relief it seeks.

[10] The applicant contends that the Court has jurisdiction because in terms of the electricity agreement concluded by the parties the jurisdiction of this Court was agreed to in the event of litigation.

Eskom's Contentions

[11] Eskom's case is that it cannot and should not be ordered to restore power to the applicant because before it could replace the transformer, it must conduct an audit to identify the illegal connections. For that process to commence, it should go onto the premises of the residents of Nkombose to conduct the audits. It contends that the community members have become hostile and prevent its officials from conducting the audit and the community members insist that they should not be disconnected and are threatening violence if that is done. Eskom therefore pleads that it is

impossible to replace the burnt transformer before it conducts the audit as set out above.

[12] It is also common cause that the applicant is up to date with its payment obligations to Eskom. The applicant says it seeks the intervention of the Court as the continuation of emergency power sourced from its generator is unsustainable due to the high price of fuel it uses to power its premises and contends that it is not sustainable to rely on emergency generator and the risk of the businesses failing owing to lack of reliable power supply is high.

[13] Eskom contends that the matter was not urgent because of the time that had elapsed since the 28 December 2023. It further contends that the Court did not have jurisdiction because the premises concerned are in KwaZulu-Natal where this Court has no jurisdiction. It furthermore contends that because of the illegal connections to the grid, the Court cannot compel it to restore power until an audit is completed and that it is doing all within its power to restore power to the applicant by first ensuring that the audit of illegal connections is done and thereafter replace the affected transformer.

[14] Eskom furthermore contends that the order sought against it is for specific performance in terms of the contract will constitute an empty

order should it be granted because the order will not be effective against the third parties on whose land the transformer is located. It argues furthermore that the order will extend beyond a mere contractual obligation and that the applicant ought to have sought relief in a Court that would have jurisdiction over the third parties who own the land where the transformer is located.

[15] Eskom argues furthermore that the matter is not urgent because the subject matter of the litigation started on 28 December 2023.

Issues for Determination

[16] The issues to be decided are as follows: -

a) Whether the application is urgent;

b) Whether Eskom‘s defence that illegal connections preclude the Court from granting the order is sustainable;

c) Whether the alleged impossibility of performance due to being prevented to conduct audits of the alleged illegal connections can be sustained; and

d) Whether the order sought is not effective and enforceable against the community and police services

The Legal Principles and Reasons

Urgency:

[17] The urgent applications are regulated by Rule 6(12) of the Uniform Rules of Court which provides thus: -

> "(a) In urgent applications 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 it deems fit.
>
> (b) In every affidavit filed in support of any application under paragraph (a) of this subrule, the applicant must set forth explicitly the circumstances which is averred render the matter urgent and the reasons why the applicant claims that applicant could not be afforded substantial redress at a hearing in due course."

[18] Urgency in urgent applications under Rule 6 involves mainly the abridgment of times prescribed by the rules and the departure from established filing and sitting times of the Court.[2] In urgent applications, the applicant must show that he will not otherwise be afforded substantial redress at the hearing in due course.[3]

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[2] Luna Meubel Vervaardigers (Edms) Bpk v Makin (t/a Makin's Furniture Manufacturers) 1977(4) SA 135(W) at 136H.
[3] See Luna Meubel above at 137H.

[19] Urgency does not relate only to some threat to life or liberty; the urgency of commercial interests may justify the invocation of the sub rule no less than any other interests.[4] Where an applicant first seeks compliance from the respondent before lodging the application it cannot be said that the applicant had been dilatory in bringing the application or that urgency was self-created. [5]

[20] If the Court hearing the application is not persuaded that the application meets the requirements for urgency, it may refuse to enrol the matter. The appropriate order to make is to strike the matter form the roll for lack of urgency and this gives the applicant an opportunity to enrol the matter on the ordinary roll.[6]

[21] In the instant case, Mr Shangisa SC submitted on behalf of Eskom that the application is not urgent because the applicant failed to involve the mechanism to mediate or arbitrate the matter before approaching the Court. This submission loses sight of the fact that since the transformer burnt down, the applicant's representatives took the initiatives of addressing the problem with the view to assisting Eskom to resolve the issue and replace the transformer. The steps that were taken are well

[4] *Twentieth Century Fox Film Corporation v Anthony Black Film (Pty) Ltd* 1982 (3) SA 582 (W) at 586G; *Bandle Investments (Pty) v Registrar of Deeds* 2001 (2) SA 203(SE) at 213B-D
[5] *Nelson Mandela Metropolitan Municipality v Greyvenouw CC* 2004 (4) SE381(SE) at 94C-D.
[6] See *Commissioner for the South African Revenue Services v Hawker Air Services* 2006(4) SA 292(SCA) at para 11.

documented in the papers and there is no dispute in so far as those initiatives and communications are concerned. It follows in my view that the applicant was not dilatory and cannot be faulted for trying to resolve the matter in the manner it attempted to. It was only when it became evident from Eskom's side that it was not going to replace the damaged transformer before an audit of illegal connections was concluded that the applicant correctly sought the intervention of this Court. It cannot under the circumstances of this case, be expected of the applicant to seek relief in the ordinary course because the supply of power to its business is a matter that determines, in my considered view, the survival of the businesses operated by its tenants which employ a significant number of people. The application is therefore urgent.

[22] The Court was referred to several cases by Mr. Shangisa SC on the issue of urgency. First was the case of *IL & B Marco Caterers* Pty Ltd v *Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty)Ltd* [7]. The application in that case concerned an interdict based on competition between the two liquor distributors. The applicant sought the matter to be heard on an urgent basis and Fagan J correctly refused to entertain the application because it was found that a substantial redress in due course could be achieved as both parties were powerful liquor

[7] 1981(4) SA 108(C)

distributors in the Republic. In my view, the facts of that case do not find application in the matter before this Court.

[23] I was also referred by Mr Shangisa SC to *Commissioner for the South African Revenue Services v Hawker Air Services Pty Ltd and Another* [8] where the Court said the following about the requirements of Rule 6(12): -

> "[9] One of the grounds on which Patel J dismissed the applications was that at their inception they had lacked urgency. This was erroneous. Urgency is a reason that may justify deviation from the times and forms the rules prescribe. It relates to form, not substance, and is not a prerequisite to a claim for substantive relief. Where an application is brought on the basis of urgency, the rules of court permit a court (or a judge in chambers) to dispense with the forms and service usually required, and to dispose of it 'as to it seems meet' (Rule 6(12)(a)). This in effect permits an urgent applicant, subject to the court's control, to forge its own rules which must 'as far as practicable be in accordance with' the rules). Where the application lacks the requisite element or degree of urgency, the court can for that reason decline to exercise its powers under Rule 6(12)(a). The matter is then not properly on the court's

[8] 2006 (4) SA 292 (SCA) at para 9.

roll, and it declines to hear it. The appropriate order is generally to strike the application from the roll. This enables the applicant to set the matter down again, on proper notice and compliance." This as stated by the Supreme Court of Appeal is trite in our law and of course each case depends on its own facts.

[24] In the case referred to me by Mr Shangisa SC, the appeal concerned the dismissal of an urgent application brought by SARS against the respondent and its related parties for the substantial debt of tax owed. The Court of first instance dismissed the urgent application to liquidate the respondent instead of striking it from the roll. The appeal set the dismissal of the liquidation urgent application aside and allowed the winding-up of the respondent. The facts of the instant case on urgency are distinguishable and although the principle on urgency finds application in this case, there is no refuge to be derived by Eskom from the said case.

[25] I was again referred to the Labour Court case of *Valerie Collins t/a Waterkloof Farm v Bernickow NO and Another*[9] which dealt with Rule 8 which is similar to Rule 6(12) of the Uniform Rules where Waglay J said the following:-

"[8.] Furthermore, if the applicant seeks this Court to come to its assistance it must come to the Court at the very first opportunity it

[9] [2001] ZALC 223 at para 8.

cannot stand back and do nothing and some days later seek the Court's assistance as a matter of urgency."

[26] In that case, the applicant had brought an application of an urgent application to review and set aside the CCMA's granting of condonation for referral of the labour matter for conciliation out of the prescribed timelines by the former employee. The Court was not satisfied with the reasons advanced for urgency and refused to entertain the matter. In the instant matter, I have already found that the facts set out in the founding affidavit are sufficient to establish urgency and I need not repeat myself in respect thereof.

Do Illegal Connections Preclude the Court from Granting the Order?

[27] Where there are illegal connections to the power grid, there is an obligation on Eskom in terms of its licence and the Code to remove such illegal connections to secure the supply of electricity for the benefit of the applicant and the community[10]. The common facts are that there are 33 illegal connections and 4 legal connections to the damaged transformer.

[28] The Court was referred to *Eskom Holding SOC Ltd v Masinda*[11] as an instructive judgment where the illegal connections preclude the Court

[10] Section 23 of ERA allows Eskom to inspect the properties that are supplied with electricity and of course this will include the power to perform the audit functions.
[11] [2019] ZASCA 98; 2019 (5) SA 386 (SCA)

from ordering Eskom to restore power where the grid has illegal connections. In that case, the appeal concerned the order by the Eastern Cape Division of the High Court, Mthatha that compelled Eskom to reconnect the power to Ms Masinda. Eskom alleged that it had determined that the connections to Ms Masinda's premises did not meet the minimum standards and were done by an unauthorised contractor. After disconnecting the illegal connections, Ms Masinda initiated litigation to be reconnected. On appeal, the Supreme Court of Appeal held that Eskom was not obliged to reconnect power to Ms Masinda and upheld the appeal by Eskom.

[29] The facts of the present case are distinguishable from the *Masinda* case because unlike in *Masinda,* in the present case, there is no suggestion that the applicant is one of the illegally connected. Eskom's case is simply that because it needs to determine who the 33 illegal connections belong to by way of audit, it cannot be expected to resolve the damaged transformer as doing so without disconnecting the illegal connections, would create harm to its replaced transformer which may lead to the repeat of the fire incident. It contends that it cannot conduct the audit because the members of the community would not allow it to do so. Whilst I have sympathy with Eskom in regard to their predicament, I

believe that the applicant cannot be made to suffer for something it is not party to.

[30] The applicant is not illegally connected to the grid. The ERA and Code have mechanisms in place to ensure that connections to the grid are legal and that Eskom is obliged to take all steps necessary to disconnect the illegal connections. This is what the law expects of Eskom and in my considered view, reliance on *Masinda* by Eskom is misplaced.

[31] Mr Shangisa SC also referred me to *Eskom Holdings Ltd v Strydom* [12]. In that case, Eskom had appealed a judgment of the lower court (Magistrate) where the lower court had confirmed a *rule nisi* order in terms of which Eskom was ordered to restore electricity to Mr. Strydom after it had disconnected the power to the hostel and piggery business owned by Mr. Strydom on account of non-payment of the overdue account. The issue the appeal Court had to deal with was whether the supply of electricity to the respondent did not result in it becoming an incident of possession and thus the *mandament van spolie* was not an applicable remedy in the circumstance.

[32] Kollapen J writing for the appeal Court after considering relevant authorities found that the right to the use of electricity was largely governed by a relationship and an understanding that payment would be

[12] [2015] ZAGPPHC 315.

made for the services being rendered and that failure to make payment and subject to the procedural fairness, Eskom had a right to disconnect the electricity.

[33] *In casu,* the facts are evidently distinguishable because the termination or failure of Eskom to replace the damaged transformer is not premised on non-payment of the account by the applicant. Accordingly, reliance on that case is misplaced.

[34] I was also referred to *Lateovista (Pty) Ltd and Others v Ekurhuleni Metropolitan and Another*[13]*; 39 Van Der Merwe Street Hillbrow CC v City of Johannesburg Metropolitan Municipality and Another*[14]. Having considered those authorities, I am not persuaded that the authorities are of relevance in the instant matter. It follows, in my considered view, that this Court is not precluded from making an appropriate order as the applicant is not illegally connected to the grid.

Impossibility of Performance

[35] It is trite law that impossibility of performance (*impossibilium nulla obligatio est*[15]) is a valid defence in our law. An undertaking to do the

[13] [2023] ZAGPJHC 163.
[14] [2023] ZAGPJHC 963.

[15] Rosebank Mall (Pty) Ltd and Another v Cradock Heights (Pty) Ltd 2004(2) SA 353(W) at 383F-G.

impossible could not be regarded as a rational choice and would therefore preclude the conclusion of a contract.[16] For the impossibility of performance to be sustained as a defence, it must be objective in the eyes of the law.[17]

[36] The test for objective impossibility of performance is a pragmatic standard.[18] Therefore, an absolute impossibility will satisfy the test.[19] Where performance is prohibited by law, the inability to perform may be treated as an instance of objective impossibility or illegality.[20]

[37] Eskom contends that it cannot remove the damaged transformer because the transformer is on someone's land and the community members are not so to speak, co-operating as they insist on being supplied with electricity as well. Whilst I have sympathy with Eskom's contention, I disagree that the impossibility of performance meets the test set out above. This is so because section 23 of ERA makes it abundantly clear that Eskom is empowered to access any land on which its infrastructure is situated for the supply of electricity to inspect and do all that is necessary to give effect to its contractual obligations. The defence is therefore rejected.

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[16] Ziimmermann ,Obligations 686.
[17] McPhee v McPhee and Another 1989 (2) SA 765(N) at 769B-F.
[18] De wet & Van Wyk Kontratereg 85-86.
[19] Hyeneke v -Abercrombie 1974(3) SA 338(T) at 342-343
[20] Wilsom v Smith and Another 1956(1) SA 393 (W).

The Court Order Sought is Not Effective and Enforceable Against the Community and the Police Services

[38] Mr Shangisa SC submitted on behalf of Eskom that the relief sought is not effective and enforceable against the community and the police services because of non-joinder. I fail to see the logic on how the contractual dispute for restoration of electricity by replacing the damaged transformer can adversely affect any of the community members. Insofar as the aspect of the community members is concerned, the contention is rejected out of hand.

[39] As regards the order to be enforced presumably by seeking the intervention of the police, the argument loses sight of the fact that Eskom is empowered by ERA to perform its functions without any hinderance from third parties and the protection of the police is not something that, in my considered view, requires the police to be joined in this type of litigation. Consequently, the defence stands to fail.

Order

[40] Having considered the arguments and the papers before me, the following order is made:

a) Pending the institution, within **10 days** of this order being granted, and the finalisation of the proceedings by the applicant, the respondent is ordered to immediately, upon the issuing and service of this order, do all things reasonably necessary to restore the electricity supply to the applicant's premises within 48 hours.

b) Paragraph 1 of this order acts as an interim order with immediate effect.

c) The respondent is ordered to pay the costs of this application on an attorney and client scale.

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ML SENYATSI
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This Judgment was handed down electronically by circulation to the parties/ their legal representatives by email and by uploading to the electronic file on Case Lines. The date for hand-down is deemed to be 12 March 2024.

APPEARANCES

For the Appellants: Adv M Louw

Instructed by: Hahn and Hahn Attorneys Incorporated

For the Respondent: Adv SL Shangisa SC
Adv L Rakgwale

Instructed by: Molefe Dlepu Attorneys

Date of Hearing: 23 February 2024

Date of Judgment: 12 March 2024