REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 2018/16

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

13-10-2020 p.p. .....

In the matter between:

PIONEER FOODS (PTY) LIMITED	**Applicant**
and	
ESKOM HOLDINGS SOC LIMITED	**First Respondent**
WALTER SISULU LOCAL MUNICIPALITY	**Second Respondent**

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA **Third Respondent**

JUDGMENT

MBONGWE AJ

SUMMARY

[1] This application, PART B, is a sequel to a two – part application the applicant launched against the respondents. At the heart of the dispute, as evidenced by the relief sought, is the exercise by the first respondent of its statutory powers to introduce interruptions in its supply of electricity to the second respondent due to non – payment for the electricity supplied and subsequent failures by the second respondent to honour payment arrangements it had undertaken to settle its debt. The applicant operates a production business within the second respondent's demarcated area and receives electricity supply via the electricity reticulation network of the second respondent. It consequently stands to be affected by the electricity supply interruptions. It is on this premise that the

applicant sought an order interdicting the first respondent from implementing the interruptions and other ancillary relief the main being an order that the first respondent effects uninterrupted supply of electricity to the second respondent or, alternatively, direct to the premises of the applicant (PART A). In PART B the applicant seeks the review and setting of the certain decisions of the first respondent aimed at the implementation of the interruptions, an order directing the first respondent to supply electricity direct to its premises as well as various alternative orders directing the first and second respondents to engage in various acts to avert the interruptions to the supply of electricity. Held: That the applicant has misconstrued the nature of the impugned decisions; that the applicant has no locus standi and consequently not entitled to any of the orders of a directive nature against the first respondent or directing first respondent alone or in conjunction with the second respondent to participate in any engagement. Application dismissed with costs.

BACKGROUND

[2] The first respondent was established legislatively for the purpose of generating, distributing and supplying bulk electricity to Municipalities such as the second respondent,

inter alia, against payment therefor. Being a creature of statute the first respondent is obliged, in the conduct of its business, to adhere strictly to the provisions of its founding and enabling statute and other legislative measures applicable to it. In addition, the third respondent was established in terms of the National Energy Act 34 of 2008 to be the custodian of the enabling statutory provisions and further anointed with the authority to regulate the first respondent.

THE THREE TIER RELATIONSHIP

[3] The relationship between the 1st and 2nd respondents is founded on the Electricity Supply Agreement entered into between them. The supply of electricity is subject to provisions of various legislative measures as well as regulations issued by the third respondent. The latter also issues trading licences to both the first and second respondents with specific conditions attached thereto. The third respondent determines the tariff the first respondent is to charge the 2nd respondent for electricity supplied. The 2nd respondent resells the electricity to persons, natural and juristic, resident within its area and electricity reticulation network at a profit. Municipalities are required by law to keep a separate account for moneys received from electricity sales from which they pay the first

respondent after deducting their commission. It follows, therefore, that there exists no direct relationship between the applicant and the first respondent.

THE ORIGINS OF THE DISPUTE

[4] It is common cause that the root cause of the dispute between the parties is the inability of the second respondent to settle its debt for electricity supplied to it by the first respondent and the failure to honour undertaken payment arrangements. This resulted in the first respondent taking a decision to exercise its statutory power to cajole the second respondent to make good of the debt. The first respondent opted for the milder of the two modes of enforcement of payment available to it in terms of Section 21(5) of the Electricity Regulation Act 4 of 2006 (ERA), being the introduction of interruptions to the supply of electricity as opposed to a total cut- off of the supply of electricity to the second respondent.

PRELIMINARY STEPS TAKEN BY FIRST RESPONDENT

[5] Prior to taking the decision to introduce the electricity supply interruptions, the first respondent published notices in two newspapers circulating in the area of the second respondent

communicating its intention to introduce the interruptions to the supply of electricity to the second respondent. The reasons for the intended interruptions are clearly set out and so are the details of the intended commencement date, the days, times and duration of the interruptions for the awareness of all who stand to be affected, including the applicant. In addition, the first respondent extended an invitation to persons reliant on the second respondent's electricity reticulation network to engage with the first respondent and make submissions, ostensibly to avert the interruptions. A cut - off date for public participation is also stated. It is important to state that in the same notice, the first respondent stated that it reserves the right to extend the duration of the interruptions. The importance of the notification of the reservation of this right will dispose of the applicant's contentions in respect of one of the impugned decisions of the first respondent.

[6] The first respondent alleges that its invitation for public participation and input drew a blank and that not even the applicant took advantage of this opportunity to make an input. This state of affairs resulted in the first respondent taking a decision in September 2017 to implement the interruptions in line with its publicised notification. However, the notification

appeared to have awaken the 2nd respondent as a meeting took place between the two and culminated in the 2nd respondent making an undertaking to pay its debt. This resulted in the 1st respondent publishing another notification announcing the suspension of the implementation of the electricity supply interruptions and disclosing the 2nd respondent's undertaking as the reason for the suspension. It is common cause that the 2nd respondent defaulted. This resulted in the 1st respondent taking a decision in NOVEMBER 2017 (THE FIRST DECISION) to publish and published another notice announcing the reinstatement of the suspended implementation of the interruptions.

[7] The 2nd respondent persisted in the failure to pay its debt or honour its payment arrangement undertaking. In response, the 1st respondent took a decision in December 2017 (THE SECOND DECISION) to publish and published a notice announcing its intention to increase the duration of the interruptions with effect from the middle of January 2018.

DISPUTE ON THE DECISIONS

[8] The applicant firstly disputes the 1st respondent's entitlement to invoke the provisions of Section 21(5) of the Electricity Regulation Act 4 of 2006 to take and implement these decisions which, it contends, are not compliant with the provisions of the PAJA and describes them as irrational. The applicant seeks a review and setting aside of these decisions. In the second instance the applicant challenges the lawfulness of the interruptions which it successfully had interdicted. Curiously, the applicant does not seek the same relief in respect of the September 2017 decision which it persistently refers to as the alleged September 2017 decision.

[9] The applicant's dispute regarding to the entitlement of the 1st respondent to invoke the provisions of section 21(5) of the ERA, the enabling statutory instrument to recover debts owing to it, is without merit. The validity of this section has been confirmed in a number of cases one of which is a decision of the Constitutional Court in **OLGA RADEMAN v MOQHAKA LOCAL MUNICIPALITY & OTHERS; CASE CCT 41/12[2013] ZACC11.** The applicant's contention, therefore, ought to be rejected.

ARGUMENTS

[10] The first respondent contends that the applicant's failure to participate in the public participative process and to engage other internal problem resolution formations such as the 3rd respondent renders this application premature. In response, the applicant alleges to not have been aware of the first respondent's initial publicised notice nor the decision to implement the interruptions taken in September 2017. The applicant further suggested that the attachment of notices to electricity bills would have been an effective mode of notification. It seems to me the applicant has lost sight of the fact that publication of the notification was done by or at the behest of the first respondent who has no direct ties with the residents of the second respondent nor does it produce and send electricity bills to such residents. I can find no fault in the steps alluded to above that were followed by the 1st respondent prior to deciding on the implementation of the interruptions. I accordingly find that the preliminary steps followed by the 1st respondent leading to it taking the decision to implement the interruptions complied with all applicable statutory provisions, including the PAJA and regulatory provisions. The applicant's contentions to the contrary stand to be rejected.

[11] The applicant's professed ignorance of the initial public notification and the persistent denial of the existence of the September 2017 decision of the 1st respondent despite proof thereof appears more of a designed mechanism to obstruct the 1st respondent from exercising and executing its statutory powers to ensure its sustainability. It was the stratagem, in my view, to create the urgency in PART A of these proceedings.

[12] Notwithstanding its failure to heed to the second respondent's invitation, the applicant was advised at some point by officials of the first respondent to approach the third respondent in an effort to seek a resolution and aversion of the interruptions. Interestingly, the applicant admittedly made no concerted effort in this regard, boldly arguing, without cogent evidence, that the third respondent had no power to stop the interruptions. The engagement of the third respondent is part of the internal problem resolution processes envisioned in Section 7(2) of the PAJA and is imperative. The applicant in essence concedes its failure to engage in and exhaust prescribed internal dispute resolution formations to seek a resolution of the problem before deciding on approaching the court. Overlooking the peremptory prescripts of the PAJA in this regard is fatal to the applicant's application for a review

and setting aside of the impugned decisions. I accordingly find that this application was launched prematurely and not suited to be entertained by the court. The pertinent provisions of section 7(2) of the PAJA which read thus;

Section 7 "(2) (a) 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 been exhausted."

I can find no exceptional circumstances in the entire version of the applicant to qualify this application for entertainment by the court in terms of the provisions of Section 7(2)(c) of the PAJA. The finding that this application was prematurely launched consequently stands.

[13] The other alternative reliefs sought by the applicant in this PART B of the proceedings are listed in the applicant's AMENDED NOTICE OF MOTION dated or uploaded on caselines on 27 May 2020. It is observed that the applicant seeks orders which are directive in nature. As expected, opposing arguments were presented in and around the applicant's entitlement to these orders. The applicant seeks in the first instance orders:

[14] 1. Granting any relief that has not been granted in PART A of this application. It appears to me that the only prayer that appears to be outstanding from the hearing of PART A is the one couched in the applicant's papers as follows: "The first respondent is ordered to supply electricity on an uninterrupted basis to the applicant's premises located at....." I specifically mentioned the date the amended notice was at least uploaded, being 27 May 2020, for the reason that the relief sought falls short of the appreciation of the main intervention that has since occurred, namely, the load reduction process, as it is referred to lately. This intervention alone will render it impossible for the first respondent to comply with the order sought and the applicant's insistence on the granting thereof is absurd. The load reduction process is a national inconvenience and it is unreasonable of the applicant, itself a part of the nation, to seek to be immunised from the inconvenience by an order of the court. Besides, there exist an agreement between the first and second respondents, the Electricity Supply Agreement, for the supply of bulk electricity. There is no such agreement between the applicant and the first respondent. This is yet another indicator of the lack of locus standi on the part of the applicant to seek an order for a direct supply of electricity to its premises by the first respondent.

[15] The findings in paragraph 9 dispose of the applicant's assertions of unlawfulness in the impugned decisions and the implementation thereof. These decisions were grounded on obligatory statutory provisions and with the finding that the first respondent had acted in compliance with the law in the exercise of the powers afforded to it, the assertion of unlawfulness is untenable.

[16] The genesis of this matter lays bare the fact that some of the electricity supply interruptions experienced by the applicant were due to the load reduction process. The applicant had ample time and opportunity to reflect these changes in its amended notice of motion, but chose not to do so. The flagging of this relief in the judgment of Van Oosten J in one of the hearings of PART A appears to have been in vain. A court order must be implementable, bring about or restore fairness, equality and justice, inter alia, and ought to be respected. These constitutional imperatives will be lost in the relief sought. For the reasons given the order sought is refused.

[17] Having found that the applicant lacks legal standing as against the first respondent, I further find that the applicant is not entitled to any orders of a directive nature against the first

respondent. It follows that, to the extent that the remaining relief sought is aimed at effectively directing the first respondent alone or in conjunction with the second and/or the third respondents to perform certain acts, the applicant's lack of legal standing disqualifies it from entitlement to such orders.

[18] The applicant, despite its admitted knowledge that the second respondent does not have money and has failed to honour its payment arrangements towards settlement of its debt, nevertheless seeks an order directing the second respondent to pay the first respondent. The applicant is clearly clutching at straws in this respect. The applicant knows the order will be of no practical effect in the circumstances of this case. This ought to be frowned upon if court orders and the court itself are to be respected. I say this in light of counsel's argument and submission on behalf of the applicant that applicant's success in at least one aspect of its case should entitle it to costs. This should not be the basis for extensive litigation and is frowned upon.

CONCLUSION

[19] In light of the findings in this judgment the application is dismissed.

COSTS

[20] There has been quite a number of hearings in PART A of this application. It is noted that orders for costs were mainly reserved and deferred to the determination of PART B. The dismissal of the application and the success of the first respondent must result in the applicant having to bear the costs. In awarding costs I take into account that the applicant acts herein not for the community,but for its own interests. That much came repeatedly out in arguments on its behalf particularly with regard to notifications and a demand for special recognition and treatment based on applicant being a 20% consumer of the electricity reticulated by the 2nd respondent. Further, this matter has unjustifiably dragged for far too long. This has also been the observation in at least two earlier judgments in PART A. I agree with Van Oosten J that ulterior motives appear to be behind this occurrence, one example of which, in my view, is the obvious prejudice to the first respondent who has, for the duration of these proceedings, been forced to continue to supply electricity to the 2nd respondent in circumstances of persistent non-

payment therefor by the 2nd respondent. The complexity of the issues involved in this matter justified the engagement of two counsel.

ORDER

[21] In light of the findings in this judgment I make the following orders:

1. The applicant's application is dismissed.
2. The applicant is ordered to pay the costs of the application which shall include the costs in PART B and all costs reserved in the different hearings in PART A.
3. The costs ordered shall include the costs consequent upon the employment of two counsel.

M. MBONGWE AJ

ACTING JUDGE OF THE GAUTENG LOCAL DIVISION OF THE HIGH COURT, JOHANNESBURG

APPEARANCES

For the applicant:	Adv. J.P.V McNally SC with him: Adv. B.L. Manentsa
Instructed by:	Webber Wentzel, Johannesburg
For the first respondent:	Adv. S. L. Shangisa SC with him: Adv. L. Rakgwale
Instructed by:	The State Attorney, Johannesburg.

Date of hearing: 31 July 2020

JUDGMENT HANDED DOWN / ELECTRONICALLY TRANSMITTED ON 12 OCTOBER 2020.