IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

CASE NO: 4102/2019P

In the matter between:

NEWCASTLE MUNICIPALITY	First Applicant
MEC (KWAZULU-NATAL) FOR THE DEPARTMENT OF CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS (COGTA)	Second Applicant

and

ESKOM SOC LTD	First Respondent
LANXESS CISCA (PTY) LTD	Second Respondent

Coram: BEZUIDENHOUT A J
Heard: 11 December 2019

Delivered: 30 January 2020

ORDER

The following order is made:

1. The first respondent is directed to pay the second respondent's costs of its intervention in the application, second respondent's wasted costs in respect of the adjournment of the matter on 6 December 2019 and the second respondent's costs of 11 December 2019, such costs to include the costs of two counsel, where so employed.
2. No further order as to costs is made.

J U D G M E N T

BEZUIDENHOUT AJ :

[1] The matter initially came before the Honourable Mr Justice Bezuidenhout on 3 October 2019 as an urgent application wherein first applicant, the Newcastle Municipality and second applicant, the MEC (KwaZulu-Natal) for the Department of Co-Operative Governance and Traditional Affairs (Cogta) sought an order interdicting the first respondent, Eskom Soc Ltd, from disconnecting the electricity supply to the municipality, pending the finalization of an application for the review of Eskom's decision to disconnect such supply.

[2] At the hearing of the matter the second respondent, Lanxess Cisca (Pty) Ltd (Lanxess) applied for leave to intervene.

[3] On 8 October 2019 Bezuidenhout J granted the following order:

'1. A rule nisi is granted in terms of paragraphs 1, 1.1, 1.2 and 3 of the notice of motion. The date in paragraph 1 to be 6 December 2019;
2. The matter is to be set down on the opposed roll on 6 December 2019;
3. Lanxeso Cisa (Pty) Ltd is granted leave to intervene and is joined as second respondent in these proceedings;
4. Second respondent is to file its answering affidavit by 18 October 2019;
5. All parties are granted leave to file supplementary papers by 29 October 2019;
6. Pending finalisation of this application first applicant is to make a minimum monthly payment to respondent (Eskom) in the sum of R30milion (thirty million rand) per month by no later than the 15th of each month commencing on 15 October 2019.
7. Cost are reserved.'

[4] On 29 November 2019, a week before the hearing of the matter on the opposed roll on 6 December 2019, Eskom filed a 17 page supplementary answering affidavit to which was attached annexures consisting of some 128 pages. The affidavit was filed a month out of time as per paragraph 5 of Bezuidenhout J's order.

[5] It also bears mentioning that at the time Eskom had failed to file heads of argument as well as a practice note in compliance with the practice directives of this division.

[6] Eskom's supplementary answering affidavit was not accompanied by a substantive application for condonation for its late filing, the deponent of the affidavit, one Ronald Chonco, merely choosing to apologise for the late filing and begging leave for condonation in one sentence. This was off course wholly inadequate.

[7] Not surprisingly, at the hearing of the matter on 6 December 2019, the other parties objected to the filing of Eskom's supplementary answering affidavit, and after a brief argument before me and subsequent discussions between the parties, an agreement was reached to adjourn the matter to 11 December 2019, with the other parties given leave to file affidavits in response to Eskom's supplementary answering affidavit. The wasted costs occasioned by the adjournment were reserved.

[8] On 11 December 2019 the parties came to an agreement in settlement of the merits of the application but could not all agree on the issue of costs.

[9] The parties consented to an order in the following terms:

'1. The rule nisi is discharged.

2. The First Applicant is ordered to pay the First Respondent all amounts falling due to the First Respondent in terms of the monthly current account for the supply of bulk electricity as set out in the monthly invoices issued by the First Respondent with effect from 15 January 2020.

3. The First Respondent is ordered not to interrupt the supply of bulk electricity to the First Applicant provided the First Applicant complies with the terms of the current account for its monthly electricity bill. In the event that the First Respondent fails to comply with paragraph 2 above, the First Respondent shall not terminate the supply of bulk electricity supply without complying with the provisions of PAJA.

4. The Applicants and the First Respondent are directed to engage in constructive negotiations for the payment of the arrear debt owed by the First Respondent within 3 (three) months of issuing of this order.'

and which order I subsequently granted.

[10] The Newcastle Municipality and Eskom agreed that as far as costs were concerned, each party would pay its own costs.

[11] Cogta and Lanxess were both seeking their costs from Eskom, which would include the wasted costs of the adjournment on 6 December 2019. Counsel for the relevant parties proceeded to argue the issue of costs before me.

[12] In the decision of *President of the Republic of South Africa and others v South African Rugby Football Union & others* 1999 (2) SA 14 (CC) para 52 Chaskalson P said the following (footnotes omitted):

'Rules relating to the award of costs in these and other circumstances are not immutable and, although affording broad guidelines, have to be applied to the facts of each case. In the end the award of costs depends on an equitable weighing up of various factors, including the evaluation of success in the particular proceedings, the reasons for bringing them, the circumstances in which they were brought and the nature of the opposition.'

[13] Cogta's counsel submitted that in general, courts are loathed to order costs in litigation between government departments. This is off course so because such costs are ultimately sourced from the same public purse (see *Minister of Police & others v Premier of the Western Cape & others* 2014 (1) SA 1 (CC) para72 and *Johannesburg Metropolitan Municipality v Gauteng Development Tribunal & others* 2010 (6) SA 182 (CC) para 94).

[14] Cogta's counsel submitted that in this particular matter however, Eskom should be directed to pay its costs as Eskom failed to act in good faith and was ultimately the cause of what was described as unnecessary litigation. Cogta's involvement in the litigation was further more justified by virtue of the provisions of s 154 of the Constitution and s 135 of the Local Government Municipal Finance Management Act 56 of 2003. It was also due to Cogta's involvement, it was submitted, that the municipality revised its budget and came to be in a financial position where it could consent to the order as agreed upon between the parties on 11 December 2019.

[15] It is common cause that at the time of the bringing of the application, the municipality was substantially indebted to Eskom. As at June 2019 it owed Eskom the amount of R236 million – which debt had accumulated over a number of years. The municipality and Eskom had concluded Acknowledgement of Debt and Repayment agreements on various occasions, with the municipality defaulting inevitably as a result of worsening financial difficulties. This situation is currently facing a number of municipalities across the country.

[16] Eskom, as it is legally entitled to do, decided to disconnect the supply of electricity to the municipality. It is this decision that would ultimately have formed the subject of a review application had the merits not become settled.

[17] Eskom, in a letter dated 5 August 2019 addressed to the municipality, in effect placed it on terms to pay 'the full outstanding bill' or else 'Eskom will proceed with the Promotion of Administrative Justice Act 3 of 2000 (PAJA) process in respect of the above mentioned electricity account on 19 August 2019' (sic).

[18] Eskom proceeded to publish a notice, apparently what it believed to be incompliance with PAJA and in particular s 4(3) thereof. The section reads as follows:

'If an administrator decides to follow a notice and comment procedure, the administrator must —

(*a*) take appropriate steps to communicate the administrative action to those likely to be materially and adversely affected by it and call for comments from them;

(*b*) consider any comments received;

(*c*) decide whether or not to take the administrative action, with or without changes; and

(*d*) comply with the procedures to be followed in connection with notice and comment procedures, as prescribed.'

[19] The notice and comment procedures were subsequently 'prescribed' when regulations were promulgated and published under Government Notice R1022 in *Government Gazette* 23674 of 31 July 2002, as amended by Government Notice R614 in *Government Gazette* 27719 of 27 June 2005. Chapter 2 (consisting of Regulations 17-22) in particular deals with this procedure. Regulation 18 deals with publication in particular. It reads as follows:

(1) Information concerning the proposed administrative action must be published by way of notice-

(*a*) if the administrative action affects the rights of the public throughout the Republic, in the *Government Gazette* and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout the Republic; or

(*b*) if the administrative action affects the rights of the public in a particular province only, in the *Provincial Gazette* of that province and a newspaper which is distributed, or in newspapers which collectively are distributed, throughout that province; or

(*c*) if the administrative action affects the rights of the public in a specific area only, in a newspaper which is distributed in that specific area.

(2) A notice published in terms of subregulation (1) must include -

(*a*) an invitation to members of the public to submit comments in connection with the proposed administrative action to the administrator concerned on or before a date specified in the notice, which date may not be earlier than 30 days from the date of publication of the notice;

(*b*) a caution that comments received after the closing date may be disregarded; (*c*) the name and official title of the person to whom any comments must be sent or delivered; and

(*d*) the -

(i) work, postal and street address and, if available, also an electronic mail address;
(ii) work telephone number; and
(iii) fax number, if any,
of the person contemplated in paragraph (*c*).
(3) A notice published in terms of subregulation (1) must -
(*a*) contain sufficient information about the proposed administrative action to enable members of the public to submit meaningful comments; and
(*b*) when appropriate, specify a place or places where, and the hours within which, further information concerning the proposed administrative action will be available for public scrutiny.
(4) A notice published in terms of subregulation (1)(a) and (b) in a newspaper may, notwithstanding the provisions of subregulations (2) and (3), only contain-
(*a*) a concise statement of the proposed administrative action;
(*b*) the name, official title, contact telephone number and physical address of the person from whom further information on the proposed administrative action and the administrative procedure can be obtained; and
(*c*) a note that a more detailed notice concerning the proposed administrative action appears in the Government Gazette or Provincial Gazette, as the case may be.
(5) If a notice published in terms of subregulation (1) specifies a place or places where further information about the proposed administrative action will be available for public scrutiny, access to that information must be allowed from the date on which the notice is published until the closing date for comment, with the exclusion of Saturdays, Sundays and public holidays.
(6) In order to ensure that a proposed administrative action is brought to the attention of the public, an administrator may, in addition, publicise the information referred to in subregulations (1) to (5) by way of communications through the printed or electronic media, including by way of press releases, press conferences, the Internet, radio or television broadcasts, posters or leaflets.'

[20] An administrator, such as Eskom, is bound by the requirements of s 4(3) of PAJA and by the regulations that supply detailed instructions concerning the procedures (see *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) para 131-132 as referred to by C Hoexter *Administrative Law in South Africa*, 2 ed (2012), at 245).

[21] It is clear from a mere cursory glance that the notice published by Eskom on 28 August 2019 did not comply with the regulations.

[22] Regulation 18(2)(*a*) prescribes a period of not less than 30 days to allow members of the public to submit comments. Eskom's notice only gave the public 28 days to comment.

[23] Eskom failed to comply with Regulation 18(2)(*c*) and (*d*) in that the name of the official to whom comments must be sent was not mentioned and the notice contained no work telephone number or fax number.

[24] As required by Regulation 18(3)(*b*) Eskom also failed to supply details of where further information concerning the proposed administrative action would be available for public scrutiny.

[25] Eskom furthermore paid mere lip service to the requirements of Regulation 18(1)(*c*) which deals with the publication of the notice in a newspaper which is distributed in that specific area. It is common cause that Eskom published notices in the *Natal Mercury* newspaper as well as the *Isolezwe* newspaper. Mr GJ Strydom, on behalf of Lanxess, alleged in his affidavit that the *Natal Mercury* has a very limited distribution in the Newcastle area of only approximately 100 copies per day and the *Isolezwe* newspaper 950 copies per day. This in a municipal area home to almost five hundred thousand people. Apparently, the *Newcastle Advertiser* is an English newspaper which is more widely circulated and distributed in the Newcastle area. The *Amajuba Eyethu*, a Zulu newspaper, is likewise more widely circulated and distributed within the Newcastle area.

[26] Eskom further failed to comply with Regulation 20 which deals with the rights of members of the community who cannot read or write or who would otherwise need special assistance. It reads as follows:

'(1) If any proposed administrative action may materially and adversely affect the rights of members of a specific community consisting of a significant proportion of people who cannot read or write or who otherwise need special assistance -

(*a*) a notice must be publicised in the area of that community in a manner that will bring the proposed action to the attention of the community at large; and

(*b*) the administrator must take special steps to solicit the views of members of the community.

(2) Special steps in terms of subregulation (1)(b) may include -

(*a*) the holding of public or group meetings where the proposed action is explained, questions are answered and views from the audience are minuted;

(*b*) a survey of public opinion in the community on the proposed action; or

(*c*) provision of a secretarial facility in the community where members of the community can state their views on the proposed action.'

[27] Perhaps the most important of all the shortcomings in the notice was the confusing and contradictory times set out in the time tables for interruption and/or disconnection. It is stated in the notice that there would be an interruption and/or disconnection of power supply for:

WEEK 1 (30 September to 05 October 2019)

Monday to Friday	**Monday to Friday**
06h00 – 09h00	06h30 – 12h00
17h00 – 20h30	15h00 – 19h00

and

WEEK 2 (07 October 2019 until breach is remedied)

Monday to Friday	**Monday to Friday**
06h00 – 20h00	06h00 – 20h00

[28] Counsel appearing for Eskom was adamant that Eskom had complied substantially with the requirements of s 4 of PAJA and submitted, inter alia, that Eskom could not be expected to go to the expense of first doing research to ascertain which local newspapers enjoy a bigger distribution. I agree fully with Cogta's counsel that Eskom could simply have made a phone call to its local manager in Newcastle to ascertain something as basic as this.

[29] Despite all the aforementioned shortcomings, Eskom nonetheless published its final decision notice in terms of which it would commence with disconnections on

30 September 2019 in accordance with a time table that differed substantially from the one published in the first notice.

[30] Eskom's counsel urged me to not favour form over substance and submitted that the issues raised by Cogta and Lanxess amounted to 'a splitting of hairs' and that Eskom should only be held to the bare minimum of standards.

[31] Although writers such as Currie and Hoexter are of the view that courts would be more likely to adopt a particularly generous and flexible approach when it comes to the detailed regulations and are unlikely to insist on strict compliance (see Hoexter; supra, at 419-420), I am of the view that when an entity such as Eskom embarks upon administrative action, which can have potentially catastrophic consequences for businesses such as the second respondent and especially ordinary members of the public, the least it could have done was to pay attention to the basic requirements of the regulations. Eskom clearly has access to substantial legal expertise in order to ensure compliance with legislation and its failure to do is disappointing.

[32] Cogta's counsel referred me to the decision of *AllPay Consolidated Investment Holdings (Pty) Ltd & others v Chief Executive Officer, South African Social Security Agency & others* 2014 (1) SA 604 (CC) where the court dealt with the materiality of non-compliance with legal requirements, which requires an assessment of whether the purpose the requirements are to serve, have been substantially achieved. The notice published by Eskom fails miserably in this regard and clearly establishes grounds for review under PAJA. The municipality, Cogta and Lanxess's prospects of success on review would have been strong indeed and the bringing of this application was fully justified.

[33] As to be expected, counsel for Eskom argued vigorously against an order that it be liable for Cogta's costs and submitted that it would be wholly inappropriate. It was further submitted that the municipality's default and Cogta's failure to prevent the municipality's debt from spiralling out of control were being ignored.

[34] It was further emphasised that Eskom is drowning in debt and that as far as state organs are concerned it would be just and equitable that each party pay its own costs.

[35] As far as the wasted costs of 6 December 2019 were concerned, Eskom's counsel conceded that Eskom filed its affidavit out of time but also referred to a supplementary affidavit filed on behalf of the second respondent on the morning of the hearing which equally, it was submitted, lead to the adjournment.

[36] The difference between the two scenarios were however that counsel for the second respondent delivered a substantive application for condonation together with his client's supplementary affidavit which, in any event, only dealt with a few issues not relevant to the substance of the matter. The same cannot be said of Eskom's affidavit, which required a response from all the other parties.

[37] I am of the view that the sole cause of the adjournment of the matter on 6 December 2019 was Eskom's late filing of its supplementary affidavit and the other parties were clearly justified in seeking an opportunity to respond to the affidavit.

[38] As mentioned herein above, Lanxess also sought a cost order against Eskom. It was granted leave to intervene and its application to intervene was not opposed by Eskom or anyone else for that matter.

[39] Lanxess filed a substantial answering affidavit and provided relevant information regarding its own circumstances as well as a detailed analysis of Eskom's failure to comply with PAJA and its regulations. It in particular dealt with the issue relating to Eskom's publication of the notice in the *Natal Mercury* newspaper and went to the trouble of obtaining the distribution figures from the newspaper's publishers.

[40] Eskom's counsel submitted that Lanxess should have sought relief against the municipality, that it could have made arrangements to pay to Eskom directly and that Eskom should therefore not be liable for its costs. Lanxess should rather look to the municipality and Cogta for its costs, it was submitted.

[41] Counsel for Lanxess pointed out, quite correctly in my view, that it was Eskom, and not the municipality, who made the decision to disconnect the electricity supply, a decision which would have had significant and disastrous consequences for everyone concerned.

[42] Lanxess operates the largest kiln (worldwide) in the industry at its plant in Newcastle, which specialises in the production of chrome chemicals and which is dependent on a consistent and uninterrupted supply of electricity. It stands to lose approximately R2 million per day as primary cost, and approximately R3,3 million gross revenue per day if not in operation. It is also one of the biggest employers in the Newcastle area, employing directly and indirectly almost five hundred people.

[43] In weighing up the various facts and circumstances set out herein above and in exercising my discretion, I am of the view that Eskom should be directed to pay the second respondent's costs.

[44] As far as Cogta's costs are concerned I am however of the view that Eskom should not be liable to pay its costs. Mr Rall SC, for Cogta, made a compelling argument and I did not come to this decision lightly. Eskom's conduct throughout leaves much to be desired. Its decision to oppose this application where it so clearly failed to comply with the requirements of PAJA is questionable. In the end, however, the costs of these two state organs will come from the same public purse as mentioned herein above, and for that reason only I will apply the so called general rule in this regard and make no order as to the costs as between Cogta and Eskom.

[45] The following order is made:

1. The first respondent is directed to pay the second respondent's costs of its intervention in the application, second respondent's wasted costs in respect of the adjournment of the matter on 6 December 2019 and the second respondent's costs of 11 December 2019, such costs to include the costs of two counsel, where so employed.
2. No further order as to costs is made.

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BEZUIDENHOUT A J

DATE OF HEARING:	11 December 2019
DATE OF JUDGMENT:	30 January 2020

APPEARANCES

For the First Applicant:	Adv J Nxusani SC Adv D Pillay
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For the First Respondent:	Adv SL Shangisa Adv L Rakgwale (Ms)
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