

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRAHAMSTOWN**

CASE NO.1781/2021

THE CRADOCK BUSINESS FORUM **1st Applicant**

THE MIDDELBURG RATEPAYERS ASSOCIATION **2nd Applicant**

THE CRADOCK RATEPAYERS ASSOCIATION **3rd Applicant**

and

INXUBA YETHEMBA LOCAL MUNICIPALITY **1st Respondent**

THE EXECUTIVE MAYOR OF THE INXUBA **2nd Respondent**

YETHEMBA LOCAL MUNICIPALITY

THE MUNICIPAL MANAGER OF THE **3rd Respondent**

INXUBA YETHEMBA LOCAL MUNICIPALITY

ESKOM HOLDINGS SOC LIMITED **4th Respondent**

JUDGMENT

NQUMSE AJ:

Introduction

[1] This is an application in which the applicant seeks an order against the first, third and fourth respondents (the respondents) in the following terms:

- 1.1. It is declared that the Inxuba Yethemba Local Municipality, the Municipal Manager of Inxuba Yethemba Local Municipality and Mr Mkululi Mbebe, in his personal capacity, are in wilful and *mala fide* contempt of the order of

Mr Justice Bloem of 17 June 2020 for their failure to have made payments to Eskom, in respect of its bulk supply of electricity to the towns of Cradock and Middelburg during the period 31 July 2020 to 31 January 2021 in circumstances where the income received by the Inxuba Yethemba Local Municipality from its sale of electricity was sufficient for it to have done so;

1.2. That a *rule nisi* is hereby issued calling upon Mr Mkululi Mbebe to appear before the above Honourable Court, on a date to be determined, to show cause why he should not be committed to prison for such period as the above Honourable Court may find appropriate;

1.3. That the order of Mr Justice Bloem of 17 June 2020 be supplemented with orders in the following terms:-

1.3.1 that the first respondent shall effect payment to Eskom of the sum of its monthly accounts in respect of its bulk supply of electricity to the towns of Cradock and Middelburg from the income derived from the first respondent's electricity reticulation business;

1.3.2. in the event that the first respondent should not be able to effect payment of the full sum of the monthly accounts of Eskom for its bulk supply of electricity to Cradock and Middelburg for any month they shall then include in their reports:-

1.3.2.1. an explanation as to why payment was not, or could not, be made;

1.3.2.2. an accounting in respect of what expenses of the first respondent were paid for the proceeds of the sales of electricity other than the payment of the monthly accounts of Eskom and the arrear liability of the first respondent to Eskom;

1.3.2.3. how the non-payment of Eskom's monthly bulk supply accounts will be made up in the future.

1.4. That the first respondent, the second respondent and the fourth respondent, in his personal capacity, pay the costs of this application, jointly and severally, the one paying the others to be absolved, on the scale as between attorney and client.

2. The application arises out of a judgment and order of Bloem ("the order") where both Eskom and the municipality were the respondent's in terms of which:

2.1. It was declared that the municipality was indebted to Eskom in the sum of R127 974 276.27;

2.2. The municipality was ordered to make monthly payments in the aggregate sum of R900 000.00 towards the payment of its arrear liability to Eskom;

2.3. The respondents were ordered to keep separate financial statements and a balance sheet in respect of the municipality's electricity reticulation business as envisaged by section 27 (1) of the electricity Reticulation Act No. 4 of 2006 in which a distinction was to be made, on a monthly basis, between capital and ongoing expenditure and the bulk purchases of electricity and of revenue received with a disclosure of monthly revenue and the extent to which it was appropriated for payment of municipality's current account with Eskom and the payments it was ordered to make towards the repayment of its arrear liability.

3. The order further provided for the municipality to furnish quarterly records to the applicant, Eskom and the court.

4. Eskom and the municipality were granted leave to enrol the application for the purpose of formulating orders arising out of the financial statements and reports which the municipality was required to file.

5. The brief background which has led to this application is that the applicants had brought an application (main application) which served before Bloem J, in which they sought the remedy to put an end to the delinquency of the municipality in its management of its electricity reticulation business in order to prevent a situation that may arise in which Eskom could terminate its bulk supply of electricity to the towns of Cradock and Middleburg. After the application was argued, Bloem J, issued an order in terms of which as set out above. It is apparent from the order of Bloem J, that at the time of the application the municipality had accrued an arrear liability of R127 974 276.27. the importance of this figure will become clearer below as I deal with the merits of this application.

6. According to Wilhelm Smit (Smit) who deposed to the founding affidavit, the first report which was to be filed on 15 November 2020 by the municipality was filed accordingly, albeit only on 8 January 2021. The second report which was due to be filed on 15 February 2021 was filed on 16 March 2021. Both reports were annexed to the founding affidavit as annexures "D" and "E" respectively.

7. The late filing of the reports that were due on 15 November 2020 led the applicants to launch an application under reference case number 27494/2020 on 11 December 2020, for contempt of court against the municipality manager (manager) since as it is contended by the applicants, the respondents have failed to comply with the filing requirements as required in the order.

8. Smit, further stated that the late report of 15 November 2021 which was received by the applicant during the course of the conduct of their application, established that the municipality had been paying what it was ordered to pay towards its arrear liability but was not making payment towards its current account, this is despite it having made a forfeit from the sale of electricity supplied by Eskom.

9. This caused the applicant to adapt the relief sought in that application so as to direct and oblige the manager to appear before this court and to produce the Eskom accounts and proof of such payments as were made toward the purchases of electricity during the months of August, September and October of 2020. If no such payments were made for the manager to disclose, why such payments were not made.

10. Instead of the municipality addressing the issue raised in the application, it sought, whilst represented by its acting manager, Mkululi Mbebe to have the applicant's replying affidavit struck out and objected to the adaptation of the relief, this is despite the provisions of paragraph 21.9 of the order of Bloem J. the application to strike out served before Lowe J and was dismissed. Subsequently, the municipality's application for leave to appeal Lowe J's order was granted.

11. The applicants contend that under the circumstances the delinquency of the municipality remains un-addressed. It is further contended that the municipality and its manager have adopted a stratagem to avoid their accountability of the municipality's electricity reticulation business and according to Smit have set out about a game of "catch me if you can". A conduct that cause the applicants to expend monies to compel the municipality to properly discharge its obligations.

12. Smit further stated that the repots which were filed reveal in their balance sheets that the municipality's liability to Eskom has increased from R127 974 276.27 on 17 June 2020 at the time the order of Bloem J to R203 708 470.00 as at 31 January 2021. The reason for the alarming increase according to Smit is caused by the municipality paying in addition to what it was ordered by the court to pay, only an aggregate sum of R90 000 during July 2020 and the sum of R6 000 000.00 during January 2021 toward its current account. This is despite the consistent profit earned by the municipality after taking into account all its liabilities including provision for the payment of Eskom current accounts.

13. The documents referred to as D and E above sum up the picture of purchases, payments and profit made by the municipality over the period 31 July 2020 to 31 January 2021 as follows:-

13.1. the municipality purchased electricity from Eskom at an aggregate cost of R51 089 363.00;

13.2. the municipality received from the sale of electricity the aggregate sum of R52 898 542.00;

13.3. in the period 31 July 2020 to 31 January 2021 the municipality with permission having been made for the payment of its monthly purchases of electricity from Eskom, has accrued a net profit in the sum of R1 850 338.00;

13.4. the municipality made no payments in respect of its monthly bulk purchases of electricity other than during July 2020 when it paid R9 000 000.00 and in January 2021 when it paid the sum of R6 000.000.00.

14. The applicants contend that the municipality, its manager who is also the accounting officer have been content to on-sell the electricity supplied to it by Eskom to residents account businesses in its jurisdiction and to keep not only the profit earned from its electricity reticulation business, but almost everything else received from its sale of electricity and not to make payments to Eskom for its bulk purchases of electricity when it could have done so from the proceeds of its sales of electricity.

15. According to the applicants the municipality has deliberately and wilfully breached its contractual obligation and the order of Bloem J, in not making payments towards its current account liability but instead by making modest sums of payments towards its arrear liability, notwithstanding its means to meet its obligation. A proper interpretation of Bloem J 's order is directed at:

15.1 compelling the municipality to make payments towards the reduction of its arrear liability to Eskom;

15.2 for the municipality to keep adequate financial statements regarding its electricity reticulation business and

15.3 for the municipality to administer its electricity reticulation business in accordance with those financial statements, which extends to making payments of bulk purchases of electricity from Eskom from revenue it

receives from the supply and sale of electricity to residents and businesses of the towns of Cradock and Middelburg.

16. The attitude of the municipality so it was contended, to make payments towards the arrear liability with no obligation to make payments towards its current accounts for the supply of electricity has the effect of defeating the entire purpose of the order of Bloem J. A further effect of the municipality's attitude is to render the order ineffective and it will continue with its delinquent conduct with no consequences. The applicant contends that the current interpretation of the order by Bloem J, particularly paragraph 4 thereof, required the municipality to account for its revenue received from its sales of electricity and application of that revenue toward the payment of its current account and the payments directed by the order of court be made against its arrear liability.

17. Due to the continued delinquency of the municipality and its manager, the applicant contends that the contempt of the order by the fourth respondent necessitates his imprisonment. The applicants further find it necessary for the order of Bloem J be expanded as envisaged in paragraph 9 thereof, so as to extend its supervisory terms for the municipality to make payments each month of its current accounts of Eskom and, in the event that it is not able to do so, in full or at all, that it provide a written explanation of its failure to do so in which it sets out why, if it is the case, any of the income received from the sale of electricity was not applied to the payment of the expenses necessary for the conduct of its electricity reticulation and with as to what the income from the sale of electricity not applied toward the expenses of its electricity reticulation business was spent and how the non-payment of that required to be paid to Eskom will be made up.

18. Mkululi Mbebe (Mbebe) in his opposing affidavit, took a *point in limine by raising* the failure of the applicants to comply with Rule 41 A (2) (a) of the Uniform Rules wherein the applicants were obliged to indicate whether they agree or not to the referral of the dispute to mediation. This the applicants did not do, albeit this being a new application.

19. In response to the allegation in the founding affidavit he denies that he and the first respondent acted delinquently in the administration of its electricity reticulation business. In support of his assertion he attached a report for the months of February, March and April 2021 which is marked "MM1". According to "MM1" a payment in the sum of R900 000.00 was made to Eskom during February 2021, a further payment of R6,9 million was made during March 2021 and another payment of R900 000 00 was made during April 2021. Due to an equitable share of R11.3 million received by the municipality in March 2021, this caused the municipality to be able to pay an amount of R6 million to Eskom which is above the Order to pay R900 000.00 per month.

20. He further stated that the first respondent has complied with the order of Bloem J which was obtained by agreement and before which, an interdict was obtained by the municipality interdicting Eskom from interrupting or disconnecting the power supply to Cradock and Middleburg which order is still in force and applicants are fully aware thereof. Pursuant the previous administration he and the first respondent are endeavouring despite all the challenges and those related to the current Covid-19 pandemic to administer the functions of the first respondent effectively and diligently. He contends that the barrage of applications by the applicants to have him committed to prison is clear that the applicants hold a personal vendetta against him.

21. He further denies that the first respondent is making a monthly profit as alleged by the applicants. He attributes this wrong assumption to the misinterpretation of annexure "MM1" specifically annexures "D" and "E" attached to the founding affidavit.

22. His explanation of the surplus or deficit reflected in the financial information for the Technical Department: Electricity as required by the Court Order includes any costs directly attributable to the department which are separately identifiable in the financial system. He stated that in terms of GRAP23, a conditional grant revenue is recognised in the statement of financial performance as and when conditions for the grant are met.

23. In the case of the municipality, grant revenue directly attributable to the Intergrated National Electrification Programme (INEP) accounting to R4 500 000.00 has been recognised in the current year and contributes directly to the surplus for the Technical Department: Electricity. He further stated that the cost of funding the administrative functions and depreciation as required by GRA16, which represents the municipality's cost of using the infrastructure which is calculated annually had not yet been taken into account when determining the reported surplus or deficit.

24. Therefore, so he contended, the Technical Department: Electricity, will incur a deficit for the financial year ended 30 June 2021 once all adjustments have been taken into account. He also stated that other necessary expenses pertaining to the administration of the municipality is the payment of staff benefits, such as salaries of employees which are in the region of R6,8 million to R7 million. The result of the monthly salary costs is that the profit from the sale of electricity is utilised to assist in the payment of employees.

25. As a result of these obligations the respondent is unable to effect more payments to Eskom than what it currently pays. The first respondent's council in an endeavour to rectify its financial position, resolved to request assistance from COGTA in collaboration with DBSA to assist the first respondent with a Financial Recovery Plan to improve its cash flow position. Whilst admitting the increase of its liability towards Eskom, the respondents contend that such increase is as a direct result of the first respondent's financial inability to effect greater payments than what it is currently effecting. It's inability to effect greater payments is not wilful and mala fide.

26. According to Mbebe a plain reading of the order of Bloem J, the first respondent has to file financial statements which shall distinguish on a monthly basis: firstly, between the capital and an-going expenditure in respect of reticulation infrastructure and the bulk purchase of electricity, secondly, the revenue received in respect of both the reticulation infrastructure and the supply of electricity to customers. The financial statements shall disclose, on a monthly basis, the revenue received in respect of the supply of electricity and the extent to which the revenue is appropriated for payment of its current account with Eskom and its obligations in

terms of annexure "A" of the Court Order. Respondents contend that the order does not compel the first respondent to make payment to Eskom for the current usage of electricity, even if it is being paid to Eskom. The effect of the Order is directed to compel the first respondent to make payments of the arrears to Eskom as indicated in paragraph 1 thereof.

27. The respondents admit their awareness of the order but deny its interpretation by the applicants. According to the respondents, the misinterpretation of the order by the applicants is evident in the order sought to supplement Bloem J's order to incorporate an order to oblige the respondents to make payments for the current supply of electricity by Eskom. The order sought, it is contended is not competent as it does not comply with Rule 42 (1) (b) neither does the court have the jurisdiction to supplement the Order of Bloem J.

28. The respondent sought an order dismissing the application with costs on an attorney and client scale on the grounds that the application is wholly misplaced and not bona fide. The result of which taxpayers' monies are utilised to oppose frivolous and repetitive applications by the applicant.

29. In his answering affidavit, Smit stated that the increase of the first respondent's liability to Eskom is because the first respondent has limited its payments to Eskom contrary to what was ordered by Bloem J. this is despite the on-selling of the electricity at a profit. Since the relief that is sought it concerns the order issued in case 1900/2019 and raises issues which cannot be resolved by medication, reliance upon Rule 41 A (2) (a) is misplaced. The applicants insist that the order of Bloem J requires of the respondent to make payments to Eskom of its ongoing monthly purchases of bulk electricity.

30. He further stated that the balance sheet of the first respondent over the months, February, March and April demonstrates that the first respondent purchased bulk electricity of R20 560 955.00. From the sale of that electricity it received R22 933 320.00 and paid to Eskom R7 800 000.00. He further stated that the figures in the balance sheet and those in the financial income statements do not accord since according to the income statement, the first respondent purchased electricity

over the same period above, for the sum of R15 957 908.00, whilst the income from the sale of electricity was R22 933 320 00 and it paid to Eskom R7 800 000.00.

31. According to the balance sheet it was further revealed that over the period May and June 2021 the first respondent purchased bulk electricity at a cost of R17 555 085.00, whereas the income statement shows that the bulk electricity over the same period was purchased at a cost of R13 089 382.00 and from its sale the first respondent received R13 798 856.00. Further, according to the balance sheet the first respondent paid R900 000.00 to Eskom but made no payments during June 2021. No payment for April was made and no explanation was made why such payment is not reflected. The applicants contend that whilst the payment of R6 000 000.00 is reflected, it does not detract from the fact that the first respondent despite receiving from its sale of electricity more than the cost of its purchase of bulk electricity, has consistently failed to pay its current account and as a consequence, allowed its liability to increase.

32. He averred that the order interdicting Eskom, which was an interim order had not been prosecuted by the respondents and they are of the belief that it is no longer of any effect. However, they contend that any order precluding Eskom from terminating its supply of electricity does not excuse the first respondent from making payment of its purchase of electricity from Eskom. Neither does the Covid pandemic justify the failures of the respondents to make payments of what is owed to Eskom. According to the applicants their applications against the respondents are not a money making scheme nor frivolous as alleged by the respondents but are as a result of the respondent's failure to comply with its contractual obligation and the order of Bloem J.

33. It is also not sustainable for the first respondent to utilise its income from the sale of electricity to pay its salary bill nor can it "structure its profits" so as to avoid making payment of its creditor which is Eskom. Instead first respondent under the management of the third and fourth respondents is utilising Eskom to fund its operation with no intention, and with no hope of ever making payments of the continually increasing sum it owes to Eskom. The only additional payment which

have been made over and above that which is expressly ordered by Bloem J to Eskom have been paid from grant funds.

34. Smit also contends that a proper interpretation of the order of Bloem J, does not justify the first respondent making payment to Eskom only of what it was ordered to pay by the court which is payment towards its arrear liability. Instead, the third and fourth respondents have deliberately sought to frustrate the purpose of the order of Bloem J and the only mechanism available to the applicants to hold the fourth respondent accountable is to find him in contempt of court. The applicants aver that the order is express or at least implicit, that the first respondent is required to apply the proceeds it receives from its sale of electricity toward payment of its current accounts from Eskom for its bulk supply of electricity to the first respondent.

35. The applicants further stated that the reason the order is sought to supplement the order of Bloem J, is to dispel the respondent's belief that the order does not require the payment of Eskom's current accounts, and for the respondents to account for any failure to do so and to further address how it will make payment of its now considerably greater liability to Eskom.

Discussion

36. The issue to be determined by this court which has been referred to by Mr Olivier, counsel for the respondents, as the crux of this application, is whether the respondents are in wilful and mala fide contempt of the order of Bloem J, and thus for the court to issue an order for the incarceration to prison of the fourth respondent or he be cautioned and warned as prayed for by the applicants in their heads of argument, and if he commits any further contempt it may result in his committal to prison.

37. As a point of departure I find it necessary to refer to the order of Bloem J, only to the extent it relates to the paragraphs that are relevant to this application.

38. In paragraph 21.1 the order reads "*The third respondent (the municipality) be and is hereby declared to be indebted to the first respondent (Eskom) in the sum of*

R127 974 276.27 which shall be paid to Eskom in terms of the payment schedule annexed to this order and marked "A".

39. In paragraph 21.4 the order states *"The municipality's financial statements shall disclose on a monthly basis, revenue received in respect of the supply of electricity and the extent to which such revenue is appropriated for payment of its current account with Eskom and to obligation in terms of Annexure "A" to effect payment for arrears"*. Annexure "A" reflects the monthly payments to be effected by the municipality in respect of both Middleburg and Cradock. The total figure payable monthly according to the annexure is an amount of R900 000.00 for both towns.

40. Undeniably, the municipality has endeavoured to effect payments towards its arrear liability to Eskom. This fact is borne out in the statements of income and balance sheet contained in annexure "MM1" more specifically annexures "D" and "E" although it is patently clear that the municipality's payments towards Eskom is weigh below the revenue it collects from selling electricity to its customers. It has been sufficiently demonstrated by the applicants, using the balance sheets of the municipality that as a result of the short payments to Eskom by the municipality, its liability to Eskom is ever increasing. What is also clear is that due to the inconsistent payments and a deviation from the structured plan envisaged in Annexure "A" of the order, the objective of the order may never be realised in the envisaged period.

41. Of great concern which is admitted by the municipality is its inability to meet its obligations and the ongoing financial troubles it finds itself in. Whilst I agree with the applicants that the municipality's financial troubles are no justification not to meet its obligation towards Eskom, it is with no surprise that part of the revenue and even profit derived from the on sold electricity to respondents is not optimally utilised towards its intended purpose in order to maintain a healthy balance sheet of its electricity reticulation business. The effect of the conduct of the respondents as it currently stands is merely to comply with the order to the extent it refers to arrear liability. This brings me to the interpretation of the order.

42. First, what is patently clear from paragraph 21.1 of the order is that the municipality was indebted to Eskom in the sum of R127 974 276.27 (at the time) and the municipality was ordered to pay the said arrear amounts owing. Second, in

paragraph 21.3 of the order the municipality was ordered to keep separate financial statements including a balance sheet of its electricity reticulation business.

43. From the facts before me, it appears that in keeping and in compliance with the order in respect of the two aforementioned paragraphs the municipality has acted accordingly. I say this because, in acknowledging its debt owed to the municipality, there are payments which have been effected in order to address its arrear obligation towards its debt to Eskom. This is so, albeit effected with staggered payments with varying amounts.

44. Second, it appears that the municipality has managed to separate its financial statements including a balance sheet of its electricity reticulation business. This is borne out in the reference to the income statements which established what the municipality had received from its sales of electricity which was substantially more than it was obliged to pay for its purchases of electricity and wherein it has paid a paltry sum of money towards its debt owed to Eskom.

45. Flowing from paragraph 21.3 is paragraph 21.4 wherein the municipality shall disclose the revenue received in respect of the supply of electricity and the extent to which such revenue is appropriated for payment of its current account with Eskom and its obligations as per the annexure. The bone of contention is whether in the plain reading of this part of the order, the municipality was ordered to pay its current account.

46. It is a trite legal principle and correctly referred to by Mr De La Harpe for the applicants that a court order is to be interpreted as the executory part of the judgment in accordance with the ordinary rules of interpretation¹. I agree with the submission by the applicants that a plain reading of the order (paragraph 21.4) clearly points out that the municipality should make monthly payments to Eskom in terms of the schedule which was annexed to the order. And further, it was required to disclose the revenue received and the extent to which such revenue is appropriated for payment of its current account with Eskom and its obligation. Whilst there may be a strong belief that the order contemplates payment of the current

¹ Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 AD at 304; Department of Transport & Others v Tasima (Pty) Ltd 2018 (9) BCLR 1067 (CC)

account, it has not been spelt out clearly in the order and in the direct terms as reflected in the previous paragraphs of the order. Neither does the with specificity prevent the municipality from using the money available from its sale of electricity to pay for other commitments unrelated to its electricity reticulation business.

47. The difficulty that is apparent in the order in relation to this aspect, has caused the applicants to argue that the order for the municipality to pay its current account if it is not express it is implied, hence it seeks a relief for the order to be supplemented in order to give more clarity and certainty on this aspect.

Contempt of Court

48. In *Pheko and others v Ekurhuleni City*², the Constitutional Court laid down the requirements to be met and to be established for contempt of court as the following:-

- (a) The order must exist;
- (b) The order must have been duly served on, or brought to the notice of, the alleged contemnor,
- (c) There must have been non-compliance with the order; and
- (d) The non-compliance must have been wilful or mala fide.

49. The standard of proof which must be applied in application for contempt of court was stated in *Matjabeng Local Municipality v Eskom Ltd and Others*³ as that for an order of contempt where committal is sought, the standard of proof beyond reasonable doubt applies. In *Fakie N.O. v CC 11 Systems (Pty) Ltd*⁴ it was held that whenever committal to prison for civil contempt is sought, the criminal standard of proof applies. Once an applicant for committal order has proved the elements in (a), (b) and (c) above, the respondent bears the evidentiary burden to create reasonable doubt in the existence of wilfulness and mala fides.

50. In *Fakie*⁵ the requirements for wilful and mala fide were stated thus

² 2015 (5) SA 600 (CC) para 32

³ 2018 (1) SA (CC)

⁴ [2006] ZASCA 52, 2006 (4) SA 326 (SCA) para 9

⁵ Ibid

“ [9] *The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed deliberately and mala fide. A deliberate disregard is not enough, since the non-complier may genuinely albeit mistakenly believe him or herself entitled to act in the way claimed to constitute the contempt. In such a case, good faith avoids infraction. Even a refusal to comply that is objectively unreasonable may be bona fide (though unreasonableness could evidence lack of good faith); [10] These requirements - that the refusal to obey should be both wilful and mala fide, and that unreasonable non-compliance, provided it is bona fide, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court’s dignity, repute or authority that this evinces. Honest belief that non-compliance is justified or proper is incompatible with that intent”.*

51. I now propose to apply these criteria with reference to the conduct of the first, third and fourth respondents. As alluded there appears to be no contention with the rest of the orders by Bloem J, save the order in paragraph 21.4, a proper scrutiny of the conduct of the respondents have to be juxtaposed with the terms of the order. As indicated above the municipality endeavours to meet its obligation of arrears owed to Eskom but it fails to do so when it comes to its current account. This is notwithstanding it’s the ability to do so, if it were to utilise the money received from its sale of electricity purely for that purpose and not for any other expenses of the municipality. It must be mentioned that, it appears that the money it received has been accounted for, albeit used for a different commitment other than for its electricity reticulation business. Whilst this may warrant criticism in its administrative functioning, it may not necessarily amount to a conduct demonstrating disobedience for the order of the court. Surely, the position would have been different had it been an express provision of the court order that monies which have been generated from the sale of electricity may not be used for any other purpose other than for payment

of its arrear obligation towards Eskom and for the payment of the current electricity purchases.

52. I am therefore unable to find that the respondents' conduct constitutes a wilful and mala fide breach of the order of Bloem J. Nor am I convinced in light of the explanation that had been proffered by the respondents for failing to meet their obligation on their current account can be seen as contemptuous, warranting imprisonment alternatively a caution as proposed by the applicants.

53. In light of my finding here above, I do not deem it necessary to deal with the preliminary issue that was raised regarding the failure by the applicant to comply with Rule 41 (A) (2) since my findings above.

54. In order to cure the apparent *lacuna* in the order of Bloem J or better stated, to sharpen its effect on the municipality where it relates to the use of revenue collected from the sale of electricity, the following has to be borne in mind. According to paragraph 21.9 it is ordered that "*Eskom and the municipality be and are hereby granted leave to re-enrol this application on the same papers, duly amplified, for the purpose of formulating orders in regard to and arising out of the financial statements and reports referred to in paragraphs 3,4 and 5 above*". I find myself in agreement with Mr Olivier for the respondents that the application before me is under a different case number and can therefore not have been the application referred to by Bloem J under (Case number 1900/2019). Furthermore, even if it was, the order is specific, that leave was granted in respect of Eskom and the municipality and not the applicants. It therefore follows that this application for contempt of court, much as it flows from the order of Bloem J, is a new application and is not in conformity with paragraph 21.9 of the Order.

55. I now turn to deal with the issue of costs. Ordinarily cost should follow the successful party. However, this is a matter, in my view that requires the court to take into account what was the reason for this litigation and whether, had things been done differently, it could not have been avoided.

56. It is undeniable that the applicants are citizens and business people who endeavour to hold their local municipality accountable to escape the misery that could befall them if Eskom were to terminate their electricity supply due to non-payment of its debt towards its purchase of electricity by the municipality.

57. It can be easily ascertained or reasonably assumed that the applicants litigate through their pockets against an organ of state that is also funded through their tax monies. In light thereof I am not persuaded that I should further cause the applicants to be mulcted by an order of costs. In the proper exercise of my discretion, it is my view that a fair order is for each party to pay its own costs.

58. In conclusion the application ought to fail with each party ordered to pay its own costs.

Order

59. Therefore, the following order will issue:

- (a) The application is dismissed.
- (b) Each party to pay its own costs.

M.V. NQUMSE
ACTING JUDGE OF THE HIGH COURT

APPEARANCES

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Date of hearing : 10 March 2022

Date of delivery of judgment : 05 April 2022