



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case number: **1910/2020**

In the matter between:

ALPLA TRADING SOUTH AFRICA (PTY) LTD

Applicant

and

ESKOM SOC LIMITED

1st Respondent

MALUTI-A-PHOFUNG MUNICIPALITY

2nd Respondent

**THE ADMINISTRATOR: MALUTI-A-PHOFUNG
MUNICIPALITY**

3rd Respondent

MR AMOS GOLIATH

4th Respondent

**EXECUTIVE MAYOR: MALUTI-A-PHOFUNG
MUNICIPALITY**

5th Respondent

MS MASETJHABA LAKALJE-MOSIA

6th Respondent

**THE MUNICIPAL MANAGER: MALUTI-A-PHOFUNG
MUNICIPALITY**

7th Respondent

MR FUTHULI MOTHAMAHA

8th Respondent

CORAM:

DAFFUE, J

HEARD ON:

19 JUNE 2020

JUDGMENT BY:

DAFFUE, J

DELIVERED ON:

25 JUNE 2020

- [1] The applicant, Alpla Trading South Africa (Pty) Ltd is a manufacturing company conducting its business in the special economic zone outside Harrismith. It is a commercial consumer of electricity.

- [2] Eskom Soc Ltd is cited as the 1st respondent, the Maluti-A-Phofung Municipality as the 2nd respondent and the 3rd to 8th respondents are the administrator, executive mayor and municipal manager of the Municipality in their official as well as personal capacities respectively.

- [3] On 12 June 2020 applicant brought an urgent application before Van Zyl, J. She was satisfied that the application was urgent and granted condonation in accordance with prayer 1 of the notice of motion. She did not entertain the merits of the application, but granted leave to respondents to file answering affidavits and applicant to reply, if so required, during the course of the following week. Provision was made for the filing of heads of argument on 18 June 2020 and the application was postponed to Friday, 19 June 2020.

- [4] Initially Eskom gave notice to abide the judgment of the court, but on receipt of the answering affidavits of the 2nd – 8th respondents, it decided to file an affidavit to put matters in proper perspective.

- [5] During oral argument Adv P Zietsman SC, appearing for applicant, presented a draft order essentially in line with the notice of motion, but excluding the prayer for urgency, which reads as follows:

- “1. A rule *nisi* is hereby issued on all the respondents to show cause, if any, to this Honourable Court on **30 JULY 2020**, at **09:30**, or so soon as counsel may be heard, why an order should not be granted in the following terms:
- 1.1 The respondents are ordered to comply with the order of the above Honourable Court granted by Justice Van Rhyn AJ in favour of the applicants under case number **9931/2020** (sic – it should be 993/2020)) on **4 March 2020** (“the order”).
 - 1.2 It is declared that the second, third, and fourth respondents are in contempt of the Order.
 - 1.3 The second, third, and fourth respondents are committed to a period of **thirty (30) days** imprisonment, alternatively fined in an amount of **R100,000.00**, wholly suspended for three years, and on the condition that the second, third, and fourth respondents comply with the Order.
 - 1.4 The second, third, and fourth respondents are ordered to pay the applicant’s costs, jointly and severally, on the attorney and own client scale.
2. Pending the return date of the rule *nisi*, the orders sought in paragraphs 2.1 and 2.2 (sic) operate with immediate effect as an interim interdict.”

Paragraph 1.1 of the draft refers to all the respondents, including Eskom. Eskom has so far complied with the March 2020 order and it would in principle not make any difference to order that this paragraph operates with immediate effect as an interim interdict. I do not understand Eskom to say anything to the contrary in its

affidavit. Paragraph 1.3 of the draft is nonsensical insofar as the Municipality cannot be committed to imprisonment. However it is not my intention to consider this aspect now as it would ultimately be dealt with by the court hearing the application on the return date.

- [6] Mr Zietsman indicated that his colleague, Adv S Grobler SC, appeared for the 2nd – 8th respondents on the 12th and indicated that his clients were satisfied that a rule *nisi* with return date 9 July 2020 be issued, but on condition that interim relief is not granted. When the matter came before me, Mr Zietsman insisted that interim relief be granted although he conceded that the return date should not be 9 July 2020, but rather 30 July 2020, being the first opposed motion court day in the third term. He submitted if the court did not come to his client's assistance, it may very well decide to relocate which will have an enormously negative impact on its employees and the local community in general.
- [7] Adv FW Botes SC, who appeared for the 2nd - 8th respondents, submitted that a return date of 30 July 2020 was in order, but vehemently argued that the court should refrain from finding that the 2nd, 3rd and 4th respondents are in contempt of the court order issued on 4 March 2020. He submitted during argument that his clients should be ordered to depose to a further affidavit wherein they deal with certain aspects that were not fully canvassed in the answering affidavit. I granted leave to him to present the court and other parties with his proposed draft order by way of electronic means, which he did. The draft order prepared by Mr Botes reads as follows:

- “1. The application is postponed to Thursday, 9 July 2020;
2. The Respondents are ordered to comply with the order that was made by this Court on 4 March 2020, under case no. 993/2020;
3. The Second, Third and Fourth Respondents (hereinafter referred to collectively as “*the Respondents*”) are ordered to depose to an affidavit which should be filed and delivered by no later than Friday, 3 July 2020, in which the following aspects are dealt with and canvassed:
- 3.1. What measures do the Respondents intend to implement, so as to ensure that the Applicant is provided with uninterrupted electricity supply;
- 3.2. Whether it is appropriate for the Applicant and the First Respondent to enter into an agreement in terms of which the First Respondent supply the Applicant with electricity;
- 3.3. What measures did the Respondents take, so as to avoid the interruption of electricity supply to the Applicant and other consumers or customers who are dependent on the Greenlands substation for electricity; and
- 3.4. Whether it is prudent for the Respondents to join the Free State Provincial Government in this application (specifically the MEC for Finance of the Free State Province), so as to consider the implementation of a recovery plan aimed at securing the Second Respondent’s ability to meet its obligations to provide basic services, including electricity supply, as provided for and envisaged in Section 139(5) of the Constitution.
4. The costs of this application are reserved.”

- [8] In terms of the draft presented by Mr Botes a postponement is sought to Thursday, 9 July 2020, being the original return date contained in the notice of motion. However, the 9th of July 2020 falls in the July recess and there is no reason for an opposed application to be heard by the duty Judge during the recess. In my view the application should be heard during the term and the first available date is Thursday, 30 July 2020.
- [9] It is also apparent from paragraph 3 of the draft order presented by Mr Botes that he is seeking a proverbial second bite of the cherry on behalf of his clients to enable them to place evidence before the court which should have been there in the first place. I shall return thereto later.
- [10] Mr Botes is satisfied that his clients be ordered to comply with the court order issued on 4 March 2020. This is in essence in line with paragraph 1.1 of the draft prepared by Mr Zietsman. Generally speaking, I would not be inclined to issue such an order as the order speak for itself. Court orders must be complied with until set aside. However, insofar as I am requested by the parties to grant such an order, I shall do so.
- [11] Advv TL Sibeko SC & N Moloto also appeared before me and argued the matter on behalf of Eskom. Mr Sibeko was severely critical of the conduct of the Municipality and its officials and the allegations in their answering affidavit insofar as they wanted to

put blame on Eskom for the power interruptions which are in *casu* not Eskom's fault, but that of the Municipality.

[12] My initial intention was to deal with the matter on the facts presented to me and in doing so, to consider the interim relief sought by Mr Zietsman with particular reference to the contempt of court order that he was seeking. However, the relief sought is of a serious nature and it will be unfair to adjudicate the issue of contempt of court at this stage of the proceedings without allowing the respondents a further opportunity to present evidence to the court. In this regard I take the following into consideration:

- (1) the application was brought on an urgent basis on 12 June 2020, the documents having been served by email on the respondents on the 11th of June 2020, a day before the first hearing;
- (2) truncated time frames were directed by Van Zyl, J in terms whereof the respondents were ordered to file their answering affidavits on/or before Tuesday, 16 June 2020 (a holiday) at 09h30, the effect being that they were granted one court day to respond to applicant's founding affidavit;
- (3) the administrator of the Municipality, cited in his official and personal capacity as 3rd and 4th respondent respectively, assumed his duties on 1 April 2020 and thus during level 5 of the lockdown which came into effect on 27 March 2020;
- (4) no doubt, the Municipality is commercially insolvent; in fact its administrator says the following: "The Municipality is for all practical purposes hopelessly insolvent." Later on he reiterated: "We have inherited a mess."

- (5) the issues to be canvassed as set out in the draft order of Mr Botes will assist the court that will eventually have to consider the matter in coming to a proper conclusion. However, I believe that the 2nd – 8th respondents should, over and above the aspects mentioned in paragraph 3 of the draft order, be directed to place such further information before the court as will be set out in the orders I intend to make.

[13] Mr Botes suggested that the supplementary affidavits of his clients should be filed by the 3rd of July 2020. In my view they should have more time and therefore I am prepared to allow them an opportunity until Friday, 10 July 2020.

[14] Both applicant and Eskom as 1st respondent shall be given an opportunity to file supplementary affidavits in order to respond to any of the allegations that might emerge from the supplementary affidavits of the 2nd – 8th respondents. This they should do before 17 July 2020.

[15] The following orders are made:

1. A rule *nisi* is hereby issued calling upon the respondents to show cause, if any, to this Honourable Court on **30 JULY 2020**, at **09:30**, or as soon as counsel may be heard, why an order should not be granted in the following terms:

- 1.1 The respondents are ordered to comply with the order of the court granted by Van Rhyn AJ in favour of the

applicants under case number **993/2020** on **4 March 2020** (“**the order**”).

- 1.2 It is declared that the second, third, and fourth respondents are in contempt of the order.
 - 1.3 The second, third, and fourth respondents are committed to a period of **thirty (30) days’** imprisonment, alternatively fined in an amount of **R100,000.00**, wholly suspended for three years, and on condition that they comply with the order.
 - 1.4 The second, third, and fourth respondents are ordered to pay the applicant’s costs, jointly and severally, on the attorney and own client scale.
2. Pending the return date of the rule *nisi*, paragraph 1.1 of this order shall operate with immediate effect as an interim interdict.
 3. The second to eighth respondents (hereinafter referred to collectively as “the respondents”) are ordered to depose to an affidavit which should be filed and delivered by no later than Friday, 10 July 2020, in which the following aspects are dealt with and canvassed:
 - 3.1 What measures do the respondents intend to implement, so as to ensure that the applicant is provided with uninterrupted electricity supply;

- 3.2 Whether it is appropriate for the applicant and the first respondent to enter into an agreement in terms of which the first respondent supplies the applicant with electricity;
- 3.3 What measures did the respondents take, so as to avoid the interruption of electricity supply to the applicant and other consumers or customers who are dependent on the Greenlands substation for electricity;
- 3.4 Whether it is prudent for the respondents to join the Free State Provincial Government in this application (specifically the MEC for Finance of the Free State Province), so as to consider the implementation of a recovery plan aimed at securing the second respondent's ability to meet its obligations to provide basic services, including electricity supply, as provided for and envisaged in Section 139(5) of the Constitution;
- 3.5 The respondents are directed to indicate exactly what steps have been taken thus far to ensure that the 60% of consumers that allegedly did not pay for electricity, pay their dues; and when failing to do so, what was done to cut them off the formal Municipality electricity reticulation network;
- 3.6 The respondents are directed to indicate whether the assistance of the court and/or the South African Police was sought to assist them in dealing with tampering of

electricity supply as complained in *inter alia* paragraphs 6 and 9 of the answering affidavit and if no assistance was requested, why not;

3.7 The administrator, executive mayor and municipal manager are specifically directed to state in detail what they did to ensure compliance with all court orders, particularly the order of 4 March 2020, and in this regard they shall explain how it came about that they only learnt of the aforesaid order on 8 June 2020 and what circumstances prevented them from becoming aware of the existence of the order before then.

4. Applicant and first respondent shall file supplementary affidavits in reply to second to eighth respondents' supplementary affidavit(s) on or before 17 July 2020.
5. The applicant shall file its additional heads of argument on or before 22 July 2020 at 12h00 and the respondents shall file their additional heads of argument on or before 24 July 2020 at 12h00.
6. Any costs not provided for in the rule *nisi* are reserved for adjudication on the return date.

J P DAFFUE, J

On behalf of Applicant : Adv P Zietsman SC
Instructed by : JOUBERT GALPIN SEARLE
c/o HONEY & PARTNERS INC
Bloemfontein

On behalf of 1st Respondent : Advv TL Sibeko SC & N Moloto
Instructed by : PHATSHOANE HENNEY INC
Bloemfontein

On behalf of 2nd – 8th Respondents : Adv FW Botes SC
Instructed by : ROSSOUWS ATTORNEYS
Bloemfontein