**REPUBLIC OF SOUTH AFRICA**

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

**CASE NO: 35921/2020**

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

31/5/2023
DATE

SIGNATURE

In the matter between:

| | |
|---|---|
| **THE CITY OF MATLOSANA LOCAL MUNICIPALITY** | Applicant |
| and | |
| **ESKOM HOLDINGS SOC LIMITED** | First Respondent |
| **ABSA BANK LIMITED** | Second Respondent |
| **NEDBANK LIMITED** | Third Respondent |
| **THE SHERIFF KLERKSDORP** | Fourth Respondent |

**Neutral citation:** *The City of Matlosana Local Municipality v Eskom Holdings Soc Limited and Others* (Case No. 35921/2020) [2023] ZAGPJHC 605 (31 May 2023)

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**JUDGMENT**

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**MAKUME J:**

[1] On the 28th April 2023 the Applicant launched this Urgent application in accordance with the provisions of Rule 6(12) and seeks the following relief against the Respondent.

1.1 That an interim interdict be granted to stay execution of the writ under case number 35921/2020 issued on 20 March 2023 until 15 June 2023 to allow the Applicant to make application to this Court on or before 15 June 2023 to:

a) Suspended execution of the order of this Court dated 8 December 2020 in terms of Rule 45A for a period as determined by the Court in order to allow the Applicant to apply to National Treasury for "Municipal debt relief" in respect of the Applicants debt owed to the first Respondent in terms of the Court order. And

b) For the setting aside of the writ.

[2] The Respondents were afforded an opportunity to file written notice to oppose by 12 noon on 30 April 2023 and to file their Answering Affidavit by the 2nd May 2023. The application was set down to be heard on 9th May 2023.

[3] The first Respondent has filed its opposing affidavit and bases its opposition on the following:

- Firstly, that the application is not urgent.
- Secondly that Applicant should have joined National Treasury.
- That the issues in this application have already been dealt with in the judgement by Goedhart AJ when she dismissed a similar application though not based on the Municipal debt relief issue. The first Respondent accordingly pleads *res judicata*.

BACKGROUND FACTS

[4] This application has its initial origin in an agreement concluded between Eskom and the Applicant on the 8th December 2020 which agreement was made an order of court. In terms of that order the Municipality bound itself to liquidate its indebtedness to Eskom by way of payment of large sums of money. The Municipality at that stage owed Eskom well in excess of R500million (Five Hundred Million).

[5] The Municipality failed to comply strictly with payments as it had undertaken this led to the Eskom issuing a writ of execution on the 21st August 2021 for payment of the sum of R228 379 535.82

[6] The Sheriff acting on instructions set out in the writ of execution went ahead and attached the Municipalities right, title and interest in and to the bank accounts of the Municipality at both Absa bank as well as Nedbank.

[7] On the 2nd September 2021 the Municipality launched an urgent application in this Court seeking an order to set aside or uplift the attachment on its bank accounts. That urgent application culminated in a judgement by Goedhart AJ on the 5th July 2022 in which the learned Judge dismissed the Municipalities application. An application for leave to appeal was also dismissed this was during 7 February 2023.

[8] On the 20th March 2023 Eskom re-issued a writ of execution and once more attached the Municipalities right, title and interest in the bank accounts held at ABSA bank as well as Nedbank.

[9] On the 28th April 2023 the Municipality launched this urgent application seeking a stay or suspension of the writ in terms of Rule 45A pending an application still to be launched suspending the Court order of the 8th December 2020.

THE APPLICANT'S CASE

[10] The Applicant in brief says it needs to be given an opportunity to make application in terms of the MFMA circular 124 to National Treasury for Municipal debt relief in respect of the debt it owes Eskom.

[11] The Municipality further contends that if the writ is not uplifted it will prejudice its ability to provide services within its jurisdiction. As a belated and unmeritorious issue the Municipality also argues that the amounts stated in the writ are incorrect.

[12] The Municipality further contends that a prolonged attachment of its funds at both banks will result in it not being in a position to pay its employees as well as to assist indigent citizens who rely on free energy supply from the Municipality. The Municipality needs time so that it can be able to participate in the Municipal debt relief scheme offered by National Treasury such application must be made before the 30th May 2023.

[13] As stated above the Applicant now says that the present writ that was issued for the amount of R1 246 280 259.42 was issued without an affidavit explaining how the amount there was calculated and comprised.

[14] The Municipality says that it has an obligation to provide alternative energy to approximately 16 000 indigent households within its jurisdiction and that the attaching of its funds held in the two banks will result in hardships because it will not be able to fulfil that constitutional obligation.

[15] The Applicant further makes a vague and unsubstantiated allegation that the affidavit that was filed in support of the writ of execution on perusal "was found that a number of issues emerged from the contents...which it is submitted by the Applicant exposes the "writ of execution" to be set aside.

[16] In its letter dated the 21st April 2023 addressed to Eskom the Municipality raised a plethora of issues which it argues makes the writ invalid and afforded Eskom until close of business on Monday 24 April 2023 to withdraw the writ of execution failing which the Municipality threatened to institute legal action which they did on 28 April 2023.

[17] The basis on which the Applicant relies to have the writ of execution set aside is that the writ is invalid and has no legal effect. This is set out in paragraph 5.31 of its affidavit which reads as follows:

> "The premises upon which the Applicant shall proceed to do so is set out in paragraph 6 of COM4. I respectfully submit that the contents of paragraph 6 of Annexure COM4 set out a prima facie basis to found such relief."

[18] The writ of execution and attachment of funds happened on the 13th April 2023. This was two weeks after publication and the launch of National Treasury's Municipal Debt Relief Scheme which the Applicant says stands to assist Municipalities with the unburdening of their arrears and debt owed to Eskom.

[19] In brief Applicant says that it needs time to compile documentation data and set out its financial difficulties to National Treasury where after everything will depend on whether Treasury is satisfied or not that Applicant qualifies for debt relief.

[20] The Municipality is pleading a case similar to that of a company in business rescue and seeks an indulgence that legal proceedings against it be suspended pending the outcome of its application to Treasury. In paragraph 78.7 the Municipality says the following:

> "It is accordingly submitted that substantial injustice and prejudice shall result if the execution of the court order and thus the execution of the Writ of execution is not temporarily stayed to provide the Applicant with a reasonable opportunity to make a presentation to the National Treasury for participation in the Municipal Debt Relief Scheme as set out in MFMA circular No 124."

[21] It must be noted that qualifying for Municipal Debt Relief Scheme is not automatic. This is clear from clause 2.2 of the document it reads as follows:

> "Eskom in consultation with the National Treasury and only after the Municipality has met the applicable set of conditions to Municipalities (to the National Treasury Satisfaction) to write off a third of the Municipality debt annually (over three financial years) The Municipality must meet the conditions applicable to Municipalities set out in 6.1 to 6.14 for 12 consecutive months to qualify for debt write off."

FIRST RESPONDENT'S CASE

[22] Eskom being the first Respondent opposes this application and has set out the basis on which it says the application should be dismissed with costs. Eskom's Answering Affidavit is deposed to by Maeva Barnes who incidentally deposed to Eskom's Answering Affidavit in the previous similar application in 2021.

[23] Eskom maintains that this application is not urgent and ought to be struck off the roll. I agree with that however and because of other legal issues that needed ventilation and in the interest of justice I allowed parties to deal with the merits of the application so that a decision on this vexed energy issue be reached. I therefore will not make any ruling on the issue of urgency.

[24] Eskom argues that the Applicant should have joined National Treasury in the application. Eskom has not indicated the basis for such joinder whether it is on the basis of interest or convenience. Without deciding on this issue I am not satisfied why National Treasury should have been joined. In **Dendy v University of the Witwatersrand 2005 (5) SA 357 (W)** it was held that the question of law and fact must "in the main or in their principal essentials be essentially the same."

[25] The last two issues that Eskom rely on in opposing this application are in my view dispositive of this application. Firstly, it is that the Municipality has not satisfied the requirements for the grant of an interim interdict to stay the writ issued on 23 March 2023. Secondly it is

that the issue is res judicata in that a decision on the same facts involving the same parties has already been pronounced on earlier in the judgement by Goedhart AJ on the 5th July 2022 when the Municipalities' application to set aside the writ of execution issued pursuant to the Court order of 8 December 2020 was dismissed and the subsequent application for leave to appeal was also dismissed.

HAS THE APPLICANT SUCCESFULLY SET OUT REQUIREMENTS FOR INTERIM RELIEF

[26] The requirements for interim relief were aptly stated by Corbett J as he then was in **LF Bshoff Investments (Pty) Ltd vs Cape Town Municipality 1969 (2) SA 256 (C) at 267 A-F** as follows:

> "Briefly these requirements are that the Applicant for such temporary relief must show:-
>
> a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or if not clear, is *prima facie* established though open to some doubt;
>
> b) that if the right is only prima facie established there is a well-grounded apprehension of irreparable harm to the

Applicant if the interim relief is not granted and he ultimately succeeds in establishing his right.

c) That the balance of convenience favours the granting of interim relief. and

d) That the Applicant has no other satisfactory remedy.

[27] In this matter the Municipality contends that it has a *prima facie* right to an interim interdict because it has a right to operate the attached bank accounts and to utilise the funds therein to conduct its business. The fallacy with that argument is that the two bank accounts have been under attachment since 2021 the Applicant has despite that been able to conduct its affairs. The Respondent in paragraph 24 of its Answering Affidavit alludes to the fact that the Applicant has an additional ten (10) other bank accounts which are not attached. The Applicant has not told the Court how it utilises the funds in those other accounts all that the Applicant says is that the attached accounts are subsidiary to the Applicant's Primary account and that it is unable to access such subsidiary account for as long as the primary accounts are under attachment. The Applicant fails to indicate how it has since 2021 been able to pay its stuff and other service providers. I am satisfied that the Applicant has failed to demonstrate a *prima facie* right because it does have an alternative remedy which has been available to it since 2021.

[28] I am satisfied that the Municipality has like in the previous application before Goedhart J failed to make out a case for interim relief. This should be the end of the matter.

IS THIS MATTER *RES JUDICATA?*

[29] This exception or special plea is based on the irrebuttable presumption that a final judgement on a claim submitted to a competent Court is correct. This presumption is founded on the public policy which requires that litigation should not be endless and on the requirement of good faith, which does not permit the same thing being demanded more than once.

[30] The Respondent raises this crucial defence at various places in its Answering Affidavit especially at paragraph 7.9 wherein it says the follows:

> "The interim order sought by the Municipality is an abuse of Court process because it impermissibly reopens litigation between the parties on the issue of the debt that has been determined by this Honourable Court as per Goedhart AJ."

[31] In response to the Answering Affidavit the Municipality says that its application for stay of execution is premised on MFMA Circular 124 which was published on 31st March 2023 after the decision by Goehard

AJ. What the Municipality says is that the Circular gives it a "new cause of action."

[32] The Municipal is incorrect with that interpretation because as it correctly says in its paragraph 14 of the reply: "The MFMA Circular provides for a write-off of the historical debt owed by the Applicant to Eskom on compliance by the Municipality with the conditions specified therein."

[33] Many years ago Corbett JA in **Evins vs Shield Insurance Company Ltd 1980 (2) SA 814 (A) at 835 F-G** held that:

> "Closely allied to the once and for all rule is the principle of res judicata which establishes that where a final judgement has been given in a matter by a competent Court, then subsequent litigation between the same parties or their privies, in regard to the same subject matter and based upon the same cause of action is not permissible and if attempted by one of them can be met by the exception *rei judicatae vel litis finitae*. The object of this principle is to prevent the repetition of law suits, the harassment of a defendant by a multiplicity of action and the possibility of conflicting decisions."

[34] After the Municipality was refused leave to appeal the decision by Goedhard AJ that judgement became final. That judgement dealt with the same subject matter namely stay of writ of execution based upon the same cause of action being the 8th December 2020 Court order. The parties as well as the case number is exactly the same. In my

view the Applicant's desire to apply for debt relief can never be and is in the circumstances not a defence not to pay and execute on the judgement.

[35] Should the Municipality be successful in its application for debt relief it still does not amount to a rescission of the order granted on the 8th December 2020. The debt relief is aimed at nothing else but to improve financial administration and accountability within Municipalities an issue which is bedevilling government and is clearly lacking.

[36] The Supreme Court of Appeal in the mater of **Ceaserstone Sdot-Yam v Word of Marble and Granite 2000 (2013) (6) SA 499 at paragraph 18** held as follows:

> "The plea of res judicata and *lis pendens* are undoubtedly cognate pleas and it follows that the elements required to establish the once are the same as elements required to establish the other."

[37] Goedhart AJ relying on the decision of the SCA in **Eskom holdings vs Letsema Local Municipality Case No 990/2020** said that relying on IRFA is no defence to evade a Court order. Similarly, in this matter the Municipalities reliance on National Treasury Debt Relief project cannot suspend the effect of a process initiated by the executive.

[38] In the result I have come to the concern that this application is devoid of any merit in law and falls foul of the principle of *res judicata* and should be dismissed.

ORDER

1. The Application is dismissed with costs such costs to include costs of two Counsel one of them being senior counsel.

DATED at JOHANNESBURG this the day of MAY 2023.

**M A MAKUME**
**JUDGE OF THE HIGH COURT**
**GAUTENG LOCAL DIVISION, JOHANNESBURG**

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| DATE OF HEARING | : | 09 MAY 2023 |
| DATE OF JUDGMENT | : | MAY 2023 |
| FOR APPLICANT | : | ADV SCOTT |
| INSTRUCTED BY | : | MESSRS HILL MCHARDY & HERBST INC |
| FOR RESPONDENT | : | ADV SL SHANGISA |
| WITH | : | ADV L RAKGWALE |
| INSTRUCTED BY | : | MESSRS PHATSHOANE HENNEY ATT. |