THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 1207/2018

In the matter between:

ESKOM HOLDINGS SOC LTD	**APPELLANT**
and	
SIPHELELE SIDOYI	**FIRST RESPONDENT**
NOMNABHULU MBOLEKWA	**SECOND RESPONDENT**
MZWANDILE MTYOBILE	**THIRD RESPONDENT**
ZWELITHSA ZOLILE	**FOURTH RESPONDENT**
SITHEMBISO MATITI	**FIFTH RESPONDENT**

Neutral citation: *Eskom Holdings Soc Ltd v Sidoyi and Others* (1207/2018) [2019] ZASCA 65 (28 May 2019)

Coram: LEACH, WALLIS and MOCUMIE JJA and MOKGOHLOA and WEINER AJJA

Heard: 17 MAY 2019

Delivered: 28 May 2019

Summary: Electricity – disconnection of allegedly unlawful connections and apparatus – challenge by affected property owners to disconnection – order sought for restoration of electricity supply – such could only be determined after determining whether the disconnected supply was lawful – dispute of fact on the papers – application referred for the hearing of oral evidence on the issue of the lawfulness of the disconnected supply.

ORDER

On appeal from: Eastern Cape Division of the High Court, Mthatha (Jolwana AJ, sitting as court of first instance):

1 The appeal succeeds, with no order for costs.

2 The order of the high court is set aside and replaced with the following order:

'(a) The application is referred for the hearing of oral evidence on the issue of whether the electricity installations to the applicants' homes were lawfully installed.

(b) The provisions of rules 33 to 39 are to apply to the hearing of that evidence.

(c) The deponents to affidavits are to be available at the hearing of oral evidence for the purpose of giving such evidence as may be relevant in supplementation of their affidavits and to be cross-examined.

(d) Either party may call additional witnesses on the issue so referred for the hearing of oral evidence, in which event in respect of each such witness they shall give notice of the identity of the witness and a brief summary of their evidence not less than 10 days prior to the hearing of the oral evidence.

(e) The costs of this application are reserved for decision by the court hearing the oral evidence.'

JUDGMENT

Wallis JA (Leach and Mocumie JJA and Mokgohloa and Weiner AJJA concurring)

[1] On 17 July 2017, in the Zwelitsha area, the appellant, Eskom Holdings Soc Ltd (Eskom), implemented a programme of disconnections of electrical apparatus, such as wires, conductors and electricity poles, that had been illegally erected and connected to the national grid and posed a danger to the public, but was being used by consumers to obtain a supply of electricity. This included the connections to a property owned by the first respondent, Mr Sidoyi. The result of the disconnections was that Mr Sidoyi's tenants, who live in the twelve flats he had built on the property, ceased to have access to electricity via a prepaid meter installed on the property by an unnamed contractor, who had assured Mr Sidoyi that he was authorised by Eskom to undertake that installation.

[2] Mr Sidoyi's response to the removal of the illegal installations and the consequent disconnection of any electricity supply to his property was to launch the present proceedings in the Eastern Cape Division of the High Court, Mthatha. The other respondents instituted similar proceedings. Initially they sought an order directing Eskom to furnish them with reasons for the disconnection of electricity to their premises. That was not pursued because the reasons, namely the fact that the connections were illegal and dangerous, were furnished in the answering affidavits. They pursued their applications for final relief and at this stage of the proceedings it was agreed that Mr Sidoyi's case would be taken as

a test case with the result of the other cases following upon the result of his.

[3] The high court (Jolwana AJ) upheld Mr Sidoyi's claim for final relief, and the claims of the other respondents, and granted the following orders:

'1 That the termination of electricity supply at the applicants' premises at Zwelitsha Administrative Area, Mqanduli be and is hereby declared unlawful.

2 That the Respondent be and is hereby directed to install electricity supply to the Applicants' homesteads within 30 days of the date of this order.

3 That the Respondent be and is hereby interdicted and/or restrained from terminating the electricity supply to the applicants' premises without following due process of law.

4 That the Respondent is directed to pay the costs of this application.'

An application for leave to appeal was dismissed, but such leave was granted on petition by this court.

Mr Sidoyi's basis for the relief

[4] In his founding affidavit, Mr Sidoyi alleged that he had applied for electricity to Eskom's local office in Mthatha in August 2014. A contractor 'which assured [me] that it had been authorised and was delegated by the respondent to install electricity onto my premises' installed electricity in 2015. His tenants had enjoyed the benefits of an electricity supply since that date and since 2015 he had purchased the electricity from Eskom stores and shops selling electricity. The supply was routed through a meter on the premises operated by the insertion of a card and he purchased electricity and had it loaded onto the card for use in the meter. He claimed that he had from time to time reported faults in the supply to Eskom and its technicians had attended to these complaints by repairing electricity wires, cables and/or conductors at his homestead.

[5] The tenor of the affidavit was therefore that Mr Sidoyi had a lawful supply of electricity to his premises and that it had been unlawfully disconnected on 17 July 2017, when the team of Eskom employees arrived in the area and proceeded to cut off cables, conductors and wires and remove electrical poles connecting particular premises including his own. Were that in truth the position his legal right to the final relief he sought and obtained would have been beyond dispute. Summary termination of a lawful supply, for which the owner was paying, would be a straightforward breach of the contractual relationship between him and Eskom.

[6] At this point, however, the founding affidavit took a turn in a different direction. It continued as follows:

'For the reasons that follow I submit with respect that the electricity supply at my homestead was disconnected in an unlawful manner:

a. The respondent did not inform me in writing of the decision to terminate the electricity supply;

b. The respondent did not give me a chance to make representations before taking a decision to terminate the supply at issue;

c. The respondent did not give me a clear statement of the envisaged administrative action, namely; disconnection of the electricity supply;

d. The respondent did not give me notice of the right to make a review or to lodge an internal appeal in view of its decision, and

e. The respondent further failed to give me a notice of the right to request reasons.'

Mr Sidoyi then added that he did not know the reasons for the disconnection of the electricity supply to his premises.

[7] In dealing with his claim for final relief Mr Sidoyi said that the disconnection of the electricity supply adversely affected his rights and

legitimate expectations. The latter was based upon the fact that from 2015 until 17 July 2017 he had been able to purchase electricity from Eskom. Mr Sidoyi invoked his right to administrative action that is lawful, reasonable and procedurally fair, repeating the points already made in respect of his claim for reasons. He alleged that it was unreasonable for Eskom to cut off his premises without notice and that the decision was irrational and so unreasonable that no reasonable person could have exercised their powers or performed their functions in that way. Lastly he submitted that in taking the decision Eskom took into account irrelevant considerations and did not consider relevant considerations. He did not develop either of these last two points by reference to any facts, so that the claims of irrationality, unreasonableness, taking irrelevant considerations into account and ignoring relevant considerations were not explained on any factual basis.

Eskom's response

[8] Eskom's response to these allegations was twofold. It sought to rebut Mr Sidoyi's claims insofar as they were directed at showing that his electricity connection was lawful. It explained that his application for an electricity supply had been for an indigent supply limited to 20 Amps. Plainly this was not an appropriate supply for twelve flats occupied by separate families, all making use of lights, stoves, televisions and other electrical equipment. According to Eskom the application for this supply was not completed and the indigent supply programme was discontinued in 2016.

[9] On the basis of its records, Eskom denied that the unidentified contractor who had made the connections to Mr Sidoyi's home was approved or authorised by it and pointed out that neither a certificate of

compliance, nor an installation certificate, had been provided. Mr Kandhai, who deposed to the main answering affidavit, said that the unlawful connections had first been identified and thereafter removed. They had all been checked and found to be illegal and not meeting the requirements of a proper connection. All of them constituted a danger to the public. Mr Khandai had not been present when this was done but his affidavit was accompanied by a brief and formal confirmatory affidavit by Ms Dyalvane, an electrician, and another rather fuller affidavit by Mr Makhonza, a security officer, who were among those dealing with the disconnections. Apparently Ms Dyalvane had undertaken a prior inspection on 13 July 2017 in which she identified the illegal connections on the basis of incorrect pole sizes; lack of stays; poles with incorrect foundations; poles without Eskom tags; conductors of the incorrect size and height; and wires not conforming to specifications.

[10] Eskom accepted that Mr Sidoyi was reflected on its system as a legal purchaser and consumer of electricity. Mr Kandhai said somewhat cryptically that Eskom 'accordingly … knows … that the electricity was drawn through the meter installed at Applicant's property'. It is unclear whether this meant that Eskom was aware that there was a meter on the affected premises and that electricity was being supplied to it, notwithstanding the alleged unlawfulness of the connection, or whether it meant that they were aware that Mr Sidoyi was buying and using electricity, but were unaware until they received the application that it was being used through a meter at the premises relevant to the present case.

[11] Mr Kandhai said that on 14 July 2017 a community meeting had taken place facilitated by the local councillor for the area, Cllr Mlotywa,

at which the community expressed dissatisfaction over interruptions in supply caused by overloading of transformers as a result of illegal connections. Concerns were also expressed over safety issues arising from people climbing up poles and other dangers that illegal connections posed, especially to children. Apparently there had been deaths as a result of illegal connections.

[12] Eskom's second response to Mr Sidoyi's claim for relief was to say that it was under a duty to remove illegal installations that posed a danger to the public. It relied upon the obligations imposed by Regulation 7(7) of the Electrical Installations Regulations promulgated in terms of the Occupational Health and Safety Act 85 of 1993.[1] That read:

''If an inspector, an approved inspection authority for electrical installations or supplier has carried out an inspection or test and has detected any fault or defect in any electrical installation, that inspector, approved inspection authority for electrical installations or supplier may require the user or lessor of that electrical installation to obtain a new certificate of compliance: Provided that if such fault or defect in the opinion of the inspector, approved inspection authority for electrical installations or supplier constitutes an immediate danger to persons, that inspector, approved inspection authority for electrical installations or supplier shall forthwith take steps to have the supply to the circuit in which the fault or defect was detected, disconnected …'

[13] Mr Kandhai said that Ms Dyalvane was an inspector in terms of these regulations and that she had made the determination that the installations posed an immediate danger. She deposed to an affidavit confirming this. In reply Mr Sidoyi denied her status as an inspector; that she had made an inspection or a determination of immediate danger; that the equipment giving his premises access to electricity suffered from any

[1] GN 242, *GG* 30975 of 6 March 2009.

defects or posed an immediate danger to anyone; or that Ms Dyalvane was entitled to demand a compliance certificate from him.

The issues

[14] The affidavits were couched on the basis that the removal of the allegedly illegal apparatus constituted administrative action, but had been undertaken without complying with the procedural requirements in s 3 of PAJA.[2] Eskom initially approached the matter on the basis that the removal constituted administrative action in the light of the Constitutional Court's decision in *Joseph*.[3] At the outset of the hearing before us, however, its counsel raised the issue of whether this concession was correctly made. There was a fundamental difference between this case and *Joseph*, in that the applicants in that case were undoubtedly receiving a lawful electricity supply from the city. Here the case for Eskom was that the supply being used was received via unlawfully connected apparatus that posed a danger to members of the public in the area.

[15] If Eskom was correct in saying that the supply of electricity to Mr Sidoyi's house was via an unlawful connection using electrical apparatus that had been unlawfully erected and installed, it was difficult to see how the removal of that apparatus, which would have the effect of terminating the supply, could constitute administrative action as defined in PAJA. The reason was that the definition of administrative action in s 1 of PAJA requires that the action in question 'adversely affect the rights' of the person bringing the proceedings. If the means of receiving a supply of electricity is an unlawful connection to the electricity network there is no right or legitimate expectation to receive that supply of electricity.

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[2] The Promotion of Administrative Justice Act 3 of 2000.
[3] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC).

[16] Recognising these difficulties, counsel for Mr Sidoyi sought to argue that because he had purchased electricity that gave him a right to a supply of electricity. That may be correct as far as it goes, but the underlying premise is that Eskom would provide the supply through suitable electrical apparatus installed by it or a contractor authorised by it. In other words it would be a lawful supply. Whatever rights may accrue under PAJA to a person who has been in receipt of an electricity supply lawfully connected and whose supply is at risk of being terminated, a person who has never been in receipt of an electricity supply through a lawful connection is situated differently.

[17] In the result the argument before us took a different turn. Counsel for Mr Sidoyi sought to contend that his electricity supply was indeed lawful and that Eskom had not adduced sufficient evidence to show otherwise. Of course if he was correct in that contention there was no need to explore any of the potentially difficult questions that would arise under PAJA if the supply were unlawful. In that event, Mr Sidoyi would be entitled to relief by way of the restoration of the supply to his property by virtue of the fact that its removal was unlawful and in breach of the contractual rights flowing from his purchase of electricity. If it transpired that the supply was unlawful then that would put an end to Mr Sidoyi's claim for it to be restored.

[18] In advancing the argument that the supply was lawful, counsel relied heavily on the fact that he had been assured that the person who connected him to the supply was authorised by Eskom to do so, and that he had been able to purchase electricity and by doing so to operate the existing meter on the property. The mechanism of pre-paid meters is

simple. Each meter has an identification number and the consumer is issued with a card bearing that number that entitles them to purchase electricity. When they do so, whether through the internet or by approaching various outlets such as service stations or shops that are authorised to sell electricity, the receipt for their payment has a numerical code that must be entered into the meter in order to activate the supply. That code will only operate that particular meter. Hence, the argument ran, the fact that the consumer was able to purchase electricity in this way and operate the meter in their home by entering the code demonstrated that the apparatus being used was lawful.

[19] The force of this argument cannot be discounted, but it was accompanied by other factors that undermined it. For example Mr Sidoyi's explanation of how the supply was installed was remarkably vague. He said that it was installed in 2015 'by a contractor which assured [me] that it had been authorised and was delegated by the respondent to install electricity onto my premises'. The contractor was not identified and, when this version was pertinently challenged by Eskom, he made no attempt in his replying affidavit to identify the installer or produce an installation certificate. In regard to the latter he said that he was under no obligation to produce the certificate to Ms Dyalvane. He denied that the electrical meter box installed on his premises was not supplied by Eskom, but then added: 'Even if that was so the point is that I had been purchasing electricity from the respondent and the respondent admits being aware of this'.

[20] Eskom for its part relied on the evidence of Mr Kandhai, as supported by Ms Dyalvane and Mr Makhonza. Mr Khandai said that, apart from the abortive application for an indigent person supply,

Eskom's records showed that Mr Sidoyi had made no other application for an electricity supply. He said that whoever had installed the meter had not been authorised or delegated by Eskom to do so. Had they been, there would have been a record of such installation and the accompanying instruction or authorisation, but there was none. He also relied on the supporting affidavits for the proposition that the relevant installation did not meet the standards of an authorised installation. He drew attention to the absence of a certificate of compliance and an installation certificate.

[21] The supporting affidavits left much to be desired in their description of the unlawful installation. One would have expected Eskom to have ensured that, as it undertook the programme of disconnections, it would have made a record of every item removed, the place from which it had been removed and the reasons for its removal. In a day and age when virtually everyone carries a phone with a capacity to take photographs such a record could have been supported by photographic evidence. Instead the affidavits simply contain the bare statements that Ms Dyalvane had done an inspection prior to the disconnections and identified all unlawful installations and that these were the installations that were removed. There was express confirmation from Mr Makhonza that everything removed was unlawful and posed a danger to the public, but as his function was to head the security aspect of the operation it was unclear on what basis he was qualified to make these statements.

[22] Despite the criticisms of the evidence on behalf of Eskom it cannot, in the light of the *Plascon-Evans* rule, be rejected out of hand on the papers. The result is that there was a clear dispute of facts on the papers as to the lawfulness of the installation to Mr Sidoyi's property. We were asked if that was our conclusion to set aside the high court's order

and remit the case with a direction that it be referred for the hearing of oral evidence on the central issue of the lawfulness of the installation. I agree that this was the correct order for us to make. Rule 6(5)*(g)* of the Uniform Rules provides that if a case cannot be properly determined on the papers the court may make such order as is appropriate for its resolution including an order for the hearing of oral evidence. It is a great pity that the judge in the high court did not identify the issue of illegality and refer it to oral evidence. Had he done so the evidence would by now have been heard and the issues in the case finally resolved.

[23] In the light of this conclusion it is unnecessary for me to deal with the issues raised by the order granted by the high court. They required Eskom to install an electricity supply to the homesteads of each of the respondents within thirty days of the court order. That seemingly overlooked the fact that if the existing connection had been effected unlawfully the effect of the implementation of the order would have been to compel Eskom to replace an unlawful supply not installed by it, with a lawful supply. It is unclear on what basis that could ever be a legitimate order for a court to make. It highlighted the simple point that the case could not be resolved without determining at the outset the issue of the lawfulness of the disconnected installation and that once that had been resolved that would resolve the entire case.

[24] In the result the following order is made:

1 The appeal succeeds, with no order for costs.

2 The order of the high court is set aside and replaced with the following order:

‘(a) The application is referred for the hearing of oral evidence on the issue of whether the electricity installations to the applicants’ homes were lawfully installed.

(b) The provisions of rules 33 to 39 are to apply to the hearing of that evidence.

(c) The deponents to affidavits are to be available at the hearing of oral evidence for the purpose of giving such evidence as may be relevant in supplementation of their affidavits and to be cross-examined.

(d) Either party may call additional witnesses on the issue so referred for the hearing of oral evidence, in which event in respect of each such witness they shall give notice of the identity of the witness and a brief summary of their evidence not less than 10 days prior to the hearing of the oral evidence.

(e) The costs of this application are reserved for decision by the court hearing the oral evidence.’

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant:	T J M Paterson SC
Instructed by:	Makaula Zilwa Inc, Sandton
	Matsepes Inc, Bloemfontein
For respondent:	L Matotie (with him D Sikoti)
Instructed by:	SR Mhlawuli & Associates, Mthatha,
	Maduba Attorneys, Bloemfontein.