THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 990/2020

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**APPELLANT**
and	
LETSEMENG LOCAL MUNICIPALITY	**FIRST RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA ("NERSA")	**SECOND RESPONDENT**
MINISTER OF ENERGY	**THIRD RESPONDENT**
MINISTER OF PUBLIC ENTERPRISES	**FOURTH RESPONDENT**
THE MEC: DEPARTMENT OF COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS, FREE STATE PROVINCE	**FIFTH RESPONDENT**

Neutral citation: *Eskom Holdings SOC Limited v Letsemeng Local Municipality and Others* (Case no 990/2020) [2022] ZASCA 26 (9 March 2022)

Coram: SALDULKER ADP, SCHIPPERS and PLASKET JJA and SMITH and PHATSHOANE AJJA

Heard: 26 November 2021

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Summary: Electricity Regulation Act 4 of 2006 – interdict and counter-application – municipality's obligation to pay for electricity supplied to it by Eskom – interdict to prevent the interruption of the electricity supply for non-payment – counter-application to compel payment as agreed to by the municipality.

ORDER

On appeal from: Free State Division of the High Court, Bloemfontein (Loubser J, sitting as the court of first instance):

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below dismissing the appellant's counter-application is set aside and replaced with the following order:

'The Municipality is directed to pay to Eskom:

(a) all amounts, in respect of the electricity it receives from Eskom, when such amounts are due and payable, in accordance with clause 9 of the electricity supply agreement concluded between the parties and s 65(2) of the Local Government: Municipal Finance Management Act 56 of 2003;

(b) all arrear debts due and payable to Eskom, in accordance with the terms of the acknowledgement of debt and payment plan concluded between the parties which is attached to the founding affidavit as annexure 'FA2';

(c) such portion of the equitable share that relates to electricity within 24 hours of receipt of the equitable share;

(d) the amount of R 5 million which the national treasury made available to the municipality for the payment of its electricity debt;

(e) costs, including the costs of two counsel.'

JUDGMENT

Phatshoane AJA (Saldulker ADP and Plasket JA and Smith AJA concurring):

[1] Eskom Holdings SOC Limited (Eskom), the appellant, and Letsemeng Local Municipality (Letsemeng), the respondent, are locked in a dispute over the non-payment

by Letsemeng of its electricity supply account. As at 31 January 2020, Letsemeng's debt had accumulated to an astronomical figure of R41 094 530.19. Based on Letsemeng's recurrent failure to comply with its obligations, Eskom issued a final notice to interrupt electricity supply with effect from 18 February 2020. This precipitated the launching of an urgent application in the Free State Division of the High Court, Bloemfontein (the high court) by Letsemeng to interdict Eskom from implementing the interruption pending the review of that decision and the determination of a dispute between the parties to be referred to the National Energy Regulator of South Africa (Nersa), the second respondent, in accordance with the provisions of the Electricity Regulation Act 4 of 2006 (the ERA).

[2] Eskom opposed the application and filed a counter-application in which it sought, inter alia, to compel Letsemeng to comply with its obligations in terms of the electricity supply agreement (ESA) that it and Letsemeng had concluded. Letsemeng's failure to meet its payment obligations lies at the heart of the counter-application which is founded on two acknowledgements of debt (AOD) signed by Letsemeng and a certificate of balance issued by a senior manager of Eskom.

[3] The high court (per Loubser J) acknowledged that Eskom could not continue to supply electricity without Letsemeng paying for it. However, it was of the view that it could not grant Eskom an order for payment as Letsemeng had no funds with which to satisfy the debt. In any event, the high court held, such an order would have no practical effect. The high court was of the view that Eskom had itself to blame as it could have resorted to a number of alternative legal processes to remedy the default. Eskom proceeded at a glacial pace, so reasoned the high court, until it deemed it appropriate to resort to a threat to interrupt the supply of electricity to Letsemeng in order to force it to pay. The high court granted Letsemeng the interim interdict but dismissed Eskom's counter-application.

[4] Leave to appeal was granted by the high court in unqualified terms against both its order on the interim interdict and the counter-application. Despite this, Eskom only appeals against the order dismissing its counter-application.

Background:

[5] Eskom is the sole supplier of electricity on the national grid within the borders of the Republic of South Africa and is a licensee in terms of the ERA for the generation, transmission and distribution of electricity to bulk consumers and end-users. Letsemeng is also a holder of a temporary distribution license issued by Nersa. The ERA authorises Eskom to enter into ESAs with municipalities which, in turn, distribute to end-users who reside in their areas of jurisdiction.

[6] Eskom and Letsemeng entered into an ESA on 13 February 2006. The material terms of relevance for present purposes are contained in clauses 4 and 9. In terms of clause 4.1, Eskom agreed to supply Letsemeng with electricity and Letsemeng agreed to take from Eskom all the electricity required by it for its distribution system on terms and conditions set out in the agreement. Clause 9.1 provided that the electricity accounts for all charges payable under the ESA would be sent to Letsemeng as soon as possible after the end of each month and each account would be due and payable on the date the account was received by Letsemeng. Clause 9.2 provided that if payment was not received within 10 days from the date the account was deemed to have become payable in terms of sub-clause 9.1, Eskom could discontinue the supply to Letsemeng or terminate the ESA. In terms of clause 9.3, if Letsemeng disputed an account it would not be entitled to reduce or set-off its debts or defer payment but had to settle the account in full pending resolution of the dispute. Finally, clause 9.5 provided that a certificate signed by an authorised employee of Eskom setting out the amount due and payable by Letsemeng at any time would be prima facie proof, subject to manifest error, of Letsemeng's debt.

[7] During 2017, Letsemeng first fell into arrears with the payment of its account. At that stage, it owed Eskom R5 247 883.94. Eskom threatened to commence a process that would culminate in the interruption of the electricity supply, a measure that is authorised by s 21(5) of the ERA. Letsemeng acknowledged its indebtedness, undertook to make arrangements with Eskom to settle the debt and pleaded with Eskom not to interrupt the supply of electricity. Despite that, Letsemeng failed to discharge its payment

obligations. It repeated its unequivocal admission of liability on 28 September and 02 November 2017 but defaulted in making payments.

[8] On 23 February 2018 Letsemeng once more acknowledged its indebtedness which had grown, by then, to R12 037 025.83 and undertook to pay the full amount owed by 31 December 2019. It reneged on its obligations yet again. On 11 October 2019 Eskom informed Letsemeng that in the light of its breach, the debt had increased to R30 million. It urged Letsemeng to pay by 31 October 2019 and threatened to interrupt the supply of electricity if Letsemeng did not pay. Eskom was, however, still willing to enter into another payment arrangement with Letsemeng, which once again readily acknowledged the debt but still did not honour payment.

[9] On 6 December 2019, Letsemeng signed the second AOD on terms identical to that of 23 February 2018. The amount then owed was R35 865 884.81. Letsemeng failed to make good on its commitment to pay yet again.

[10] In light of the various breaches, on 31 January 2020, Eskom, exercising the power conferred upon it by s 21(5) of the ERA, issued a final notice to interrupt Letsemeng's electricity supply with effect from 18 February 2020. On 5 February 2020, Letsemeng, with a view to preventing the interruption, sought a R5.4 million advance from the Free State Provincial Treasury which would be set-off against its subsequent equitable share. The Treasury undertook to make the advance and Eskom and Letsemeng agreed that Letsemeng would pay R5 million to Eskom on 25 February 2020. On the eve of the payment date, however, Letsemeng launched the urgent proceedings in the high court. It did not pay the R5 million as promised.

The issues

[11] The primary issue to be addressed in this appeal, as I see it, is whether Eskom was entitled to the relief sought in its counter-application. It is necessary first to outline the relief claimed in the counter-application.

The counter-application

[12] In the first three prayers, orders were sought to compel Letsemeng 'to comply with the payment conditions' set out in clause 9 of the ESA concluded by the parties; directing Letsemeng to pay for its electricity consumption in accordance with s 65(2) of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA); and directing Letsemeng to 'pay all monies due and payable on its current account to Eskom as set out in the ESA'.

[13] Prayer 4 stands on its own. It is a prayer for a declarator that Letsemeng is 'in breach of section 153*(a)* of the Constitution in that it has failed to structure and manage its administration, budgeting and planning processes in order to give priority to basic needs, including the payment of electricity to Eskom, and promote the social and economic development of its community'.

[14] Prayers 5, 6 and 7 seek structural interdicts. Prayer 5 is for an order directing Letsemeng to 'deliver a notice, on affidavit' to the high court and Eskom 'on or before the 8th day of each month indicating and providing evidence of its compliance with its obligations under the acknowledgement of debt and repayment plan, and its monthly current account obligations to Eskom'. Prayer 6 states that the Municipal Manager 'is mandated and ordered to ensure compliance with the terms of this order and give effect thereto'. Prayer 7 directs Letsemeng to 'report to this Court on affidavit and to the applicant . . . before the last business day of every second month after the granting of this order furnishing full and comprehensive details as to the manner of such compliance with paragraphs 1-4'.

[15] In prayers 8 and 9, Eskom sought orders declaring that Letsemeng has 'a legal obligation, on a monthly basis, to ring fence such portion, as determined in its electricity distribution licence, of its electricity revenue collected from all electricity sales in terms of its (sic) sec 27*(i)* [of the] Electricity Regulation Act'; and directing Letsemeng 'to ring fence

a certain portion of its electricity revenue collected from all electricity sales in terms of sec 27*(i)* [of the] Electricity Regulation Act . . . and its Licence for the Distribution of Electricity'.

[16] Prayer 10 sought an order directing Letsemeng to 'pay such portion of the equitable share, as may be determined, as relates to electricity, directly to the Applicant within 24 hours of receipt of such share by and forthwith to give written notice to the applicant and court that it has implemented this order'. Prayer 11 sought an order directing Letsemeng 'to pay the amount of R5 million to Eskom which National Treasury has made available for payment to Eskom on 25 February 2020'.

[17] Before I turn to the defences raised by Letsemeng, I intend to dispose at the outset of those prayers to which Eskom has not established an entitlement. First, Eskom is not entitled to an order declaring Letsemeng in breach of s 153*(a)* of the Constitution. It has not put up any evidence in this regard, apart from Letsemeng's non-payment of its electricity account. It consequently has not made out a case for this relief. In any event, it has made out no case for its standing to obtain such an order.

[18] Secondly, Eskom sought vaguely drafted structural orders that would require affidavits being filed with the high court from time to time. No explanation was given as to why these orders were necessary and what purpose they were intended to serve. No case was made out for the structural orders and I can see no point in granting them. Eskom is able to enforce its rights in the event of non-compliance by Letsemeng without structural orders.

[19] Thirdly, the orders Eskom sought in relation to ring-fencing of funds are not borne out by the legislation and are vague. It sought an order directing Letsemeng to 'ring-fence a certain portion of its electricity revenue collected from all electricity sales'. Section *27(i)* of the ERA provides no more than that municipalities must exercise their executive authority and perform their duties by, inter alia, 'keeping separate financial statements, including a balance sheet of the [electricity] reticulation business'. In *Resilient Properties*

(Pty) Ltd v Eskom Holdings SOC Ltd and Another[1] Van der Linde J, with reference to s 27*(i)*, described the obligation to keep separate accounts as 'ring-fencing'. At best, Eskom may have been entitled to an order directing Letsemeng to keep separate financial statements in respect of electricity reticulation, but there is no evidence that it does not do so.

The remainder of the counter-application

[20] A local government is required to strive, within its financial and administrative capacity, to achieve, among others, its object of ensuring the provision of services to its community in a sustainable manner.[2] Electricity is an important basic municipal service which local government is ordinarily obliged to provide.[3] Reciprocal obligations are created by the ESA concluded by the parties: Eskom is obliged to supply bulk electricity to Letsemeng; and Letsemeng is obliged to pay for this service. In terms of s 51(1)*(b)*(i) of the Public Finance Management Act 1 of 1999, Eskom must take effective and appropriate steps to collect all revenue due to it; and s 65(2) of the MFMA places an obligation on Letsemeng to take all reasonable steps to ensure that money that it owes is paid within 30 days of receiving the relevant invoice or statement.

[21] The remaining prayers sought by Eskom in its counter-application are aimed at securing payment from Letsemeng on the basis of its contractual and statutory obligations. The undisputed evidence is that Letsemeng did not honour any of the AODs and the various payment arrangements it made with Eskom. Indeed, it is common cause that Letsemeng is in default of its obligation to pay Eskom for the electricity that has been supplied to it. Furthermore, Letsemeng undertook to pay the amount of its equitable share earmarked for electricity, and then to pay R5 million to Eskom that was advanced to it by

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[1] *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd and Others* 2019 (2) SA 577 (GJ) para 56.
[2] *Rademan v Moqhaka Local Municipality and Others* [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC) para 10. See also s 4(2)*(d)* of the Local Government: Municipal Systems Act 32 of 2000 which provides: 'The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to. . .strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner. . ..'
[3] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) para 40.

the Treasury, but did not do so. Counsel for Letsemeng properly conceded that, at the least, the R5 million was owed to Eskom. It cannot be disputed that, given the facts I have outlined, Letsemeng is in breach of its obligation in terms of s 65(2) of the MFMA. In the context of Letsemeng having applied to interdict Eskom from interrupting the supply of electricity, Eskom has no suitable alternative remedy other than its counter-application for mandatory orders to enforce Letsemeng's reciprocal obligations to pay for the electricity it has and will receive.

[22] Letsemeng's defence on the merits is no defence at all – that it should not be ordered to pay what it agreed to pay because it was unable, due to its financial weakness, to do so. To the extent that this may amount to the tacit raising of a defence of impossibility of performance, the position is clear: if a person promises to do something that can be done, such as delivering a thing or paying a debt, but which that person cannot do due to circumstances peculiar to themselves, they are nonetheless liable on the contract.[4] The commercial mayhem that would result, if the rule was otherwise, is not difficult to imagine. Contractual obligations are enforced by courts irrespective of whether a defaulting party is able to pay or not. The focus is on the rights of the innocent party, not the means of the defaulting party.

[23] Letsemeng also raised as a defence the disputes it claims to have in respect of the quantum of its debt. That too is no defence because clause 9.3 of the ESA provides that Letsemeng is required to settle its account pending the resolution of any dispute it may have with Eskom.

[24] It is necessary to make brief mention of an assertion, not pressed before us by Letsemeng, that the Intergovernmental Relations Framework Act 13 of 2005 (the IRFA) provided it with a defence. In *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others*[5], this Court held that, in terms of the IRFA, Eskom had been required to

[4] *Post Office Retirement Fund v South African Post Office and Others* (Case no. 1134/2020) [2021] ZASCA 186 (30 December 2021) paras 83-84.
[5] [2020] ZASCA 185; 2021 (3) SA 47 (SCA) paras 74-84.

attempt, in good faith, to settle its disputes with the municipalities concerned before deciding to interrupt the supply of electricity to them. The fact that it had not done so meant that a precondition for the valid exercise of its power in terms of s 21(5) of the ERA was absent. That was the basis of the applicants' prima facie right for purposes of the interim interdicts applied for. The same idea applies in this case to the interim interdict, but it is not the subject of this appeal. Only Eskom's counter-application is, and the IRFA has no bearing on that: once Letsemeng applied for an interim interdict, nothing precluded Eskom from seeking counter-performance for having to continue to supply electricity. As a result, the IRFA provides no defence to Letsemeng in relation to the counter-application.

[25] For the most part, Eskom's entitlement to the remaining orders is clear. It is, however, necessary to say something of one of the orders sought by Eskom, namely that Letsemeng pay to Eskom that portion of the equitable share that relates to electricity. Local governments raise their revenue through rates and other charges but are also funded to varying degrees by grants from the national government. A municipality is entitled to an equitable share of the revenue raised nationally to enable it to provide basic services and perform the functions allocated to it.[6] Steytler and De Villiers say that each municipality's equitable share is calculated according to a formula consisting of various components including a basic service component to enable municipalities to provide water, sanitation, electricity, refuse removal and other basic services.[7] The equitable share is intended to assist municipalities to provide services. The use of the equitable share falls within the discretion of the municipality.[8] Letsemeng exercised its discretion by undertaking to pay to Eskom that part of its equitable share that related to electricity, but failed to do so. In my view, this entitles Eskom to the order in respect of the equitable share.

[6] Section 227(1)*(a)* of the Constitution.
[7] N Steytler and J De Villiers 'Local Government' in *Constitutional Law of South Africa* 2 ed (2013) ch 22 at 107-108.
[8] Ibid ch 22 at 110.

Conclusion

[26] Eskom has granted Letsemeng ample opportunity to make arrangements for the payment of its debt and to keep its current account up to date. Letsemeng, on the other hand, has displayed bad faith throughout. It has promised to pay, reached agreements on payment plans which, in every instance, it has said it could afford, but has on every occasion cynically breached its undertakings. It cannot continue to receive electricity without paying for it. The high court erred in dismissing Eskom's counter-application in its entirety.

[27] In the result, the following order is made:

1 The appeal is upheld with costs, including the costs of two counsel.

2 The order of the court below dismissing the appellant's counter-application is set aside and replaced with the following order.

'The Municipality is directed to pay to Eskom:

(a) all amounts, in respect of the electricity it receives from Eskom, when such amounts are due and payable, in accordance with clause 9 of the electricity supply agreement concluded between the parties and s 65(2) of the Local Government: Municipal Finance Management Act 56 of 2003;

(b) all arrear debts due and payable to Eskom, in accordance with the terms of the acknowledgement of debt and payment plan concluded between the parties which is attached to the founding affidavit as annexure 'FA2';

(c) such portion of the equitable share that relates to electricity within 24 hours of receipt of the equitable share;

(d) the amount of R 5 million which the national treasury made available to the municipality for the payment of its electricity debt;

(e) costs, including the costs of two counsel.'

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M V PHATSHOANE

ACTING JUDGE OF APPEAL

Schippers JA

[28] I have had the benefit of reading the judgment prepared by my colleague, Phatshoane AJA and shall utilise the abbreviations used in it. As stated in that judgment, this appeal is confined to the order dismissing Eskom's counter-application. I gratefully adopt the summary of the relevant facts and the relief sought in the counter-application, in paragraphs 1 to 16 of the first judgment. Concerning the relief, I would merely add that Eskom also requested an order directing the municipal manager to give effect to the orders sought in the counter-application.

[29] I agree with the order upholding the appeal in relation to the relief sought in paragraph 11 of the counter-application – that Letsemeng be directed to pay the sum of R5 million, which the Free State Provincial Treasury (the provincial treasury) made available for payment to Eskom on 25 February 2020. I do so for the reason that there is no dispute between the parties regarding this issue, as contemplated in s 40(1) of the IRFA. However, I find myself in respectful disagreement with the orders issued in paragraph 27 of the first judgment, save for the order in paragraph 27(2)(d), for reasons of both principle and practicality.

[30] The fundamental point is one of principle, most recently affirmed by this Court in *Eskom v Resilient Properties*.[9] The dispute between Eskom and Letsemeng is of a financial nature and both parties, as organs of state, have a constitutional and statutory duty 'to avoid judicial proceedings before a genuine attempt has been made to settle the dispute', and are bound to report the matter to the national Treasury, which may mediate the dispute.[10]

[31] At the outset it is necessary to define the dispute between the parties. This is necessary in the light of Eskom's contentions that the IRFA is inapplicable because 'there

[9] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others* [2020] ZASCA 185; 2021 (3) SA 47 (SCA).
[10] *Resilient Properties* fn 9 para 67.

is no justiciable or bona fide dispute between the parties'; that Letsemeng had 'contrived a dispute'; and that it had acknowledged its indebtedness to Eskom.

[32] In *Resilient Properties*,[11] Petse DP made it clear that in the context of a case such as the present, the IRFA finds application. He said:

'As to the question whether there is a dispute between Eskom on the one hand and the ELM [Emalahleni Local Municipality] and the TCLM [Thaba Chewu Local Municipality] on the other, the following bears emphasis. It is true that there is no real dispute as to the existence of the debts owed to Eskom by both the ELM and the TCLM. Nor is there a dispute as to the inability of these municipalities to make any meaningful payments themselves due to their parlous financial state. The real disputes concerned the manner in which these two municipalities could be enabled or empowered to pay their debts to Eskom and thus whether it was appropriate in the circumstances to interrupt the supply of electricity to exact payment from them. It was in relation to these disputes that Eskom and the affected municipalities, in collaboration with the other state role players, were constitutionally obliged to make "every reasonable effort" to avoid or settle, but failed to do so.'

[33] Petse DP went on to say:

'I am therefore persuaded that there was a live dispute between Eskom on the one hand and the ELM and the TCLM on the other, in relation to the manner as to how the debt would be liquidated and the remedies available to Eskom in the event of default. That the two municipalities involved signed acknowledgements of debt detailing how the debt was to be liquidated cannot assist Eskom. This must be so because the acknowledgments of debt themselves under the heading "Default" provided in terms that "Eskom may *with due regard to all the relevant legislation* . . . take whatever legal remedies [are] available to it including disconnection of supply of electricity . . .". In the context of the facts of these proceedings the "relevant legislation" is the IRFA, s 139 of the MFMA and PAJA.'[12]

[34] At this stage three preliminary observations are called for. The first is that the application of the IRFA is not confined to a case where Eskom threatens to terminate the supply of electricity to a municipality due to non-payment, as authorised by s 21(5) of the ERA. The IRFA also applies to the real dispute: how to enable the municipality to pay its

[11] *Resilient Properties* fn 9 para 74.
[12] *Resilient Properties* fn 9 para 75, emphasis in the original.

debt to Eskom. This is buttressed by the provisions of s 139 of the Constitution and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA).

[35] Section 139(5) of the Constitution provides that if, as a result of a crisis in its financial affairs, a municipality persistently breaches its obligations to provide basic services or meet its financial commitments, the relevant provincial executive must impose a recovery plan aimed at securing the municipality's ability to meet those obligations.[13] If a provincial executive cannot or does not do so, the national executive must intervene.[14]

[36] The purpose of the MFMA is to 'secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government'. In terms of s 44(1) of the MFMA, whenever a dispute of a financial nature arises between organs of state, the parties concerned must promptly take all reasonable steps to resolve the dispute out of court. Section 44(2) provides that if the national Treasury is not a party to the dispute, the parties must report the matter to it and may request the national Treasury to mediate the dispute.

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[13] Section 139(5) of the Constitution provides:

'**139 Provincial intervention in local government**

. . .

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must-

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which-

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and-

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph *(b)*, assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

[14] Section 139(7) of the Constitution provides:

'**139 Provincial intervention in local government**

(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.'

[37] Section 135(2) of the MFMA imposes a duty on a municipality to meet its financial commitments. If it encounters a serious financial problem, it must 'notify the MEC for local government and the MEC for finance in the province'. The criteria for serious financial problems are set out in s 138. These include a failure by a municipality to make payments as and when due, and instances where a municipality has defaulted on its financial obligations for financial reasons.

[38] In terms of s 136(1), if the MEC for local government in a province becomes aware that a municipality is experiencing a serious financial problem, he or she is obliged to promptly consult the mayor to determine the facts, assess the seriousness of the situation and the municipality's response to it, and decide whether the situation requires intervention in terms of s 139(1) of the Constitution.[15] Section 136(2) of the MFMA provides that if the financial situation has been caused by or resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution and the conditions for intervention under s 139 of the Constitution have been met, the MEC must promptly decide whether to intervene in the municipality. Section 150 of the MFMA authorises intervention by the national executive where the provincial executive 'cannot or does not adequately exercise the powers or perform the functions' referred to in s 139(4) or (5) of the Constitution.[16]

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[15] Section 139(1) of the Constitution provides:
'**139 Provincial intervention in local government**
(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including-
(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;
(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to-
(i) maintain essential national standards or meet established minimum standards for the rendering of a service;
(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or
(iii) maintain economic unity; or
(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.'

[16] Section 150(1) of the MFMA reads:
'**150 National interventions**
(1) If the conditions for a provincial intervention in a municipality in terms of section 139 (4) or (5) of the Constitution are met and the provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in that section, the national executive must-

[39] The second preliminary observation, as was held in *Resilient Properties*, is that the dispute is about the terms of repayment of the debt by a municipality and the method of the enforcement of Eskom's rights, irrespective of whether that municipality has signed an AOD in favour of Eskom.[17] In fact, as stated in *Resilient Properties*, the relationship between Eskom and municipalities is not solely contractual, governed by an ESA.[18] So, Eskom's contention that 'a party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for itself to the disadvantage of its counterpart', is inapposite.

[40] The third preliminary observation is that neither Eskom nor Letsemeng have considered a rational repayment plan – if necessary co-ordinated with the assistance of other organs of state such as NERSA and the national government, which funds both Eskom and Letsemeng. The parties made no attempt to engage the national Treasury, as required by s 44 of the MFMA.[19] The high watermark of Eskom's case on this score is a letter by the Minister of Public Enterprises dated 4 July 2018 in which he informed his colleague, the Minister of Co-operative Governance and Traditional Affairs, that a task team would be established concerning the non-payment of electricity debt and the lack of capacity and leadership in municipalities. However, the intervention by the Minister of Public Enterprises did not bear any fruit.

[41] Turning then to the applicability of the IRFA, s 41 of the Constitution provides that '[a]n organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute'. This principle has been given effect to in s 40(1) of the IRFA, which inter alia enjoins all organs of state to make every reasonable effort 'to settle intergovernmental

(a) consult the relevant provincial executive; and
(b) act or intervene in terms of that section in the stead of the provincial executive.'

[17] *Ibid*.
[18] *Resilient Properties* fn 9 para 79.
[19] *Resilient Properties* fn 9 para 82.

disputes without resorting to judicial proceedings'.[20] What is more, s 41 requires that even before declaring an intergovernmental dispute, an organ of state must in good faith make every reasonable effort to settle the dispute.[21]

[42] In *National Gambling Board v Premier, KZN*,[22] the Constitutional Court emphasised that the obligation on all spheres of government and organs of state within each sphere to avoid legal proceedings against one another imposed by s 41(1)*(h)*(vi) of the Constitution, entailed much more than an effort to settle a pending court case. This obligation, an important aspect of co-operative government which lies at the heart of Chapter 3 of the Constitution, requires each organ of state to fundamentally re-evaluate its position.[23]

[43] Applied to the present case, Eskom is an organ of state in the national sphere of government and is bound by the Constitution, which contemplates the generation and transmission of electricity as a national competence. Eskom supplies bulk electricity to municipalities which, in turn, distribute electricity to local consumers over a municipal electricity reticulation network.[24] This Court, in *Resilient Properties*, said the following about this relationship:

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[20] Section 40(1) of the IRFA provides:
'**40 Duty to avoid intergovernmental disputes**
(1) All organs of state must make every reasonable effort-
(a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and
(b) to settle intergovernmental disputes without resorting to judicial proceedings.
(2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.

[21] Section 41 of the IRFA reads:
'**41 Declaring disputes as formal intergovernmental disputes**
(1) An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing.
(2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.'

[22] *National Gambling Board v Premier, KwaZulu-Natal and Others* 2002 (2) SA 715 (CC).

[23] *National Gambling Board* fn 22 paras 29, 33 and 36.

[24] The municipal competence is limited to '[e]lectricity and gas reticulation' under Part B of Schedule 4 to the Constitution.

'As an organ of state, Eskom bears certain constitutional duties. The relationship between Eskom on the one hand and the ELM and the TCLM on the other is more than merely a contractual one regulated purely in terms of the ESAs that the parties concluded. Eskom supplies bulk electricity to the municipalities which, in turn, have a concomitant duty to supply it to the end users. The unique feature of this relationship is that Eskom, as an organ of state, supplies electricity to local spheres of government to secure the economic and social well-being of the people. This then brings the relationship within the purview of the IRFA.'[25]

[44] Since Eskom is an organ of state bound by the Constitution, it cannot act in a manner that directly violates constitutional rights. Neither can it act in a way that indirectly violates constitutional rights by preventing other organs of state from fulfilling their constitutional obligations. In *Resilient Properties*, Petse DP stated the rule in these terms:
'It must therefore perforce follow that Eskom is under a constitutional duty to ensure that municipalities which are solely dependent on it for electricity supply, are enabled to discharge their obligations under the Constitution. Thus, it goes without saying that Eskom cannot act in a way that would undermine the ability of municipalities to fulfil their constitutional and statutory obligations to the citizenry.'[26]

[45] This is entirely consistent with the constitutional obligation on local government to provide basic municipal services, including electricity. In *Joseph v City of Johannesburg*,[27] the Constitutional Court said:
'The provision of basic municipal services is a cardinal function, if not the most important function of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public-service provider.'

[46] Regarding Eskom's modus operandi to obtain payment, Petse DP, in *Resilient Properties*, said:
'As already indicated, s 41(3) requires organs of state to exhaust all other remedies to resolve disputes before they approach a court. True, in this instance, Eskom never approached a court.

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[25] *Resilient Properties* fn 9 para 79.
[26] *Resilient Properties* fn 9 para 80.
[27] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) para 34.

Instead, it took the impugned decisions to interrupt electricity supply to the municipalities, hoping that doing so would coerce the municipalities to pay for the electricity supplied over several years. This, Eskom asserts, had the desired effect in the *Sabie* matter that was settled between the parties. In taking this route, Eskom in effect circumvented the consequences that flow from the prohibition contained in ss 40 and 41 of the IRFA against instituting proceedings in a court to settle intergovernmental disputes if the dispute has not been declared a formal intergovernmental dispute, and all efforts to resolve that dispute have not been exhausted in terms of chapter 4 of the IRFA and proved unsuccessful. Nothing less than a 'reasonable effort, in good faith' to resolve the dispute will suffice.'[28]

[47] Taking a decision to interrupt the electricity supply to force payment for electricity is precisely what Eskom has done in this case. The litigation came about as a result of Eskom's notice of its intention to disconnect its electricity supply services to Letsemeng with effect from 18 February 2020. Eskom decided on this course as a debt collection measure. This was confirmed by its Senior Manager and deponent, Ms Fatima Bedir. She said:

'The municipal debt has become so dire that it has to be curbed. Therefore, in preventing an unmanageable escalation of the debt, Eskom is compelled to effect some form of interruptions . . . to the supply of electricity to the municipality.'

[48] This, when on its own version, Eskom has neglected its duties under the Public Finance Management Act 1 of 1999 (PFMA) to collect the debt owed to it by Letsemeng since at least June 2017, when the amount of the debt was significantly less – R5 247 883.94.[29] Had Eskom not neglected these duties it would have been able to collect outstanding amounts through the judicial process, to execute manageable amounts of arrears on a regular basis without putting the future of local government in Letsemeng at risk, and the debt would not have spiralled to some R41 million.

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[28] *Resilient Properties* fn 9 para 81.

[29] Section 51(1)*(b)*(i) of the PFMA provides:

'**51 General responsibilities of accounting authorities**

(1) An accounting authority for a public entity-

. . .

(b) must take effective and appropriate steps to-

(i) collect all revenue due to the public entity concerned . . . .'

[49] Thus, Eskom could not side-step the provisions of the IRFA, by resort to a counter-application for payment of all amounts under the ESA, and all arrears in accordance with the terms of the AODs. It follows that Eskom's submission that its counter-application 'places the present matter on a vastly different footing and renders it distinguishable, both in law and on the facts' from *Resilient Properties*, is wrong.

[50] Apart from this, the remaining relief sought in the counter-application raise quintessentially intergovernmental disputes to which the IRFA applies. A perfect example is the declaratory order that Letsemeng is in breach of its obligations under s 153*(a)* of the Constitution, by failing to structure and manage its administration, budgeting and planning processes in order to give priority to the basic needs of the community. So too, the order that Letsemeng pay a portion of its equitable share of national revenue, as it relates to electricity, directly to Eskom.

[51] There is a dispute between the parties concerning the manner in which Letsemeng could be enabled to settle its indebtedness to Eskom, as envisaged in s 41(3) of the Constitution. Both parties were obliged to make every reasonable effort to resolve the dispute, in accordance with the procedures provided for in, amongst others, s 139 of the Constitution, ss 40, 41 and 45 of the IRFA and ss 44 and 139 of the MFMA. Given the important requirements of co-operative government, a court will rarely decide an intergovernmental dispute unless the organs of state involved have made every reasonable effort to resolve it.[30] Solely for this reason, the order in paragraph 27 of the first judgment, is, in my view inappropriate, except for the order in paragraph 27(2)(d).

[52] However, the order sought by Eskom that the amount of R5 million be paid to it, which Letsemeng received from the provincial treasury for the specific purpose of payment of its arrear electricity account, stands on a different footing. Here, there can be

[30] *Uthukela District Municipality and Others v President of the Republic of South Africa and Others* 2003 (1) SA 678 (CC) para 14.

no question about enabling Letsemeng to pay that amount and s 40 of the IRFA is not engaged.

[53] By letter dated 5 February 2020, Letsemeng informed the provincial treasury that it was in a dire financial crisis and that Eskom would cut the power supply if no payment was made by 18 February 2020, which would result in loss of revenue to the municipality and community unrest. Letsemeng requested assistance in the sum of R5.4 million. On 17 February 2020 the provincial treasury acceded to this request.

[54] But Letsemeng did not pay the R5 million over to Eskom. Instead, on the eve of the date on which it undertook to pay this amount, Letsemeng launched an urgent application for an interdict to stop Eskom from implementing its decision to disconnect the electricity supply. Worse, Letsemeng provided no explanation for its failure to pay the R5 million over to Eskom. Its Municipal Manager, Mr Tshemedi Lucas Mkhwane, who had been involved in the discussions with Eskom and the provincial treasury, did not in the founding papers disclose the fact that the provincial treasury had on 17 February 2020 agreed to advance the R5 million, nor that Letsemeng had received it.

[55] When the non-payment of the R5 million by Letsemeng was raised in the answering affidavit, there was still no explanation why this money was not paid to Eskom, or how it had been utilised. Mr Mkhwane glossed over the issue and simply stated that Letsemeng had ‘eventually reasoned that payment of that amount to Eskom would not resolve the situation’. He then attempted to explain away the clear purpose of Letsemeng’s request to the provincial treasury – to pay Eskom to avert the termination of the electricity supply – by saying that the R5 million was for ‘technical support’. The explanation was opportunistic and contrived.

[56] The inescapable inference to be drawn from these facts is that Letsemeng acted in bad faith. The provincial treasury, by providing the necessary funds, enabled Letsemeng to pay Eskom for electricity. An order directing it to pay the sum of R5 million to Eskom is therefore justified. Since Eskom has not achieved substantial success in its

counter-application, I do not think that it should be awarded costs for being partially successful in the appeal.

[57] That brings me to the practical difficulty in implementing the relevant orders in the first judgment. Letsemeng, like most municipalities in this country, is in financial crisis. It is unable to comply with an order to settle all arrear amounts and to pay all amounts due to Eskom when they become payable. It is trite that a court will not make an order which will have no practical effect.[31]

[58] When launching the counter-application, Eskom, on its own version, was aware that Letsemeng was not by the means to settle its outstanding electricity debt of some R41 million. Ms Bedir described the bleak 'national picture of municipal debt owed to Eskom in the Republic' as follows:

'Overdue debt increased from R1.2Bn as at March 2013 to R26.8Bn at the end of December 2019. The debt has grown by R25.6Bn. The Top 10 municipalities account for 69% of the debt whilst the top 20 municipalities account for 80%. The top 20 payment levels have dropped from a peak of 91% in March 2016 to 45% in December 2019. There are 44 municipalities individually owing over R100m, 75 municipalities individually owing over R10m and 96 municipalities individually owing over R10.5m.'

[59] The following reasons advanced by Letsemeng for its inability to pay the outstanding debt, are common to most municipalities across the country. The rate of recovery of payment for municipal services from consumers is poor, mainly due to unemployment (a rate in excess of 60%) and the declining economy in the Free State. This on its own has seriously and negatively impacted on the municipality's ability to recover amounts for services and property rates. Of some 5000 households, only 1700 have registered as indigent households. In the result, Letsemeng supplies free water and services to about 3300 households for which it receives no compensation in the form of its equitable share of national revenue. Moreover, the subsidies paid by government for

[31] *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26.

indigent consumers are significantly less than the cost of municipal services rendered to them.

[60] In December 2019 the national Treasury penalised Letsemeng by reducing its equitable share from R23 million to R19 million, apparently due to its incorrect budget. Electricity is lost on the grid and unaccounted for because of old and derelict systems, and the theft of electricity, in respect of which no monies are recovered, and for which Letsemeng is held liable. Eskom has imposed penalties for late and non-payment of electricity.

[61] Letsemeng alleged that Eskom had encroached on its area of jurisdiction by supplying electricity directly to consumers in Jacobsdal, Oppermansgronde, and the townships of Luckhoff and Petrusburg. Eskom fails to recover charges for electricity as it is obliged to do under the PFMA, or to terminate the supply of electricity to those consumers when they do not pay. This has resulted in consumers in these areas not paying for any municipal services at all, including those rendered by Letsemeng, such as sewerage, the supply of water and the like, and property rates. Letsemeng struggles to recover charges for municipal services and rates in the said areas, because consumers know that it is not permitted to cut the supply of water. When the application for the interdict was brought, arrear rates were in excess of R220 million.

[62] Eskom’s answer to all of this evidence was a bald denial. It criticised Letsemeng for not remedying the situation regarding the registration of indigent households. It said that Letsemeng ‘merely makes a bald assertion that it lacks resources to meet its constitutional and statutory obligations’. It did not dispute the statement that Letsemeng simply did not have the resources to pay the amounts claimed. Neither did Eskom dispute the fact that the problem had become so serious that it would not be resolved without the assistance of the provincial or national governments, nor could it.

[63] In *Resilient Properties* this Court emphasised that government intervention in a case such as this is critical.[32] It cited with approval the following dictum by the full court in *Cape Gate (Pty) Ltd and Others v Eskom Holdings (SOC) Ltd and Others*:[33]

'[T]here are only two sources of funds on which Eskom can rely for payment in respect of on-going supply of electricity to Emfuleni. The one is Emfuleni's paying consumers, and the other is, ultimately, national treasury. And since in this country civilized society cannot exist and the economy cannot function without Eskom remaining economically viable, national treasury and ultimately National Government must inevitably step in when and where local authorities fail; that is what the Constitution expressly envisages.'

Petse DP continued:

'What this means is that without the national and provincial governments' intervention in the financial crises experienced by the ELM and the TCLM – and many other similarly-situated municipalities – all are doomed.'

[64] In these circumstances, it was unrealistic of Eskom to expect Letsemeng to forthwith comply with its obligations under the AODs and the ESA, liquidate its indebtedness of R41 million, and pay a portion of its equitable share relating to electricity to Eskom. And this, when Eskom itself acknowledged that Letsemeng is in financial trouble; that it 'failed to invoke s 139 and call for provincial intervention'; and that most municipalities in the country are in dire financial straits and unable to pay their electricity debt owed to Eskom. For these reasons, its claim for payment of the arrears of R41 million is inexplicable.

[65] The high court (Loubser J) was accordingly correct, in my opinion, in its observation that the grant of the wide-ranging orders sought in the counter-application would not assist Eskom, if Letsemeng could not pay in any event. The court however overlooked the fact that Letsemeng had raised the IRFA in its defence to the counter-application, and asserted that the relief sought by Eskom was premature. The high court erred in failing to apply the provisions of the IRFA. The dispute should have been remitted

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[32] *Resilient Properties* fn 9 para 97.

[33] *Cape Gate (Pty) Ltd and Others v Eskom Holdings (SOC) Ltd and Others* 2019 (4) SA 14 (GJ) para 148.

to the parties for resolution in accordance with its provisions. Given that the issues between them have become definite and clear, there seems to be no reason why attempts to resolve the dispute should not be completed within a period of four months.

[66] In conclusion, the evidence discloses that the relevant orders sought by Eskom in the counter application are impractical: they are difficult to implement. More fundamentally, there are constitutional and statutorily mandated interventions that impede the grant of the orders.[34]

[67] For the above reasons I would make the following order:

1 The appeal succeeds in part.

2 The order of the court below dismissing the appellant's counter-application is set aside and replaced with the following:

'(a) The first respondent is directed to pay Eskom the sum of R5 million which the Free State Provincial Treasury advanced to it for payment of its electricity debt, within 30 calendar days of the date of this order.

(b) The dispute between the appellant and the first respondent concerning the non-payment by the first respondent to the appellant for bulk electricity supply is remitted to the appellant and the first respondent for resolution, in terms of s 40(1) of the Intergovernmental Relations Framework Regulation Act 13 of 2005.

(c) In the event that the dispute is not resolved within four months of the date of this order, the appellant may set down the counter-application for its determination.

(d) Nothing in this order shall detract from the existing rights and obligations of the appellant and the first respondent under the electricity supply agreement entered into between them on 13 February 2006, or in terms of any other law.

(e) There is no order as to costs.'

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A SCHIPPERS

JUDGE OF APPEAL

[34] *Resilient Properties* fn 9 para 95.

Plasket JA (Saldulker ADP and Smith AJA concurring)

[68] I agree with the judgment of my colleague Phatshoane AJA and disagree with the judgment of my colleague Schippers JA. I highlight in brief three points that explain why I take this view.

[69] The first point relates to the facts. The relief that has been granted in the majority judgment, in respect of the counter-application, all relates to admitted liabilities on the part of Letsemeng. It cannot, and does not, suggest that it is not liable to pay its monthly electricity account to Eskom. It not only agreed to a structured means for repaying arrears, in the various AODs and repayment plans, but prepared the documents. As was stated in Eskom's answering affidavit, 'at all times, the repayment plan figures are prepared by the municipality taking into account their own affordability and revenue collected from the sale of electricity to customers'. In this way, Letsemeng 'warranted' that it could afford to pay the amounts it had agreed to pay. The amounts to be paid, in other words, were of its choosing. It also undertook to pay over to Eskom that portion of the equitable share that related to electricity. Finally, as accepted by my colleague Schippers JA, it undertook to pay Eskom R5 million advanced by the provincial treasury. There is no dispute between Eskom and Letsemeng about Letsemeng's liability to Eskom and how it would pay its debt. There is thus no dispute that requires resolution by negotiation.

[70] The second point I wish to make relates to the law. I am not aware of any general principle of the law of contract, or any other branch of the law for that matter, that absolves a debtor from liability, if they are unable to pay. As Phatshoane AJA explained in her judgment, at best for Letsemeng, its plea of poverty – perhaps, more accurately, of prodigality – could, if generously viewed, have been intended as some sort of a tacit, but inadequate, reliance on impossibility of performance. The evidence did not come close to establishing the requirements of this defence. The fact that many other municipalities display disdainful attitudes to their obligations does not help Letsemeng.

[71] Finally, I wish to say something of the standard of behaviour that the citizenry can legitimately expect from organs of state. They, being bearers of public power sourced ultimately in the Constitution, are expected and required to be role-models and to conduct themselves in an exemplary manner in their dealings with others, including other organs of state. In this case, Letsemeng has behaved disgracefully throughout. Its duplicity and dishonesty has been brazen. If it had acted honestly and in good faith, it would have reported its delinquency to the provincial executive as far back as 2017, and steps could then have been taken by the latter to step into the administrative vacuum and repair the damage at a relatively early stage. An honest, constitutionally respectful municipal administration would have done the decent thing, and fallen on its sword.

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C PLASKET

JUDGE OF APPEAL

Appearances:

For appellant:	S L Shangisa SC (with L Rakgwale)
Instructed by:	Phatshoane Henny Attorneys, Bloemfontein.
For the first respondent:	N Snellenburg SC (with MC Louw)
Instructed by:	Bokwa Attorneys, Welkom. Hill, McHardy & Herbst Inc, Bloemfontein.