Eskom's mistake – not giving proper notice

On 19 September 2023 the Johannesburg High Court, in the case of De Koker v Eskom Holdings SOC Ltd and Another[1] (the "De Koker case"), handed down judgment against Eskom Holdings Soc Ltd ("Eskom"), granting an interim interdict in favour of tenants who had no direct contractual relationship with Eskom, ordering, amongst other things, that Eskom reconnect the supply of electricity to the sectional title scheme (the "Scheme") where the tenants reside.

Eskom supplies electricity directly to the 60-unit Scheme which is owned entirely by Lutzacode (Pty) Ltd (the "Landlord").

Each unit in the Scheme is connected to a pre-paid electricity meter which the tenants operate on a "pay-as-you-go" basis in order to get access to electricity. The money paid by the tenants for the electricity is collected by the Landlord who is then meant to pay same over to Eskom.

In this case, the Landlord failed to pay Eskom the monies which it had collected from the tenants in respect of their pre-paid electricity meters, and Eskom accordingly disconnected the supply of electricity to the Scheme. The Applicant in the matter (the "Tenant") was renting and residing in one of the units in the Scheme, which she avers was occupied by low-income families, including the elderly and minor children.[2]

It appears from judgment that the Landlord had lodged a formal dispute with Eskom, but before the dispute had been resolved Eskom disconnected the supply of electricity to the Scheme.

As a result of the disconnection to the Scheme, the tenants had no electricity supply to their units.

The facts of the dispute between the Landlord and Eskom were unclear as papers filed by Eskom in an urgent application brought by the Landlord the previous week, out of the High Court in Pretoria (the "First Urgent Application"), in response to the disconnection of electricity to the Scheme, contradicted papers filed by them in this urgent application (the "Second Urgent Application"), brought by the Tenant.

This case, whilst unreported, is very interesting because one must remember that there are two separate, and distinct, contractual relationships. The first relationship is between the Landlord and Eskom, and the second relationship is between the Landlord and the Tenant. The court noted that the facts of the First Urgent Application and the Second Urgent Application were the same, but the legal question in each application differed as a result of the party bringing the respective applications.

The Pretoria High Court dismissed the First Urgent Application brought by the Landlord the previous week because the Landlord failed to prove that it met the requirements for an urgent interdict. The matter was therefore struck from the roll.

The Second Urgent Application was brought out of Johannesburg and sought similar relief to the First Urgent Application, however in this application, the Tenant argued that the matter should be heard on an urgent basis because

[1] (077168/2023) [2023] ZAGPJHC 1046 (19 September 2023), which can be accessed here, http://www.saflii.org/za/cases/ZAGPJHC/2023/1046.html.
[2] At para 2 of the De Koker case.

the tenants residing in the Scheme would have no substantial redress if the matter was not heard on an urgent basis, as it would take too long to have the matter heard on the ordinary roll. The Tenant averred that she and the other tenants could not afford to be without electricity for that long, because the disconnection of electricity affected, amongst other things, their security, ability to work, hygiene, and daily life, thereby violating their Constitutional rights.[3] The court in the Second Urgent Application was satisfied that the Tenant's argument for urgency was valid, and therefore enrolled the matter to be heard.[4]

Whilst Eskom had given advanced notice of the disconnection to the Landlord, it had not given notice to the tenants. The crisp question was therefore, given the fact that there was no direct contractual relationship between Eskom and the tenants, whether Eskom had an obligation in terms of the Promotion of Administrative Justice Act[5] ("PAJA") to serve notice on the tenants before disconnecting the electricity to the Scheme.

Eskom argued that, as a government-owned enterprise, they were statutorily authorised to disconnect the electricity supply of a customer when a customer fails to honour its payment obligations.[6] However, for the purposes of this particular application, the court was only tasked with determining whether the procedure which Eskom followed to disconnect the electricity supply to the Scheme was correct.[7]

The court referred to authority from the Supreme Court of Appeal[8] which held that a decision to disconnect the supply of electricity constituted administrative action, and therefore such a decision would have to comply with the provisions of PAJA.[9]

Further authority was cited, this time from the Constitutional Court[10] (the "Vaal River case") in which the majority (in a five to four decision) held that a substantial reduction of the electricity supply constituted a violation of fundamental rights (not directly in and of itself, but indirectly by infringing on other rights such as the right to dignity, the right of access to sufficient water, the right to an environment that is not harmful to one's health or well-being etc)[11] and that the court could not allow the effects of Eskom's conduct to persist. In the Vaal River case, the Constitutional Court held that the administrative action (the decision by Eskom to substantially reduce the supply of electricity to two municipalities) was not administratively fair because the affected residents were not given notice before the decision was taken, and no fair process had been followed prior to the decision to substantially reduce the supply of electricity.

The court pointed out that the consumers in the Vaal River case did not have a direct contractual relationship with Eskom, similar to the tenants in this case.[12]

In referring to yet another Constitutional Court[13] case (the "Joseph case"), in which the Constitutional Court held that the electricity supplier City Power, was obliged to comply with the procedural fairness requirement for administrative action in terms of PAJA, to give adequate notice to the residents of a particular building notwithstanding the fact that the

[3] At paras 7,8 and 20 of the De Koker case.
[4] At para 21 of the De Koker case.
[5] 3 of 2000.
[6] At paras 23-25 of the De Koker case.
[7] At para 25 of the De Koker case.
[8] *Resilient Properties (Pty) Ltd v Eskom Holdings Soc* 1 All SA 668 (SCA).
[9] At para 26 of the De Koker case.
[10] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [(CCT 44/22) [2022] ZACC, which can be accessed here, https://www.saflii.org/za/cases/ZACC/2022/44.html.
[11] At para 189 of the Vaal River case.
[12] At para 30 of the De Koker case.
[13] At para 32 of the De Koker case, which cited *Joseph v City of Johannesburg* [2009] ZACC 30 para 42.

residents had no direct contractual relationship with City Power.[14] In this regard, the court held that "*Placing it* [a notice, notifying the residents of the building of the proposed disconnection of electricity] *in a prominent place in the building and affording the minimum of 14 days pre-termination was considered fair and complied with the requirement of 'adequate notice'*".[15]

The court then made it clear that the relief sought by the Tenant relied on Eskom's duty to comply with PAJA, and not on any duty by Eskom to provide services.[16]

The court held that, in terms of PAJA, and as per the Constitutional Court's decision in the Joseph case, Eskom had to provide adequate notice to the tenants as well as a reasonable opportunity to make representations, before terminating the supply of electricity.[17]

While this case may seem like a victory for the Tenant, one must remember that it was only an interim interdict, and it was only granted because Eskom did not provide proper notice to the tenants as it was required to do in terms of PAJA. In fact, the prayer of the Tenant that the electricity be reconnected pending the finalisation of the dispute between the Landlord and Eskom was not granted. Eskom was ordered to reconnect the supply of electricity to the Scheme, and was precluded from disconnecting the electricity supply unless proper notice was given to the tenants. The court order clarified that a notice of disconnection which was attached to the outside security gate of the Scheme, as well as inside the common area of the Scheme and which provided 14 days' notice before the proposed disconnection, would be deemed to be proper notice.

Eskom's mistake was therefore not in disconnecting the supply of electricity to the Scheme, its mistake was not providing adequate notice to the tenants in the Scheme, as required in terms of PAJA.

DANIEL ROBB AND MARYSIA STILES
SECTIONAL TITLE SOLUTIONS (PTY) LTD
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SANDTON

*****END OF ARTICLE*****

[14] At paras 32 and 33 of the De Koker case.
[15] At para 33 of the De Koker case.
[16] At para 34 of the De Koker case.
[17] At para 41 of the De Koker case.