REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

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

14/9/18
DATE

SIGNATURE

CASE NO: 2018/11316

In the matter between:

RESILIENT PROPERTIES (PTY) LTD	Applicant
and	
ESKOM HOLDINGS SOC LIMITED	First Respondent
GAMAGARA LOCAL MUNICIPALITY	Second Respondent
MEC: COOPERATIVE GOVERNANCE, HUMAN SETTLEMENT AND TRADITIONAL AFFAIRS (NORTHERN CAPE)	Third Respondent
MINISTER OF ENERGY	Fourth Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Fifth Respondent
THE MINISTER OF WATER AND SANITATION	Sixth Respondent

MEC: ECONOMIC DEVELOPMENT AND

TOURISM (NORTHERN CAPE) Seventh Respondent

MINISTER OF FINANCE Eighth Respondent

Judgment

Summary: application by shopping mall owner in area of jurisdiction of local authority to interdict Eskom from interrupting supply of electricity on a particular basis to local authority for non-payment, pending review of Eskom's decision for being non-compliant with its Constitutional obligations and with its licence conditions and thus unlawful;

Applicant submitting that Eskom had no power in terms of its licence read with s.21(5) of the Electricity Regulation Act 4 of 2006 to interrupt supply of electricity to local authority for non-payment;

Applicant submitting that human catastrophe will follow if supply of electricity were interrupted, given past experience in like circumstances;

Applicant submitting court should grant interim order permitting direct payment of its local authority bill for electricity to Eskom, by-passing local authority, which would be obliged to credit applicant, coupled with an order interdicting Eskom from interrupting supply of electricity to local authority;

Eskom supporting applicant's proposed interim order, but local authority supporting Eskom's proposed interruption of supply of electricity;

Held: on proper construction of s.21(5) of the Electricity Regulation Act 4 of 2006, read with Electricity Supply Agreement between Eskom and local authority, Eskom entitled to interrupt supply of electricity to local authority for non-payment;

Held further: Eskom's proposed decision qualifying as administrative action for purposes of s.33 of Constitution and PAJA, and required to meet reasonableness standard but at least baseline test of rationality;

Held further: on the facts, Eskom's proposed decision irrational and balance of convenience favouring applicant;

Held further: main interim relief sought by applicant and supported by Eskom not supported by balance of convenience and not granted, and lesser interim interdict granted compelling local authority to comply with obligations of acknowledgment of debt in favour of Eskom, and interdicting Eskom from implementing particular interruption decision pending main review application.

Van der Linde, J:

Introduction

[1] This application for interim relief pending a review was brought by way of urgency in the last week of the midyear recess in July. It competed for priority with other urgent matters, hence the delay in preparing this judgment.[1] The application is about an owner of a shopping mall, who also conducts the business of landlord in respect of the shops it lets in its mall, and who scrupulously pays its electricity bill to the local authority, but who is now confronted by a decision of the first respondent ("Eskom") to cut electricity supply to the local authority (the second respondent, "GLM") on a particular basis, because GLM does not pay Eskom's account. The applicant ("Resilient") wants to review Eskom's decision in due course, and asks for an interim interdict in the meantime to prevent its implementation.

[2] The papers disclose that this is a phenomenon currently well prevalent throughout the country. Resilient says GLM's mismanagement has forced Eskom's hand. GLM says general economic hardship suffered by its constituents is to blame. Eskom says it cannot survive and fulfil its national function of providing electrical supply unless it is paid; and unless it sets in motion its specific decision of a phased discontinuance of supply, it will not be paid. Resilient says that if Eskom implements its decision a human catastrophe will follow.

[3] The papers started off in the normal way on 19 March 2018, with Resilient asking for interim relief in part A of its notice of motion pending its intended review in due course under part B of the notice of motion. Shortly thereafter Eskom reached a

[1] I am grateful for the parties' agreement that the electrical supply to the local authority would not be interrupted pending this judgment.

compromise with GLM, the threatened discontinuance receded and the urgency subsided. When the matter was called on 27 March 2018, the court was asked to make a consent order to hold the *status quo*.

[4] The part B proceedings thereafter progressed apace. Eskom made the record of the decision available under rule 53, Resilient filed a supplementary founding affidavit, and Eskom filed its answering affidavit. GLM did not file an answering affidavit, despite the fact that in part B Resilient asked for direct payment relief against GLM, entitling it to pay its GLM electricity bill to Eskom and not to GLM.

[5] GLM defaulted on its arrangement with Eskom, which had taken the form of an acknowledgment of debt ("AOD"). Eskom notified on 13 June 2018 that it would implement its specific interruption decision on 8 July 2018. Resilient then set the matter down for urgent hearing on 3 July 2018, filing a further supplementary affidavit, and Eskom responding by filing an answering affidavit.

[6] On 3 July 2018 Resilient and Eskom reached an agreement that Eskom would not implement its interruption decision pending finalisation of part B of Resilient's application – call it the main review application – provided Resilient was able to obtain additional interim relief that protected Eskom's interests against GLM in the interim period. The application was accordingly postponed to Tuesday, 24 July 2018, and allocated for hearing on Friday, 27 July 2018.

[7] In consequence, what came before this court on 27 July 2018 was a new part A,[2] which had better now be spelt out:

"(a) The Second respondent is directed to pay the First Respondent all amounts falling due to the First Respondent in terms of the Acknowledgment of Debt signed by the Second Respondent on 14 February 2018, as and when those amounts fall due;
(b) The Applicant, and any other electricity consumers in the area of jurisdiction of the Second Respondent who have agreed in writing to join the class action described in prayer 4 of Part B of the principal notice of motion, be authorised to

[2] Page 524, notice of set down.

discharge the debts that they incur to the Second Respondent in respect of the ongoing supply of electricity to them by making payment of the amount of such debts directly to the First Respondent and furnishing the Second Respondent with proof of such payments to the First Respondent;
(c) the First Respondent is interdicted and restrained from implementing its decision ("the interruption decision") to interrupt the bulk electricity supply to the entire Gamagara Municipality;
(d) in the alternative to paragraphs (a) to (c) above, the First Respondent is interdicted and restrained from implementing the interruption decision."

This relief is sought pending the relief sought in part B of "*the principal*" notice of motion, and also pending a determination by the National Energy Regulator of South Africa ("NERSA") of the dispute between Resilient and Eskom in accordance with the provisions of the Electricity Regulation Act 4 of 2006 ("ERA").

The parties' respective positions

Resilient's position

[8] Resilient made it clear in its new affidavit that the *prima facie* right it relies on for its asserted entitlement to the interim interdict still remains as set out in its original founding and supplementary urgent affidavits. Part B of the original notice of motion notifies that Resilient intends applying for an order declaring that Eskom's specific decision to interrupt the electricity supply to GLM published on 14 March 2018 is unconstitutional and invalid, and for an order reviewing and setting aside what it called the *"interruption decision"*.

[9] Further, a declaration will be sought that section 21(5)(c) of ERA is inconsistent with the Constitution and invalid. Leave will be sought authorising Resilient to claim certain further relief against Eskom and GLM, and against the National Executive and the Provincial Executive of the Northern Cape, in particular declaring that their failure to have intervened in GLM in terms of Part 2 of Chapter 13 of the Municipal

Finance Management Act 56 of 2003 ("MFMA"), is inconsistent with the Constitution and invalid.

[10] Resilient will apply for the certification of a class in terms of section 38(c) of the Constitution of all members of electricity consumers in the area of GLM who are not in arrears with their electricity accounts, and who have signed a written document indicating their intention to join the intended class action.

[11] Acting on behalf of that class, Resilient will then seek an order directing the National Executive represented by the Minister of Finance: to intervene in GLM in terms of section 150 of the MFMA; to prepare a financial recovery plan for GLM; to serve on all parties and to file with the court a copy of the financial recovery plan within three months of the court order; and to serve on all parties and file with the court within three months of commencement of the first financial year of GLM after adopting the financial recovery plan, a report on the implementation of the financial recovery plan. Finally costs are sought against Eskom and GLM, jointly and severally, and also against any other party that might choose to oppose the relief sought.

[12] In subsequent affidavits Resilient made it clear that the unlawfulness on which it relied for its *prima facie* right as against Eskom was that Eskom's decision was inconsistent with its electricity distribution licence because that licence obliges Eskom – on the argument – to supply electricity to all customers, such as GLM, and also end-users of customers, such as Resilient. Resilient contends that the licence does not authorise Eskom to disconnect a municipal customer for failure to pay its electricity accounts.

[13] Resilient relies[3] on the differences between the licence issued to GLM and that issued to Eskom in support of its submissions. Resilient contends that under clauses

[3] Page 471, paras 15, 16.

3.1 and 3.2 of the Eskom licence the latter is obliged to supply electricity to all end-users of local authorities. In contrast, it says there is no such obligation on GLM, referring to clauses 4.1 and 5.1.1 of that licence. All that that licence says, according to the argument, is that GLM is obliged to supply to a consumer who is in a position to make satisfactory arrangements for payment. So it contemplates the case of a landlord who does not pay, but has tenants who want to pay – and GLM is obliged to supply electricity to them.

[14] But says Resilient,[4] by contrast Eskom does not have a like power to supply electricity only to selected (the paying) end-users who will therefore be prejudiced if Eskom were to (unlawfully) discontinue the supply of electricity to GLM. Since Eskom cannot make selective alternative arrangements for these innocent customers – as a local authority like GLM can – therefore (given Eskom's obligation to supply electricity to all end users in accordance with clauses 3.1 and 3.2 of its licence) Eskom's licence does not permit it to discontinue electrical supply to an entire local authority for non-payment. It is limited to either suing the local authority, or referring the complaint to NERSA.

[15] Resilient also makes it plain that the interim interdict it seeks is not pending the referral of the complaint to NERSA:[5] "*The applicant relies on its Constitutional rights and its right to review an administrative act as contemplated in PAJA.*"[6] The contractual rights as between GLM and Eskom have no bearing on the matter, it says.

[16] According to Resilient, s.21(5)(c) of the ERA does not avail Eskom, because on a proper construction of that provision, it contains a prohibition against termination, with an exception to the prohibition; in other words, it does not contain a positive

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[4] Page 472, para 17.
[5] Page 517, para 8.
[6] Page 518, para 12.

power to terminate.[7] The power could conceivably reside in the ESA with GLM, but even if it does, Eskom's decision to terminate is administrative action, and the contract cannot vest Eskom with the power to act in conflict with its licence.[8]

[17] Therefore, ultimately:[9] *"As submitted in my founding and supplementary affidavits, the interruption decision is inconsistent with Eskom's distribution licence because that licence does not allow Eskom to disconnect electricity to an entire municipality and thus violate its licencing obligations to supply end users with electricity."* So it comes back to clauses 3.1 and 3.2 of the Eskom licence, a matter to which I return below.

[18] Constitutionally, the Resilient attack relies on the contentions that the decision: involves impermissible self-help, offending the rule of law under s.1(c) of the Constitution and access to a court under s.34; offends s.151 (4) of the Constitution; is substantively reviewable under s.6(2)(e)(iii) of the Promotion of Administrative Justice Act 3 of 2000 ("PAJA"), because relevant considerations were not considered, particularly the potential damage to the environment by damaging water and sewage systems, inconsistent with clauses 4.3 and 5.4 of the Eskom licence.

Eskom's position

[19] Eskom disputes the legal bases of Resilient's claims against it. It points out that there is no contractual privity between it and Resilient, and it denies having breached any constitutional obligation owed to GLM. The relevant contract is one between Eskom and GLM, and in terms of clause 9.2 of that contract it has the

[7] Rademan v Moqhaka Local Authority, 2013 (4) SA 225 (CC) at [36] seems to foreclose the point against Resilient; more about this anon.
[8] Page 519, para 13.3.
[9] Page 519, para 13.4.

explicit right either to discontinue the supply of electricity or to terminate the electricity supply agreement ("ESA") altogether.

[20] Eskom contends also that it derives the power to cut supply from s.21(5)(c) of ERA, and so it contends that any Constitutional right which Resilient has, is properly limited under s.36 of the Constitution by this subsection of ERA. Eskom supports in principle the direct payment relief claimed by Resilient, but fears that GLM will use such an order as an excuse not to pay Eskom anything at all; as a "payment holiday", as it was put in argument.

[21] It paints a dark picture of municipal debt generally. In November 2017 it amounted to approximately R13 billion. Eskom is responsible for the generation of all electricity in South Africa, and urgent intervention is needed, it says, for it to remain financially viable and sustainable, so that it can generate and supply electricity for the benefit of all South Africans.

[22] It explains that the licence issued to it by NERSA does not allow it to supply direct to the end-users of local authorities; it refers to the terms of the licence which says that the licence excludes customers being supplied by municipalities. It explains that GLM is itself licenced by NERSA to supply electricity. It explains that in terms of s.51((b)(i) of the Public Finance Management Act 1 of 1999 ("PFMA"), it has a duty to collect all revenue due to it.

[23] Eskom does accept that its entitlement to reduce or terminate supply of electricity to GLM due to the latter's non-payment is subject to it complying with procedural fairness in terms of PAJA. Specifically, it refers to Joseph and Others v City of Johannesburg, 2010 (4) SA 55 (CC) for the submission that it was obliged in terms of s.3(2) of PAJA to provide adequate notice before disconnecting the supply of electricity to affected residents.

[24] According to Eskom, it is GLM who has a constitutional duty to provide electrical reticulation to those in its area of jurisdiction. It contends that GLM has breached multiple Constitutional and other statutory duties, referring to s.152(1)(b) of the Constitution; s.153(a) of the Constitution; s.4(2)(f) of the Local Government, Municipal Systems Act 32 of 2000 (the "Systems Act"); s.73 of the Systems Act; s.9(1)(a)(iii) of the Housing Act 1 of 1997; and s.27(i) of the ERA (the obligation to ring-fence revenue collected from electricity sales). In this latter regard it points to the fact that GLM purchases electricity from Eskom at R87,56 per kWh, and on-sells it at R1,60 per kWh, a profit of 95%.

GLM's position

[25] As said, GLM did not initially file an answering affidavit, but this time emailed an unsigned affidavit on 20 July 2018, a week before the hearing. The affidavit takes the points that the application is not urgent; that Resilient cannot get the relief it seeks against GLM because its own non-payment has triggered the full outstanding balance under the AOD and so it can no longer pay instalments in terms of that document *"as and when they fall due for payment"*; that for reasons advanced by Eskom Resilient cannot succeed against Eskom in part B; that it has been held that s.21(5)(c) is not constitutionally offensive;[10] and that Resilient has no entitlement to any rights under the Bill of rights as a juristic person.

[26] It denies that it did not ring-fence its electricity revenue. It refers to the ever-increasing cost of services, the general decline in the economy, the increasing number of indigent residents and the ever-increasing cost of electricity as reasons

[10] It did not say which decision it had in mind, but it could have been referring to Rademan or Afriform NPC and Others v Eskom Holdings SOC Limited and Others (99984/2015) [2017] ZAGPPHC 199; [2017] 3 All SA 663 (GP) (24 May 2017).

for its failure to service its debts. Also, it has recently changed its billing system and that resulted in substantial errors in billing.

[27] It aligns itself with Eskom and accepts that the proposed interruptions would be reasonable. It says there is a culture of non-payment and if the interruptions are implemented, this will *"assist GLM in swaying the culture of non-payment for the better."*

[28] It says it could never afford the direct payment relief sought by Resilient. This would place an excessive burden on its staff to administer the credits; and importantly the effect of large portions of consumers paying bills direct to Eskom will severely decrease revenue and will have serious auditing complications.

[29] In its affidavit replying to this GLM affidavit, Resilient points out that there is no explanation at all for GLM's failure to have disconnected non-paying consumers as it is authorised to do in terms of its licence. It submits that the GLM affidavit illustrates it *"to be a financially delinquent municipality that is in serious and material breach of its financial commitments to Eskom and is plainly ignorant of its constitutional duties relating to financial matters and the provision of electricity services to its local community."*[11]

Expanded background facts

[30] Resilient operates a retail shopping mall known as Kathu Village Mall at a property owned by Resilient in Kathu, a town which is within the area served by GLM known as Gamagara Local Municipality, situated in the Northern Cape Province. Kathu is 45 minutes away by car from Kuruman and serves the well-known Sishen iron ore mine.

[11] Page 583, para 13.

[31] Resilient consumes electricity supplied by and pays it, and rates and taxes, to GLM. Its electricity bill is up-to-date, and it distributes electricity in turn to some 72 tenants who operate retail businesses within the mall. Resilient asserts that it brings the application in its own interest as well as in the interest of the public generally in terms of s.38(d) of the Constitution, and on behalf of the class (to be certified) of electricity consumers and residents of GLM who are up-to-date with their electricity account payments to GLM.

[32] Eskom supplies bulk electricity to GLM who on-distributes electricity to consumers within its area of jurisdiction. Eskom is an organ of state. GLM is a local municipality duly established in terms of the Local Government Municipal Structures Act 117 of 1998, and it is licensed by NERSA to distribute and supply electricity to Resilient's mall and to other consumers within the area of jurisdiction of GLM.

[33] The immediate precursor to the urgent application is the specific decision by Eskom announced on 14 March 2018 that it would interrupt electricity supply to GLM on a daily basis for a certain number of hours. Resilient says that this particular interruption would have catastrophic effects on the mall and on the citizens of GLM. It will destroy GLM's water articulation and waste water treatment systems and will have life-threatening consequences to parts of the population of GLM. It will lead to shutdown of schools and will compromise the operation of old-age homes, security companies and healthcare providers.

[34] The particular power cuts that were envisaged would have commenced on 29 March 2018 and would have entailed a week-long electricity interruption of four hours per day during the week and five hours per day during weekends. This would have escalated during the following week to respectively six and a half and seven

hours per day and the week thereafter electricity would be cut indefinitely for the entire working day and beyond.

[35] Resilient asserts in its founding affidavit that for years now many municipalities have failed to collect electricity payments from consumers, or have failed to use the revenue from electricity payments to pay Eskom for the electricity that Eskom provides to the local authorities. This has resulted in an ever-growing municipal debt due to Eskom, but until relatively recently Eskom had taken no steps to regularise its debtor-creditor relationship with local authorities. Eskom has now, over the last two years only, decided to achieve its objectives through the sudden and mass termination of supply of electricity to a large number of municipalities.

[36] During 2017 Eskom became embroiled in many instances of litigation following upon interruption decisions in various municipal jurisdictions. In most of those cases the issues are the same and it would appear that in many of them, initial interim relief was granted either by agreement between the parties or otherwise.

[37] Resilient says that it would appear that Eskom concedes that when the balance of convenience is considered, horrendous consequences would follow this particular interruption of electricity, and the balance of convenience favours, clearly, those that are prejudiced by the interruption.

[38] Resilient points out that in a matter in which it brought an application in the North Gauteng High Court against Eskom and Emalahleni under Case Number 2017/5358, Eskom conceded an interim order similar to the order sought in part A in the current application.

[39] Also, in the matter involving Lekwa (aka Standerton) under Case Number 2017/4545 in the North Gauteng High Court, Eskom agreed to the interim relief sought. Finally, in a similar matter in the Sabie, Lydenburg and Graskop areas a similar application was brought in the Mpumalanga High Court under Case Number

2017/2295. Eskom initially opposed the application successfully on a technical point, but a subsequent urgent application resulted in interim relief being granted.

[40] Resilient contends that the threatened violation of the basic human rights of the population of GLM in the present matter is at stake; but also issues of national, social and economic importance.

[41] Incorporating by reference the contents of its attorney's letter of 15 December 2017, Resilient asserts that Eskom was applying a double standard by failing to take steps to collect arrears amounting to R5 billion for its direct supply to non-paying end-users in Soweto, while threatening to disconnect entire municipalities and thus prejudicing account-paying consumers who were wholly innocent of any non-payment of electricity bills. Resilient in that letter gave notice of its intention to declare a dispute with NERSA if Eskom were to proceed with the threatened action.

[42] In the same letter Resilient emphasised the irrationality of the decision, pointing to a World Bank report which concluded that only 4% of Eskom's current account deficit was due to debt collection issues, whereas 15% was due to overstaffing, and 81% due to under-pricing.

[43] It would appear that there was some stalling on the part of Eskom at the end of 2017 and the beginning of 2018 in implementing an earlier decision to interrupt electricity supply on the basis that it had reached a payment plan with GLM. It appears however that GLM failed to adhere to the payment plan to which it had itself agreed, and that this failure was the immediate precursor to the decision of 14 March 2018 to disconnect the municipal supply of electricity with effect from 29 March 2018.

[44] Before turning to deal with Resilient's asserted *prima facie* right, it is necessary to say something more about the catastrophe that Resilient says will befall the

community if Eskom implements its interruption decision. It fits best under the rubric of "balance of convenience".

Balance of convenience

[45] Resilient makes out a case that far-reaching consequences would follow if Eskom were to carry out its threatened interruption of electricity supply to GLM. It points out that those consequences are to be distinguished from what is known as "load shedding". In the case of the latter, peak consumption is reduced with minimal adverse consequences to electricity consumers. Load shedding time periods are infrequent and of such short duration that essential services, such as the water supply and sewerage works, can survive the interruption.

[46] However in the case of the interruption decision threatened by Eskom and described above, the entire municipality is affected and, according to the applicant, this *"... will almost certainly result in the total disruption of the water supply to the inhabitants, the destruction of the sewerage network, and various other irredeemable deleterious consequence".*[12]

[47] These consequences are highlighted with reference to the experience when electrical supply was interrupted to Emalahleni by Eskom in 2017. Resilient describes what occurred there as *"catastrophic socio-economic and humanitarian consequences"*. Having regard to the facts asserted in the founding affidavit of Sandra Lee van der Walt on behalf of Resilient, these assertions are not hyperbolic. Importantly for present purposes is the fact that Eskom does not challenge them.[13]

[48] There are of course dire consequences for Eskom if its bills are not paid; and those consequences inure for the country as a whole. However, the short-term consequences for the community are more immediately drastic, and so – for

[12] Page 18, para 25, met by a bare denial be Eskom at page 324, para 172.
[13] Page 329, para 183.

immediate purposes – in my view the balance of convenience favours Resilient. The real questions, as I see it, in this application are accordingly whether the applicant has established a *prima facie* right, even if open to some doubt; and if it has, what the appropriate relief would be.

Resilient's *prima facie* right

[49] There is an inverse relationship in interim interdicts between the requirements of a *prima facie* right and the balance of convenience: the stronger the one, the weaker the other is permitted to be. Resilient need only establish a *prima facie* right, although open to doubt. It must show that on its version, together with the allegations of Eskom and GLM that it cannot dispute, it should obtain the relief sought in part B. If, having regard to Eskom's and GLM's contrary version and the inherent probabilities, serious doubt is then cast on Resilient's case, it cannot succeed.[14]

[50] This tried and tested approach was significantly qualified by a full bench of this court in Ferreira v Levin, NO and Others; Vryenhoek and Others v Powell, NO and Others.[15] Ferreira, subsequently approved in the Constitutional Court,[16] lowered the bar set by Gool. Gool required that on the asserted case the applicant *"should"* obtain final relief at trial; the former requires only *"a"* prospect of success, albeit *"weak."*

[51] Holmes, J (then) in Olympic Passenger Service (Pty) Ltd v Ramlagan,[17] approved by himself in Erikson Motors (Welkom) Ltd v Protea Motors, Warrenton, and

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[14] Webster v Mitchell, 1948 (1) SA 1186 (W) at 11189, as qualified by Gool v Minister of Justice and Another, 1955 (2) SA 682 (C) at 688E.
[15] 1995 (2) SA 813 (W).
[16] South African Informal Traders Forum and Others v City of Johannesburg and Others, 2014 (4) SA 371 (CC) at [25].
[17] 1957 (2) 382 (D) at 383 D.

Another,[18]in turn followed by Ferreira, and approved by the Constitutional Court, formulated the approach as follows (emphasis supplied):

> *"It thus appears that where the applicant's right is clear, and the other requisites are present, no difficulty presents itself about granting an interdict. At the other end of the scale, where his prospects of ultimate success are nil, obviously the Court will refuse an interdict. Between those two extremes fall the intermediate cases in which, on the papers as a whole, the applicants' prospects of ultimate success may range all the way from strong to weak. The expression 'prima facie established though open to some doubt' seems to me a brilliantly apt classification of these cases. In such cases, upon proof of a well-grounded apprehension of irreparable harm, and there being no adequate ordinary remedy, the Court may grant an interdict - it has a discretion, to be exercised judicially upon a consideration of all the facts. Usually this will resolve itself into a nice consideration of the prospects of success and the balance of convenience - the stronger the prospects of success, the less need for such balance to favour the applicant: the weaker the prospects of success, the greater the need for the balance of convenience to favour him. I need hardly add that by balance of convenience is meant the prejudice to the applicant if the interdict be refused, weighed against the prejudice to the respondent if it be granted."*

[52] The approach approved then by these authorities is that *"a prima facie right, though open to some doubt"* conveys that the strength of the right is allowed to fluctuate from strong to weak: if it is strong, the other requirements for an interim interdict may be weak; if it is weak, the other requirements for an interim interdict may be strong.

[53] The remedy remains *"an extraordinary remedy within the discretion of the Court,"* as Erikson Motors underscored,[19]but that is a description apt for the entire discretion-exercising process, not only the first element of it.

The *prima facie* right against GLM

[54] The first interim prayer is against GLM, directing it to pay all amounts to Eskom as and when they fall due for payment in terms of the AOD dated 14 February 2018.

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[18] 1973 (3) SA 685 (A) at 691.
[19] At 691.

Ultimately, Resilient will ask the court to declare that GLM's failure to pay its arrear debts is unconstitutional and invalid.[20] Eskom does not resist the interim order sought. GLM's resistance is based on its own default: that the full arrears have been triggered by it not keeping up the instalments, and so it cannot be ordered to pay the instalments under the AOD as and when the fall due for payment.

[55] If Resilient is proved correct at the final relief stage then, by raising this defence as a bar to interim relief in favour of Resilient, GLM is relying on its own default. This is not permissible. As has been said In Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd[21] by Van Zyl, AJA in an analogous context (emphasis supplied):

"[12] The rationale for this rule is twofold: A party to a contract should not by its own unlawful conduct be allowed to obtain an advantage for himself to the disadvantage of his counterpart. 'It is a fundamental principle of our law that no man can take advantage of his own wrong' and 'to permit the repudiating party to take advantage of the other side's failure to do something, when that failure is attributable to his own repudiation, is to reward him for his repudiation'. The converse is that the innocent party is not expected to make the effort or incur the expense of performing some act when, by reason of the repudiation, 'it has become nothing but an idle gesture'. This is consistent with the general principle that the law does not require the performance of a futile or useless act. These principles are of general application and may find application in a variety of circumstances. The doctrine of fictional fulfilment of contractual terms is, for example, similarly based on the principle that a contractant cannot take advantage of its own wrongful conduct to escape the consequences of the contract."

[56] GLM was obliged to have paid Eskom in terms of the AOD. GLM is obliged to ensure the provision of services to its community in a sustainable manner.[22] It must pay its bills in 30 days.[23]It must ring-fence its electricity reticulation business.[24] GLM's

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[20] Page 5, prayer 7.a.
[21] (759/2011) [2012] ZASCA 126 (21 September 2012).
[22] S.152(1)(b), read with s.152(2) of the Constitution.
[23] S.65(2)(e) of MFMA.
[24] S.27(i) of ERA.

denial of the allegation that it did not do it, is bald.[25] In GLM's AFS for 30 June 2017 the unaccounted electricity unit losses amount to 28,5 million, up from 4 million a year before as of 30 June 2016.[26]

[57] The explanation furnished is tepid and does not engage at all with the reason for the dramatic increase:

"Electricity losses occur due to technical and non-technical losses (technical losses – inherent resistance of conductors, transformers and other electrical equipment; non-technical losses – the tampering of meters, the incorrect ratios used on bulk meters, faulty meters and illegal electricity connections). The problem with tampered meters and illegal connections is an ongoing process, with regular action being taken against defaulters. Faulty meters are replaced as soon as they are reported."

[58] As dramatic is the increase, year on year, of the distribution loss:[27] from R4m at year-end 2016 to R25,3m at year-end 2017. This seems directly related to the fact that in 2016 GLM billed 96% of the electricity system input, but in 2017 only 73%. The notes to the AFS do not make mention of the billing problems that appear to have arisen only early in the new financial year.[28]

[59] If the deponent to GLM's affidavit is correct, then the 2018 financial year will report even worse results for the electrical reticulation business. The deponent concludes disquietly on this aspect of the evidence:

"It appears from my inspection of the financial records that the billing of consumers from the past number of months, specifically in respect of electricity, has been far

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[25] It is not sufficient for it merely to complain about insufficient resources, without providing detail: compare Rail Commuters Action Group v Transnet Ltd t/a Metrorail (CCT 56/03) [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) (26 November 2004), para 88: *"In particular, an organ of state will not be held to have reasonably performed a duty simply on the basis of a bald assertion of resource constraints. Details of the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided. The standard of reasonableness so understood conforms to the constitutional principles of accountability, on the one hand, in that it requires decision-makers to disclose their reasons for their conduct, and the principle of effectiveness on the other, for it does not unduly hamper the decision-maker's authority to determine what are reasonable and appropriate measures in the overall context of their activities."*

[26] Page 167.

[27] Ibid.

[28] Page 558, par 35.3; page 559, para 35.6; page 564, para 44.2.

less than Eskom's monthly bill. I have requested the officials in the office of the CFO to investigate the reasons therefor. I have, however, already been informed that it has firstly to do with the new billing systems which I have referred to, the problems which occurred in relation thereto, and because of the large volume of electricity that is 'lost' from the grid in circumstances which I have already explained. I will ensure that a task team be put together, consisting of representatives of GLM's financial department, its technical department and delegates of Eskom, to address the latter aspect."

[60] It is difficult to comprehend why at this late stage the response of GLM is to promise to fix up in the future what went wrong in financial year 2018, when already financial year 2017 has shown up the dramatic losses, and nary a word is said about those problems – pre-dating as they do the current problems. It is equally difficult to avoid the conclusion, at *prima facie* level, that mismanagement is the true source of GLM's failure to have paid its Eskom bill.

[61] I do not accept that the defence put up by GLM to the effect that it cannot comply with the terms of the AOD[29] because the full outstanding balance has been triggered, has substance. In truth, all parties, particularly Eskom, are desirous only of obtaining payment of the instalments due under that AOD. It is no answer for GLM to say that because the full outstanding balance has been triggered therefore it does not have to pay anything at all.

[62] If then GLM's conduct is Constitutionally unlawful and inconsistent with the Constitution, *"just and equitable"* relief under s.172(1)(b) is implicated. Directing, at the instance of a non-contracting but clearly interested party, that GLM complies with its AOD contractual obligations towards Eskom, seems to me to be comfortably included within the wide reach of that section.

[63] It follows that in my view Resilient's potential case for final relief against GLM[30] has accordingly been sufficiently established at the level required for the interim relief

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[29] Pages 403 – 406.

[30] Page 57 in fin to page 58, para 137.2.

it seeks in prayer (a) of part A, and such an order – modified to provide for the instalment obligation - issues at the end of this judgment.

The *prima facie* right against Eskom

[64] The interim relief sought in prayers (b) and (c) (and (d)) of the updated notice of motion quoted above implicate also the position of Eskom, and so it is appropriate next to consider Resilient's case against it.

[65] Resilient's argument has been set out above. To recap, it starts with Eskom's position as an organ of state in the national sphere of government. From there it moves to the particular interpretation of the Eskom and GLM licences respectively, whereby: Eskom is obliged to supply electricity to all end users in accordance with the licence; Eskom has no power (in its licence) to interrupt or terminate supply to customers who are in arrears; GLM is however obliged to supply electricity only to those customers who are able to make arrangements for payment; and GLM has the power to interrupt or terminate supply to customers who are in arrears. So it is self-evidently up to GLM to cut electrical supply to non-paying end-users while Eskom continues to supply bulk electricity to GLM – as it must in terms of its licence.

[66] The implications of these licence conditions – so interpreted – were refined during argument. Since Eskom derives no power from its licence to interrupt or terminate supply to GLM, it must either sue GLM for payment, or refer its dispute with GLM to NERSA. It has no power to by-pass GLM and supply only innocent paying customers of GLM direct; in contrast GLM has the power to by-pass non-paying customers and supply electricity direct to end-users.

[67] And so, given Eskom's status as organ of state in the national sphere of government, if it should interrupt or terminate supply of electricity to GLM, that

decision would be unlawful for offending a number of Constitutional imperatives: it would be inconsistent with the rule of law, a founding principle of our Constitutional arrangement;[31] it would amount to self-help, offensive to the fundamental right of access to courts;[32] and it would be inconsistent with Eskom's obligation under s.151(4) (read with s.152(1)(b) and s.156(1)(a), read with part B of schedule 4) not to compromise or impede GLM's ability to perform its functions (by terminating only the non-paying customers and not also the paying customers).

[68] Resilient's argument depends for its validity on the premise that the Eskom licence confers no power on it to interrupt or terminate electricity supply to GLM; that that conclusion forecloses the countervailing argument about its power to interrupt or terminate; and that whatever Eskom's contractual entitlements in terms of the ESA cannot override the power source of what is ultimately administrative action in the context of s.33 of the Constitution and PAJA.

[69] With respect, I do not agree, for these reasons. First, in Rademan Zondo, J (then) for the Court considered s.21(5) of ERA and said (emphasis supplied):

"[35] During the hearing there was much debate about whether there is a conflict between s 21(5) of the ERA and the bylaws which confer power upon a municipality to cut a ratepayer's electricity supply off in certain circumstances. Section 21(5) reads as follows:
'(5) A licensee may not reduce or terminate the supply of electricity to a customer, unless —
(a) the customer is insolvent;
(b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
(c) the customer has contravened the payment conditions of that licensee.'
[36] The condition in (a) is clear and not in issue. Section 21(5)(b) contemplates two scenarios. The one scenario is where there is an agreement between a resident and the municipality as to the supply of electricity by the municipality to the customer, and the customer refuses to honour the agreement. The other scenario is where there is no agreement for the supply of electricity and the customer refuses to enter into an agreement. In either case the municipality would be entitled to cut off the

[31] S.1(c).
[32] S.34.

electricity supply to the resident or customer if it were already supplying electricity to the customer. Section 21(5)(c) is very important. It contemplates conditions of payment that the municipality may have stipulated even if they were not agreed to with the customer or resident. If the condition in s 21(5)(c) is not applicable, then that means that the municipality cannot rely upon s 21(5)(c) to terminate the electricity supply to a resident's property."

[70] The unavoidable implication of the underscored unqualified *dicta* in the context in which they appear, is that the cut-off power resides in s.21(5), despite negative form in which the language in introductory portion of s.21(5) is cast. Take the wording of s.21(5)((a): *"A licensee may not reduce or terminate the supply of electricity to a customer, unless —*

(a) the customer is insolvent...".

[71] On Resilient's argument all that this does is to set a prohibition against terminating the supply of electricity to a customer, but then to lift that prohibition when the customer is insolvent; but without also empowering Eskom to terminate when the customer is in fact insolvent. More is required, on the argument.

[72] As I see it, Rademan decided that no more is required. It held with reference to s.21(5)(c) that that paragraph *"... contemplates conditions of payment that the municipality may have stipulated even if they were not agreed to with the customer..."*. It follows that properly construed, Eskom has the power under s.21(5) to terminate supply if GLM *"... failed to honour ... an agreement for the supply of electricity..."*.

[73] But second, and in any event, neither the ERA nor the Eskom licence preclude Eskom from entering into an agreement regulating the supply by Eskom to a local authority of electricity; to the contrary, as already indicated, s.21(5)(b) expressly envisages it. Further, neither of these two instruments precludes a term in such an agreement whereby Eskom would be entitled to decline to supply a local authority

with electricity in the future until the local authority will have paid Eskom for electricity supplied to it in the past.

[74] In my view therefore, in principle Eskom has the power under s.21(5) of ERA to terminate or interrupt the supply of electricity to GLM, given its contractual default. Given the nature and source of Eskom's power its exercise is, however, administrative action for the purposes of s.33 of the Constitution and PAJA, and constrained if not by the requirement of reasonableness[33] then – at best for Eskom - at least by the baseline standard of rationality.[34]

[75] If it acts irrationally in exercising that public power to terminate or interrupt, its decision is thus potentially open to attack under s.6 of PAJA for offending s.33 of the Constitution. It would have acted irrationally if the exercise of the power is not rationally connected to the purpose for which it was given.[35]

[76] Is this particular decision to interrupt the electricity supply to GLM in the manner proposed rationally connected to the purpose for which that power was conferred? That is a fact-driven enquiry and one must turn back to consider them. Ordinarily, the power to interrupt or to terminate supply of electricity would have been intended to prevent Eskom from having to supply electricity when it will not be paid for it. But I do not accept that the power could have been intended to be exercised in such a manner that it would in a given circumstance result in wide-spread human catastrophe.

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[33] Compare Afriform at [153]: *"In summary, any exercise by Eskom of the power in section 21(5) of ERA will be administrative action reviewable by the courts on the grounds of legality, reasonableness and procedural fairness under section 33 of the Constitution and PAJA."*

[34] (2015) 7 Constitutional Court Review, p82; compare Parkscape v MTO Forestry (Pty) Ltd and Another, 2018 (1) SA 263 (WCC) at [66] ff.

[35] See generally Albutt v Centre for the Study of Violence and Reconciliation and Others (CCT 54/09) [2010] ZACC 4; 2010 (3) SA 293 (CC) ; 2010 (2) SACR 101 (CC) ; 2010 (5) BCLR 391 (CC) (23 February 2010) at [49] ff; Masetlha v President of the Republic of South Africa and Another (CCT 01/07) [2007] ZACC 20; 2008 (1) SA 566 (CC); 2008 (1) BCLR 1 (3 October 2007) at [81].

[77] On the facts of this case, weighted in favour of Resilient as they must be in applications for interim relief, a human catastrophe awaits the implementation of Eskom's particular interruption decision. This situation was undoubtedly brought about by GLM default, conduct which I have found is – on a *prima facie* level – unlawful.

[78] It requires no expert evidence for a court to appreciate that debtors that are allowed to grow out of all proportion become all the more difficult to collect for that reason. To the extent that GLM was at fault in this regard, so too was Eskom. I accept fully that Eskom's riposte is potentially that this particular interruption decision is everything but irrational, because it involves a delicate phased-in process whereby GLM would be coaxed into paying up its arrears without too much disruption to the community.

[79] The difficulty for that argument is the detailed Resilient evidence of the proven previous experience when electricity supply was terminated to the intended extent. Given Eskom's direct involvement in and thus knowledge of these events, one cannot conclude that Eskom's decision to implement this particular interruption decision was rationally connected to the purpose for which it was given. The consequences that the termination of electrical supply to the intended extent spells in this case, at this time, are too far removed from the notional temporary inconvenience that a recalcitrant debtor will experience.

[80] In my view this conclusion is enough to establish for Resilient a *prima facie* case, although open to some doubt, for a review down the line at the part B hearing of this particular interruption decision.

[81] As to whether this leads to relief under prayer (b) and (c) involves further consideration of the balance of convenience. And although GLM's default has not been faultless (at a *prima facie* level), if its legitimate margin from electricity on-

sales were endangered, or if its ability to deal accounting-wise with having to credit Resilient and its (certified) class in respect of its payments to Eskom will cause greater confusion, then those who will be prejudiced will include also the paying customers, directly or indirectly through further failing infrastructure. These are issues that must abide the final relief stage when all considerations will be before the court.

Conclusion and order

[82] In my view the correct order at this interim stage is in principle one in terms of prayers (a) and (d), appropriately refined. Some comments are called for. First, one appreciates that Resilient did not ask for relief in that combination, but for reasons set out above the comprehensive relief sought should not be granted. Second, potential difficulties may arise should GLM again default – particularly in the context of the question whether there should be reciprocity between prayers (a) and (d) of the orders.

[83] Third, what is being interdicted is Eskom's particular intended interruption decision referred to in this application and judgment, i.e. implementing the *"termination notice"* dated 14 March 2018 annexed at page 66, or any substantially similar notice, and not every conceivable interruption or reduction decision. Eskom may well conceive – after appropriate notice and consultation - of a form of reduction of supply of electricity (*"load-shedding"* as Resilient calls it[36]) that will not result in the human catastrophe Resilient has pleaded in this case.

[84] Regrettably those issues must for now be deferred, but they will hopefully incentivise the parties to approach the Deputy Judge President for an urgent

[36] Page 25, para 35 ff; Eskom does not challenge Resilient's differentiation: page 329, para 181 ff.

hearing of part B. Some provision is made in the order below for delays in getting before a court on part B. Costs should be in the cause.

[85] In the result I make the following interim order, pending the final determination of the part B relief:

(a) The second respondent is directed to pay to the first respondent all amounts falling due to the first respondent in terms of the instalments provided for in the Acknowledgment of Debt signed by the second respondent on 14 February 2018, as and when those amounts fall due;

(b) the first respondent is interdicted and restrained from implementing the *"termination notice"* dated 14 March 2018 as defined in the founding affidavit and annexed at page 66, or any substantially similar notice;

(c) any party may, on the same papers appropriately supplemented, enrol this application for reconsideration of this interim order in the light of changed circumstances since date of this order;

(d) costs are costs in the cause of the main application.

WHG van der Linde
Judge, High Court
Johannesburg

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Date argued: 27 July 2018
Date judgment: 14 September 2018