THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case No: 2295/2017

(In Mpumalanga)

In the matter between:

SABIE CHAMBER OF COMMERCE AND TOURISM	**FIRST APPLICANT**
LYDENBURG CHAMBER OF COMMERCE AND TOURISM	**SECOND APPLICANT**
GRASKOP CHAMBER OF COMMERCE AND TOURISM	**THIRD APPLICANT**

And

THABA CHWEU LOCAL MUNICIPALITY	**FIRST RESPONDENT**
MUNICIPALITY MANAGER: THABA CHWEU LOCAL MUNICIPALITY	**SECOND RESPONDENT**
EXECUTIVE MAYOR: THABA CHWEU LOCAL MUNICIPALITY	**THIRD RESPONDENT**
CHIEF FINANCIAL OFFICER: THABA CHWEU LOCAL MUNICIPALITY	**FOURTH RESPONDENT**
ESKOM HOLDINGS SOC LIMITED	**FIFTH RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**SIXTH RESPONDENT**

MINISTER OF ENERGY	**SEVENTH RESPONDENT**
MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**EIGHTH RESPONDENT**
MINISTER: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	**NINTH RESPONDENT**

Case No: 83581/2017

In the matter between:

RESILIENT PROPERTIES PROPRIETARY LIMITED	**FIRST APPLICANT**
CHANGING TIDES 91 PROPRIETARY LIMITED	**SECOND APPLICANT**
RETRACTION PROPS 7 PROPRIETARY LIMITED	**THIRD APPLICANT**
MOGWELE TRADING 278 PROPRIETARY LIMITED	**FOURTH APPLICNT**

And

ESKOM HOLDINGS SOC LTD	**FIRST RESPONDENT**
EMALAHLENI MUNICIPALITY	**SECOND RESPONDENT**
MEC: CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS (MPUMALANGA)	**THIRD RESPONDENT**
MINISTER OF ENERGY	**FOURTH RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**FIFTH RESPONDENT**

And

SAKELIGA NPC (previously known as AFRISAKE NPC)	**AMICUS CURIAE**

Neutral citation: *Sabie Chamber of Commerce and Tourism; Resilient Properties Proprietary Limited v Eskom and Others* (2295 & 8358/2017) [2019] ZAGDP (07 March 2019)

Coram: Hughes J

Heard: 13 August 2018 to 17 August 2018

Delivered: 07 March 2019

Summary: Review – decision by Eskom to terminate or interrupt supply of electricity – declaratory order of illegality sought; certification of a class action – Administrative law - section 6(2)(e)(iii) of PAJA – failure to pursue other remedies.

ORDER

The following order is made:

[1] The decision of Eskom to schedule interrupted electricity cuts is reviewed and set aside.

[2] The respondents are ordered to pay the costs of the applicant's, the one paying the other to be absolved.

[3] Such costs include the employment of two counsel where so employed.

JUDGMENT

HUGHES J

Introduction

[1] There are two review applications before me. In both applications the applicants seek to have a decision taken by Eskom to terminate or interrupt the supply of electricity to their respective municipalities declared invalid and inconsistent with the Constitution. The applicants seek a declaration of invalidity and unconstitutionality. Thus, the decision be reviewed and set aside.

[2] In the first review the applicants are Sabie Chamber of Commerce and Tourism (Sabie), together with Lydenburg Chamber of Commerce and Tourism and Graskop Chamber of Commerce and Tourism. Whilst, in the second review the applicants are Resilient Properties Proprietary Ltd (Resilient), with Changing Tides 91 Proprietary Limited, Retraction Props 7 Proprietary Limited and Mogwele Trading 278 Proprietary Limited.

[3] In the papers and during the proceedings, in this court, the applicants in the first review application are referred to as 'Sabie' and in the second review as 'Resilient'. The main respondent in both applications is Eskom Holdings SOC Limited (Eskom), whilst the respective municipalities, being Thaba Chweu Local Municipality (TCLM) in the Sabie application and Emalahleni Municipality (Emalahleni) in the Resilient application are also cited as respondents. The other relevant respondents who did not participate in the proceedings are the Minister of Energy, the National Energy Regulator of South Africa (NERSA), and the Minister of Co-operative Governance and Traditional Affairs amongst others.

[4] It must be pointed out that the two review applications were not formerly consolidated to be heard together, they were merely allocated to be heard simultaneously. This came about as a result of a directive issued by the Deputy

Judge President. Even though the facts of each case differ the issue to be determined in both matters is the same. I propose to set out separately the pertinent facts in each application, thereafter I will address the common issue between the applicants, their municipalities and Eskom.

[5] Both applicant's, Sabie and Resilient, contend that the decision by Eskom to terminate or interrupt the supply of electricity arose from their respective municipalities' non-payment of their electricity debt to Eskom. The conduct of the municipalities thus necessitated the applicants, being ratepayers in good standing, to seek an order to make payment of their electricity account directly to Eskom. In the case of Resilient, further to the declaration of unconstitutionality, they seek certification to institute a class action.

Admission of the *amicus curiae*

[6] At the commencement of the proceedings, SakeLiga NPC previously known as AfriSake, a non-profit company whose main objective is the protection of constitutional and property rights, sought to be admitted as *amicus curiae* in terms of section 16A(2) of the Uniform Rules of Court in the proceedings pertaining to Resilient as an applicant. The company contends that it has 100 members made up of both individuals in their personal capacity and members representing business in the Emalahleni municipal area who would be severely prejudiced by the interruption of electricity supply by Eskom.

[7] They sought to be admitted on the premise that they would make submissions on the question of law and on the undisputed facts, which would assist the court in the adjudication of this matter. I am mindful of the *dicta* of the constitutional court as set out in *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA 620 (CC) at para 26 :

'[26] Thus, the role of an amicus envisioned in the Uniform Rules is very closely linked to the protection of our constitutional values and the rights enshrined in the Bill of Rights. Indeed, Rule 16A (2) describes an amicus as an "interested party in a *constitutional issue* raised in proceedings". Therefore, although friends of the court played a variety of roles at common

law, the new Rule was specifically intended to facilitate the role of amici in promoting and protecting the public interest. In these cases, amici play an important role first, by ensuring that courts consider a wide range of options and are well informed; and second, by increasing access to the courts by creating space for interested non-parties to provide input on important public interest matters, particularly those relating to constitutional issues. As this Court has noted:

"The role of an *amicus* is to draw the attention of the Court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an *amicus* has a special duty to the Court. That duty is to provide cogent and helpful submissions that assist the Court."[1] [Footnotes omitted]

[8] Besides the constitutional and statutory provisions relied upon by SakeLiga NPC which were also advanced by the applicants and the municipalities, in my view, they advanced a novel legal point, which the other parties had not introduced, that being, the application of the Intergovernmental Relations Framework Act 13 of 2000 and the Guidelines, which I address later in this judgment. This in fact allows for a broader consideration of the facts before me and a very persuasive one at it. I deal with this consideration later in the judgment.

[9] There was no objection raised by any of the parties with regards to SakeLiga being admitted as an *amicus curiae*. I accordingly find that they have made out a case to be admitted as such and are duly admitted.

Background

Sabie's Case

[10] The three Chamber of Commerce and Tourism institutes, namely Sabie, Lydenburg and Graskop, represent business and industries operating within TCLM. Sabie has been duly authorised by the other institutes to make submissions on behalf of the applicants. These institutes are voluntary associations formed for the mutual benefit and interest of their members operating business and industries in

[1] *In re Certain Amicus Curiae Application: Minister of Health and Others v Treatment Action Campaign and Others* 2002 (5) SA 713 (CC) in para 5

TCLM. As such they represent and serve the collective interest of business and tourism within TCLM and are responsible for the promotion and development of economic and social system within TCLM.

[11] The applicants derive their jurisdiction to pursue this application in terms of section 38 (a), (d) and (e) of the Constitution[2], in that they have an interest as consumers, they are acting in the public interest and they are acting in the interest of their members.

[12] On 9 October 2017, Eskom in an attempt to collect its debt owed by TCLM, instituted electricity supply power cuts within TCLM. These occurred in the mornings, during the week, between 06h00-08h00 and in the afternoons between 17h00-19h30. During the weekends the supply cuts were between 08h30-11h00 and 15h00-17h30. As a result, on 24 October 2017 Sabie filed this application, by then TCLM owed Eskom R487 million, in arrears, for bulk supply of electricity purchased. Significantly, TCLM does not deny that it owes Eskom the aforesaid amount.

[13] Sabie contends that the times when the interruptions were imposed encroached on family time. In that, this was when families where preparing to go to school and work. As regards to the afternoon interruptions, this was when dinner and homework preparation were being conducted. The worst was when the power supply was returned, so they contend, as this created far reaching consequence that had catastrophic effects on health, safety, access to water and sanitation for both residents and businesses.

[14] In its founding affidavit Sabie sets out aptly these far reaching consequences of Eskom's periodic power cuts, being:

'Firstly, when the power supply is cut, all sewage works immediately come to a standstill. This means that sewage is not pumped to the sewage processing plants but instead, will simply sit (eventually spill into the streets) for the duration of the cut-off, with the associated, serious risks to the health of the community.

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[2] The Constitution of the Republic of South Africa, 1996

Secondly, the minute the power is shut off, the water purification and processing plants as well as those pumping water to the community to ensure adequate water pressure come to an immediate standstill. This means that taps run dry, households run out of water, and critical water based facilities will cease functioning. Even worse, when the supply is reconnected, it will take some time for an adequate reserve to be generated to enable the community and business to recommence.
Thirdly, of course, any process (industrial, commercial or domestic) that is dependent on electricity will immediately cease.'[3]

[15] From the affidavits filed by both TCLM and Eskom, Sabie submits that even if it would have wanted to pay, TCLM is unable to pay its debt owed to Eskom. Further, the decision taken by Eskom to interrupt the electricity power supply to TCLM was irrational as it was not rationally connected to the decision taken, that being collecting on the debt due.

Resilient's Case

[16] The case of Resilient emanates from within the Emalahleni Municipal district, where they own the Highveld Mall. According to Resilient they dutifully pay over what is due in respect of electricity to the Municipality concerned. Emalahleni Municipality bills Resilient for electricity which it in turn purchases from Eskom. Resilient pays the Municipality as billed, however the Municipality due to its dispute with Eskom, does not and has not paid over the full amount it is billed by Eskom.

[17] As Resilient puts it 'Emalahleni, is a financially delinquent municipality' and its conduct is unlawful. During May 2016 Emalahleni completed an acknowledgement of debt admitting it owed Eskom an amount of R544 066 777, 67 which Eskom asserts has been accruing since 2012. The eventuality was that Eskom, having given Emalahleni notice, forged ahead and implemented the interruptions of the electricity supply during the course of February/March 2017. Due to interventions on the part of provincial government member's Eskom suspend the interruptions. This lead to the officials of Emalahleni Municipality providing yet a further undertaking to the effect that by December of 2017 the full outstanding balance would be paid. In the face of

[3] Founding affidavit of *Sabie* at page 7 para 24

these undertakings Emalahleni breached the undertakings and Eskom re-instated the power supply interruptions.

[18] Resilient echoes the same sentiment as Sabie, that when Eskom implements these interruptions it has catastrophic consequences. They go on further to explain that besides the commercial implications, the entire water and sewage system of the municipality stops functioning. This lead to sewage drying up in the municipal pipes which in turn leads to the raw sewage seeping into the Crocodile River, being the only water source. The worst is that their basic right to water is infringed as households have no access to running water during these periods and beyond.

[19] Though Resilient states that the conduct of the municipality is unlawful they submit that Eskom's conduct in disconnecting the power supply and its continued treats to do so, are unconstitutional and unlawful, hence this application.

Eskom's defences

[20] Eskom asserts that in terms of section 51(1)(b)(i) of the Public Finance Management Act 1 of 1999 (the PFMA) it is bound by statute to recover revenue owed. It further states, that the provisions of the Electricity Regulation Act 4 of 2006 (ERA) and the terms of the Electricity Supply Agreement (ESA), which agreement is concluded with the various municipalities, permits it to terminate the supply of electricity of its customers completely, for want of non-payment. In this instance they submit that they did not opt to implement such a drastic measure, hence the interruptions employed.

[21] Eskom contends that it does not bear the duty to supply electricity to local authorities, this duty lies with the municipalities. As such, they argue that their decision to implement the interruptions, which is the subject of these review proceedings, was not taken arbitrarily, capriciously, unreasonably or irrationally. In fact, they submit that they acted within the prescripts of the constitution and relevant statutes.

[22] In the process of recovering revenue owed, in the case of TCLM, they concluded an acknowledgment of debt on 9 May 2016. On 20 July 2017 Eskom issued a letter informing TCLM of its intention to implement scheduled interruptions in the supply of electricity and a letter of demand was issued by Eskom to TCLM on 22 June 2017. Eskom states that before implementation of the interruptions it further engaged TCLM, resulting in a further acknowledgment being concluded by TCLM. Incidentally TCLM failed to adhere to the terms of the acknowledgment.

[23] On 17 August 2017 Eskom published its intention to interrupt the supply of electricity, to errant municipalities for non-payment, TCLM was one of them. During the course of August, September and October 2017 TCLM engaged Eskom in negotiations. It provided Eskom with a 'catch-up-plan' on 17 August 2017 to which Eskom responded on 14 September 2017. A further 'Supply- Catch Up Plan' was provided to Eskom on 6 October 2017 to which Eskom responded on 9 October 2017. Pertinently, in the last response Eskom highlighted that an amount of R487 million was in arrears. Even so it only requested of TCLM to settle the shortfall of R79.5 million so as to suspend the interruptions which had already commenced.

[24] On 23 October 2017, TCLM and Eskom attempted to negotiate, present at the said meeting, together with TCLM and Eskom, was the Premier of the Province and members of the Provincial Department of Co-operative Governance and Traditional Affairs. This meeting did not yield a positive outcome and the stand-off between TCLM and Eskom was not resolved. Hence, this application was brought on an urgent basis, which eventually culminated on 30 January 2018, whence Roelosfse AJ granted an order interdicting Eskom from interrupting the supply of power to TCLM pending the judgment in this application.

[25] On 8 September 2017 and by publication, Eskom notified Emalahleni Municipality of its intention to interrupt the bulk supply of electricity to Emalahleni Municipality. In the notice it called for representations and received same from the applicants and Emalahleni Action Group. Having considered all the representations made and having followed the process of engagement with all those concerned,

Eskom none the less followed through on its decision to implement the scheduled interruptions.

[26] Thus, the crux of Eskom's defence is that it has a statutory duty and obligation, under the PFMA and ERA, to recover costs of its bulk supply of electricity from the various municipalities, such as TCLM and Emalahleni. It was merely complying with such duty. In any event, so it contends, the municipalities have a corresponding duty to pay for the electricity supplied, in terms of the Electricity Supply Agreements (ESA) concluded with various municipalities.

The general provision of electricity framework

[27] The production or generation of electricity as a commodity is undertaken by Eskom, the only license holder in South Africa. The custodian and regulator is NERSA duly established in terms of section 3 of the ERA[4]. NERSA amongst its duties regulates prices and tariffs, considers applications and issues licences, issues rules designed to implement the generation, transmission or distribution of electricity. Eskom has been issued, by NERSA, with a licence to distribute electricity to its *customers*[5] in bulk, being the municipalities or directly to the *end user*[6] outside of the authorised distribution areas of the various municipal metropolitans. In turn, the various municipalities such as TCLM (a licensee), are licensed by NERSA to reticulate the said electricity it receives from Eskom, to the end users, within their metropolis. The reticulation is conducted in terms of section 27 of the ERA. Consequently, the municipalities distribute within their designated areas as authorised by NERSA.

[28] The municipalities distribute the electricity to the end users at a tariff approved by NERSA. Murphy J in *Afriforum NPC v Eskom Holdings*[7] sets out the statutory framework aptly. I reiterate paragraphs 10 and 11:

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[4] Section 3 of the ERA
(1) The National Energy Regulator established by section 3 of the National Energy Regulator Act is the custodian and enforcer of the regulatory framework provided for in this Act.
[5] Chapter 1 of the ERA under Definitions: **'customer'** means a person who purchases electricity or a service relating to supply of electricity;
[6] **'end user'** means a user of electricity or a service relating to the supply of electricity;
[7] [2017] 3 All SA 663 GP

'[10] Section 27 of the ERA provides that, in relation to the exercise of its powers in respect of the supply of electricity, a municipality must *inter alia* : (i) provide basic reticulation services free of charge, or at a minimum cost, to certain classes of end-users; (ii) ensure sustainable reticulation services through effective and efficient management; (iii) must report to National Treasury and NERSA; (iv) keep separate financial statements, including a balance sheet of its reticulation business. This means that once electricity is delivered by Eskom to the municipal switchgear, the municipality is responsible for performing the distribution function.

[11] Eskom supplies the licensed municipalities in bulk at a pre-determined tariff, and the municipalities then re-sell electricity to end-users within their municipal borders at a mark-up. The terms on which electricity is supplied by Eskom to the municipalities are recorded in electricity supply agreements ("ESAs"). In this agreement municipalities are "customers" of Eskom for purposes of the ERA, and the parties (such as the applicants) who purchase electricity from the municipalities are end-users. Eskom invoices municipalities monthly for the supply of electricity in terms of the ESAs concluded with each municipality. Municipalities are obliged to effect payment of all amounts owing in terms of section 41 of the Local Government: Municipal Finance Management Act ("the Municipal Finance Act").'[8] [Without footnotes]

[29] It is worth re-mentioning that Eskom, duly authorised by NERSA, concludes Electricity Supply Agreements (ESA) with its distributing Municipalities. In this case these would be TCLM and Emalahleni Municipality.

[30] In terms of section 51(1) (b) of the PFMA, Eskom states it has a legal obligation to collect all revenue due to it in a legal and legitimate manner. Section 51 (1)(b) reads as follows:

'**51 General responsibilities of accounting authorities**

(1) An accounting authority for a public entity-

(a) ...

(b) must take effective and appropriate steps to –

(i) collect all revenue due to the public entity concerned; and

(ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the

[8] Ibid at 669-670

operational policies of the public entity; and

(iii) manage available working capital efficiently and economically;

[31] The provision set out above ought to be read with clause 9 of the ESA. Clause 9.1 provides that the electricity account ought to be sent to the distributor at the end of the month and payment thereupon will be due and payable on receipt of such account. Whilst clause 9.2 states that if such payment is not received within 10 (ten) days from the date the account was deemed to have been received, 'Eskom may discontinue the bulk supply to the Distributor and/or terminate the electricity supply agreement after having given the Distributor 14 (fourteen) days written notice.'[9]

[32] Eskom places reliance on section 21(5) of the ERA, in doing so it states that by virtue of this section it is permitted to terminate, reduce or implement scheduled interruptions to the bulk supply of electricity. It contends that the relevant sections it relies on are 21(1) and 21(5) of the ERA, which deals with reduction and termination of electricity supply. These I set out below:

'21 Powers and duties of licensee

(1) A licence issued in terms of this Act empowers and obliges a licensee to exercise the powers and perform the duties as set out in such licence and this Act, and no licensee may cede, transfer any such power or duty to any other person without the prior consent of the Regulator.

...

(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.'

Discussion

<u>Eskom's reliance on section 21(5) of the ERA</u>

[9] Eskom's Answering affidavit, annexure 'ESK4' page 1139 (the ESA)

[33] The regulator NERSA is responsible for issuing of licences to generate, transmit or distribute the supply of electricity.[10] The recipient of such a licence is a licensee and is defined as: *'licensee means the holder of a licence granted or deemed to have been granted by the Regulator under the Act'*.[11]

[34] Eskom asserts that NERSA has issued it with a licence to distribute bulk supply of electricity to the municipalities. Such supply of electricity is regulated by the ESA concluded between Eskom and that specific municipality. In the circumstances, the municipalities are Eskom's customers in terms of the ERA, as they purchase electricity from Eskom. In terms of section 7 (1) of the ERA, NERSA issues a licence to a party in order that they are able to generate, distribute, transmit, import, export and trade in the supply of electricity. It is undisputed that both Eskom and the municipalities qualify as licensee's having attained licences from the regulator from time to time. In turn those that purchase electricity from the municipalities are defined as end-users.

[35] Turning to Eskom's defence, it submits that in its defence for implementing the scheduled interruptions it was authorised to do so in terms of section 21(5) read with 21(1) of the ERA. Eskom submits that in terms of the licence conditions issued by NERSA, the ESA it concluded with the municipalities the customers and the ERA it is permitted to reduce or terminate the supply of electricity in circumstances where its customer has breached the agreement for the supply of electricity.

[36] On the other hand, according to the applicants no such power exists. In fact they equate the power prescribed in 21 of the ERA to the municipalities and not Eskom. The applicant's argue that no power is granted to Eskom to terminate or interrupt the supply to its customers. In fact they contend that if such power exist it must be read in as being implied by the section.

[37] I am persuaded that the existence of such power as set out in section 21(5), empowers Eskom to terminate or interrupt the supply of electricity. I see no need to

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[10] Section 7 (1)(a) of the ERA

(1) No person may, without a licence issue by the Regulator in accordance with this Act-

(a) operate any generation, transmission or distribution facility;'

[11] **Chapter 1** of the ERA under **Interpretation**

read into the statute, there is no conflicting interpretations and the statute in my view is clear. In applying the principals emaciated in *Natal Joint Municipal Pension Fund v Endumeni* 2012 (4) SA 593 (SCA) at para's 18 and 23 I am mindful that the process of interpretation is an objective one. On an examination of the specific provision, section 21(5) read with 21(1), there is nothing, in my view, to read into it as the literal interpretation does not create any conflicting interpretation. As was warned in *Endumeni* one ought to be careful as to cross the divide and substitute the statute an unreasonable, non-sensible and un-business-like manner. In this instance, I am confident that the words as they appear in the statute express clearly the objective required thereof.

[38] *Afriforum* at para 140 and part of para 149 highlights when the application of section 21(1) and 21(5) becomes relevant. Murphy J states the following:

'[140] Section 21of the ERA deals with the powers and duties of licensee. Section 21(5) is concerned specifically with the reduction and termination of the supply of electricity and is negatively framed as an exception to a provision limiting power in that it prohibits a licensee from reducing or terminating the supply of electricity to a customer unless certain conditions are met. That exercise of power is subject to conditions precedent. Those relevant to the matter are that the customer must have failed to honour the agreement for the supply of electricity or contravened the payment conditions of the licensee.

[149] Eskom in acting under section 21(5) of the ERA is implementing legislation and as such the exercise of the power constitutes administrative action in terms of PAJA and section 33 of the Constitution. The exercise of such power is, accordingly subject to constitutional and administrative review....'

[39] In the result I am fortified that section 21(5) empowers Eskom as contended by Eskom as in this case the *customer* of Eskom is the municipalities, whilst the end-user are the applicants. In section 21(5) reference is made to *customer* and it is in this context that Eskom asserts that it is able to reduce or terminate the services supplied to its *customer,* which in this case would be the municipalities. If one has cognisance of section 21(1) it is clear that in terms of this provision, one's powers and duties in terms of one's licence is derived from the ERA. Also worth mentioning is section 21(3). This provision, yet again, speaks to the *customer,* being the

municipalities, who generally have the licence to transmit and distribute, whilst not to generate. It states that those who have licences to transmit and distribute ought to provide no discriminatory access in the transmission and distribution of same to third parties. [My emphasis]

[40] Further, to the above I am of the view that Eskom can place reliance on section 21(5) without judicial oversight as was stated in *Rademan v Moqhaka Local Municipality and others* 2012 (2) SA 387 (SCA) at para's 15 and 16. Thus, no order of court or pre-authorisation from a court would be required for Eskom to implement the process set out in section 21(5). The SCA pronouncement, that it was unrealistic and untenable to seek a courts authorisation every time discontinuation of services was sought, was upheld by the Constitutional Court[12].

[41] In adopting the decision, which is permitted in terms of section 21(5), Eskom notified and engaged the public and the municipalities before it proceeded to do so. Just as the municipalities are constitutionally and statutory bound to take appropriate steps to recover debt due, so too is Eskom in terms of section 51(1)(b)(i) of the PFMA. In my view, it could never be said that the decision Eskom made was not related to purpose for which it was taken. Eskom is enjoined to comply with its constitutional and statutory obligation and it did just that when it took the said decision. Thus, in the circumstances Eskom complied with the pronouncement set out in *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) at para 51, 52 and 61. Eskom having complied with its statutory and constitutional prescripts, I do not see the necessity to deal with the aspect of direct payment raised by the applicants.

[42] In as far as compliance with PAJA is concerned, Eskom's compliance or lack thereof with the intergovernmental relations mechanism and procedures as prescribed, I dealt with below.

The conduct of non-payment by the municipalities

[12] Rademan v Moqhaka Local Municipality 2013 (4) SA 225 (CC) at para 46

[43] As legislated in sections 73(1)(c) and 73(2) of the Municipal Systems Act 32 of 2000 (Municipal Systems Act), municipalities have a duty to ensure and *must* guarantee that the provision of basic municipal services such as water, sanitation, roads, transport and electricity are provided in an economically efficient manner[13]. In *Joseph* at paragraph 40, Skweyiya J stated, that although there is no specific provision in the Constitution in respect of the provision of electricity, the latter is an 'important basic municipal service which local government is ordinarily obliged to provide.'

[44] Having established that the supply of electricity is an important basic service provided by the municipality, in terms of section 152(1)(b) of the Constitution, local government is obliged to ensure that the provision of services to communities are in a sustainable manner.[14] The provision of such basic services by the municipalities cannot be disputed as it is legislated and mandated in terms of the Constitution to provide same.

[45] It is well established that all spheres of government must 'respect the constitutional status, institution, powers and functions of government in other spheres' and ought to 'exercise their power and perform their functions in a manner that does not encroach on the geographical, functional or integrity of government in another sphere'[15]. Therefore, the constitutional duty rests with the municipalities, having been provided with bulk electrical supply from Eskom, to provide electricity in an economical and sustainable manner to the end-user, being the applicants. Further, they were obliged in terms of the Municipal Finance Management Act 56 of 2003, section 65(2)(e), to pay Eskom for the supply of bulk electricity that they received within thirty days of being invoiced for such bulk supply. In the case of Sabie and Resilient, emanating from this culture of non-payment adopted by the municipalities, the municipalities failed to adhere to the prescripts of the Constitution and were remiss in their statutory duties.

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[13] Also section 9(1)(a)(iii) of the Housing Act 107 of 1997

[14] Section 152(1)(b)

(1) The objects of local government –

...

(b) to ensure the provision of services to communities in a sustainable manner;

[15] Section 41(1)(e) and (g) of the Constitution

[46] It is imperative to bear in mind that the municipalities are regulated by section 84(1)(c) Municipal Structures Act 117 of 1998. This section 84 deals with the division of functions and powers of district and local municipalities. In terms of section 84(1)(c) a district municipality is empowered to manage the 'bulk supply of electricity, which includes the purpose of supply, the transmission, distribution and where a applicable the generation of electricity supplied by Eskom, to the end-user.[16]

[47] Delinquent payers might the municipalities be, however what emerges from the Constitution and the statutes cited above, is the fact that the municipalities are the accountable party to the end-user, being the applicants.

[48] The conduct and culture of non-payment of both municipalities is contrary to legislation and the constitution.

Compliance with PAJA

[49] In the case before me, I take cognisance of the fact that I have two governmental institution of the state working against each other, with no end in sight to settle the impasse between them. That is Eskom and the municipalities. It is well established in terms of the constitution that all governmental institutions or organs must co-operate, work in good faith and mutually trust each other ensuring the facilitation of settling intergovernmental disputes.[17]

[50] In my view, the legal argument of the *amicus* is dispositive to the constitutional challenge. In terms of section 41(3) of the Constitution provides that an organ of

[16] Section 84(1)(c):
Division of functions and powers between district and local municipalities
(1) A district municipality has the following functions and powers: ...
(c) Bulk supply of electricity, which includes for the purpose of such supply, the transmission, distribution and, where applicable, the generation of electricity.

[17] Section 41(1) and 41(2) of the Constitution

state involved in an intergovernmental dispute *must* make every reasonable effort to settle the dispute by means of appropriate mechanisms and procedures provided and *must* exhaust all other remedies before the courts are approached to resolve the problems. The situation in this case is such an intergovernmental disputes.

Incidentally, in the Sabie case this argument was also raised by Sabie. Sabie contends that the constitution set high standards for the exercise of public power by state institutions, in addition, it also guides these institutions as regards basis values and principles which govern public administration[18].

[51] The act that deals with intergovernmental disputes is the Intergovernmental Relations Framework Act 13 of 2000 (IRFA). In the preamble it sets out that the IRFA is formulated 'to establish a framework for the national government, provincial government and local government to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes ; and to provide for matters connected thereto'.

[52] In terms of section 41 of IRFA a party to an intergovernmental dispute may formally in writing notify the other organ of state that they are formally declaring a dispute. However, prior to doing so that organ of state should in good faith, make every reasonable effort to settle the dispute, inclusive of negotiations. Once this is done section 42 of IRFA kicks in and the consequences of having formally declared a dispute follow[19].

[53] It is apparent that there is a dispute with regards to payments due to Eskom by the two municipalities concerned. It is common cause that both parties have constitutional duties and obligations towards the public at large. Both parties in my view, have failed the public at large; on the one hand we have the delinquent municipalities and on the one hand we have Eskom having not been paid by the municipalities opting to deprive the public of basic services in terms of the Constitution and the Bill of Rights. In conclusion it is evident to me that Eskom and

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[18] Section 195 of the Constitution
[19] Section 42 of IRFA:

the Municipalities failed to adopt the dispute mechanism at their disposal in terms of IRFA.

[54] In terms of section 6(2)(e)(iii) of PAJA, the failure on the part of Eskom and the municipalities to exhaust alternative remedies and procedures before embarking on the procedure of supply interruptions by Eskom, warrants the grant of the review sought. This section makes provision for a court to review an administrative action if relevant considerations were not considered. I agree with the amici that in this instance, the failure to pursue the process and mechanism, as is found in IRFA, would constitute a ground for review.

Class Action

[55] Resilient proposed to argue a class action, however they fell short in procuring a list of names and the numbers required to get the class action off the ground.

Costs

[56] I see no need to deprive the victorious party of it costs. I am also not convinced that either Eskom or the municipalities should not be liable to pay costs. The matter is before court due to their actions or non-actions. As far as the other respondents are concerned they were vital parties in these proceeding but sat back passively. They might have made an impact of the litigious parties had they taken an initiative to take part. Therefore, costs are to follow the result. Such costs are to include the employment of two counsels where so employed.

Order

[1] The decision of Eskom to schedule interrupted electricity cuts is reviewed and set aside.

[2] The respondents are ordered to pay the costs the applicant's, the one paying the other to be absolved.

[3] Such costs include the employment of two counsel where so employed.

HUGHES J
JUDGE OF THE HIGH COURT,
GAUTENG DIVISION.

In Case No: 2295/2017

APPEARANCES

For the Applicant:	Adv. A Katz SC
For the 1st to 4th Respondents:	Adv. W Mokhari SC Adv. Z Gumede
For the Fifth Respondent:	Adv. Notshe SC Adv. M Gwala

In Case NO: 83581/2017

APPEARANCES

For the Applicant:	Adv. M Chaskalson SC Adv. C van der Spuy
For the 1st Respondent:	Adv. T Sibeko SC Adv. N Moloto
For the 2nd Respondent:	Adv. L van Wyk
For the Amicus:	Adv C van Schalkwyk