REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

CASE NO: 077168/2023

(1) REPORTABLE: Yes☐/ No ☒
(2) OF INTEREST TO OTHER JUDGES: Yes☐ / No ☒
(3) REVISED: Yes ☐ / No ☒

Date: 19 September 2023 WJ

In the matter between:

YOLANDE DE KOKER **APPLICANT**

and

ESKOM HOLDINGS SOC LTD **FIRST RESPONDENT**

LUTZACODE (PTY) LTD **SECOND RESPONDENT**

JUDGMENT

DU PLESSIS AJ

[1] This application came before me in the urgent court on Friday, 4 August 2023, with the Applicant seeking an interim interdict to reconnect their electricity supply, pending the finalisation of a dispute between First Respondent and Second Respondent. I gave the order set out at the end of this judgment and stated that the parties can request reasons for the decision if they require them. On 24 August

2023, the Respondent requested reasons in terms of Rule 49(1)(c). This judgment is the reason for the order given in the urgent court.

[2] The Applicant is a tenant in a unit in a sectional title scheme wholly owned by the Second Respondent. She rents one of the 60 units that, according to her affidavit, are occupied by low-income families, including the elderly and minor children. The Applicant will be referred to as "the tenant".

[3] The First Respondent is Eskom Holdings SOC Limited, a state-owned public company with a share capital, incorporated per the company laws of the Republic of South Africa. It is the sole electricity supplier in the country and either supplies electricity to municipalities that then manage the electricity supply to end users or directly to end users.[1] The First Respondent will be referred to as "Eskom".

[4] The Second Respondent is the owner of the sectional title scheme. The sectional title scheme does not get its electricity through a municipality. It is thus in the second category of users, as described above. The Second Respondent will be referred to as "the landlord".

[1] Background

[5] Eskom disconnected the electricity supply to the sectional title scheme where the tenant resides on 25 July 2023 and again on 1 August 2023. They aver the disconnection happened without receiving prior written notice from Eskom.

[6] The tenant avers that a formal dispute was lodged by the landlord that has allegedly not been resolved before termination. The tenants are reliant on the electricity supply at their homes. Each unit on the property has an IS-Metering remote electricity meter, whereby each unit of electricity used is run on a "pay-as-you-go" basis. The tenants are up to date with *their* payment for electricity, which the landlord collects and must pay over to Eskom.

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[1] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism* [2020] ZASCA 185 para 12.

[7] The tenant states that the disconnection of the electricity not only poses security risks. Since many tenants work from home, the disconnection of electricity affects their ability to work. The disconnection of electricity also impacts the hygiene of the tenants as there is no hot water to clean themselves. There is no water in some units because the pumps are not working is there is no electricity. It also impacts the tenants' ability to cook meals and for the children to do their homework, presumably once it is dark. After a few days of disconnection, the food goes off. All this is an infringement of the tenants' rights, she claims.

[8] The tenant argued that she and the other tenants would not be afforded substantial redress if this matter is placed on the regular roll, as they cannot afford to be without electricity for that long.

[9] Eskom opposes the application, citing an abuse of the court process, since the landlord (as the owner of the building) brought an application in the Gauteng Division, Pretoria, the previous week, to have the electricity restored to the same property, with similar relief. It was struck from the roll. Eskom states that this application is thus merely an attempt to circumvent that order.

[10] In the first urgent application, Eskom argued that the landlord did not prove that the tenants were the poorest of the poor and were suffering inconvenience or that it was a low-cost development. Since they were further not party to the proceedings, the landlord could not rely on the alleged plight of the tenants. Likewise, in this application, they state that the tenant did not demonstrate that she is the poorest of the poor or that any of the other tenants are the poorest of the poor. The crux of the problem, Eskom states, is that the landlord has been collecting payments for electricity since the property development was established in April 2022 but never paid these payments over to Eskom. According to Eskom, the landlord thus wants to receive free electricity, which is unreasonable and illegal.

[11] As for the disconnection, Eskom states that they have no obligation towards the tenant as the end user to serve an advanced notice in terms of the planned

termination of electricity, as it acts in terms of the Electricity Regulation Act.[2] It has a right to disconnect a customer that is not paying. If that customer is a landlord, the landlord must inform the tenants of the pending disconnection.

[12] Although the validity of the reasons for the disconnection was not before this court it will be briefly dealt with for context.

[13] Eskom denies that there is a dispute with the landlord. They say that when the first urgent application was launched after the first disconnection, they agreed to "without prejudice" try to solve the problem without going to court. When the talks did not lead to a solution, Eskom reminded the landlord that they would disconnect the electricity if no payment were received by 1 July 2023. There was further communication between Eskom and the landlord, where Eskom reminded the landlord to pay the monies, or at least the non-disputed portion. Eskom states that it gave the landlord two notices of intention to disconnect the electricity – one on 23 May 2023 and the second on 18 June 2023.

[14] Eskom states that the only query lodged was for not receiving bills, and once the statements were sent, there was no dispute anymore. In its founding affidavit to the first application, however, it refers to "disputed charges" and that "while the dispute is under investigation, the Applicant needed to pay the remainder of the account".[3] Later they state that "investigations relating to the disputed units were pending and Eskom was still waiting for the detailed metering information from the Applicant".[4] There is thus a dispute about whether there is a dispute, and what the dispute is about.

[15] There is also not agreement as to whether there is a valid agreement. Eskom states that there is no electricity supply agreement (ESA), as the landlord amended the agreement, which amendments Eskom did not accept. Eskom does, however, refer the court to specific clauses in the agreement, and avers that the landlord is liable for certain Service Charges usually arising from an ESA. The landlord also

[2] 4 of 2006.

[3] Par 37 of the Founding Affidavit, CaseLines 11-24.

[4] Paras 40 of the Founding Affidavit, CaseLines 11-25.

paid a guarantee of R450 000, as required by the ESA. Based on this, the landlord avers there is at least a tacit or oral agreement.

[16] Be that as it may. Whether there is a valid dispute and/or agreement is not for me to determine. The background is to contextualise how the tenants' electricity disconnection came about.

[17] What can be concluded from the papers are: The landlord collected monies from the tenants through pre-paid meters and has not paid all the money over to Eskom because they dispute the amount charged. The landlord has made some payments. The landlord further relies on the R450 000 guarantee to state that there is no prejudice for Eskom in investigating the disputes before payment, as it has access to the guarantee. However, Eskom states that that is not the purpose of the guarantee. At least through its attorneys and on the statement from Eskom, the landlord has received notification of the disconnection. Eskom did not serve any notice on the tenants, who are the end users of the electricity and who have been paying for electricity.

[18] The electricity was thus disconnected on 1 August 2023. This prompted the landlord to launch the first urgent application on 2 August 2023, which was struck from the roll. The tenant then launched the second urgent application on 3 August 2023, and enrolled on my roll to be heard on Friday, 4 August 2023 at 10:00.

[2] Ad urgency

[19] Eskom's contention that this application is just an attempt to circumvent the previous order loses sight of the fact that the landlord has a different relationship with Eskom. Furthermore, the disconnection of electricity does not have the same impact on the landlord as on the tenants. The facts are the same, but the legal question differs.

[20] The tenant argues that they will have no substantial redress in due course, as obtaining a court date is too far in the future to go without electricity. Most tenants,

even if perhaps not the poorest of the poor, are low-income earners who cannot afford alternative power solutions for months or alternative accommodation.

[21] I am satisfied that the tenants will not be afforded substantial redress in due time should the matter not be heard, and I thus enrol the matter.

[3] Ad merits

[22] In this case, the question is whether there is an obligation in terms of the Promotion of Administrative Justice Act[5] (PAJA) on Eskom to serve a notice on the tenants of a building before disconnection if there is no contractual nexus between Eskom and the tenants.

[23] Eskom argues that as a government-owned enterprise, it is bound, amongst others, by the Public Finance Management Act 1 of 1999 (PFMA) and the Electricity Regulation Act 4 of 2006. According to PFMA, Eskom must recover the costs and fees owed to it for its services.[6]

[24] It also relies on s 21(5) of the Electricity Regulation Act 4 of 2006 ("ERA") that provides:

> A licensee may not reduce or terminate the supply of electricity to a customer, unless –
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> (a) The customer is insolvent;
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> (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.

[25] Thus, by legislation, Eskom is authorised to terminate a customer's electricity supply if they do not enter into or fail to honour an agreement. This is what happened here, they state. They also point to s 30 of ERA, which sets out a dispute resolution procedure. One of Eskom's arguments is that the landlord did not follow this process to solve the dispute before approaching the court. However, the focus in this case is not a review of the decision itself but whether Eskom followed the correct procedure. As stated, the reasons for the disconnection and

[5] 3 of 2000.

[6] S 51(1)(b)(i).

the internal remedies that must be exhausted is not before me, and I make no decision about that. I am tasked to determine the procedural requirements when Eskom terminates the supply of tenants with whom it has no contractual relationship.

[26] A decision of Eskom to reduce or terminate supply is an administrative action. This was stated in *Resilient Properties (Pty) Ltd v Eskom.*[7] The Supreme Court of Appeal (SCA)[8] confirmed that Eskom's decision constitutes an administrative action as contemplated in s 1 of PAJA. It is an organ of state,[9] performing a public function in terms of legislation, and the termination of electricity adversity affects the rights of persons. Since a decision by Eskom to terminate electricity supply is an administrative action, such termination should thus comply with the prescripts of PAJA.

[27] In *Vaal River Development Association (Pty) Ltd v Eskom Holdings SOC Ltd; Lekwa Rate Payers Association NPC v Eskom Holdings SOC Ltd*,[10] the court pointed out that even if it has a contractual relationship with parties, it does not detract from the fact that it is a state-owned enterprise who has the monopoly on the supply of electricity, not just there to generate an income for the state, but also to promote the rights of individual citizens.[11]It is a public service, that is 100% state owned.

[28] Our Constitution does not protect the right to electricity, although arguments are made that electricity facilitates the enjoyment and fulfilment of other socio-economic rights.[12] Thus, when electricity is disconnected, it impacts the enjoyment

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[7] [2018] ZAGPJHC 584; 2019 (2) SA 577 (GJ); [2019] 2 All SA 185 (GJ).

[8] *Resilient Properties (Pty) Ltd v Eskom Holdings Soc* 1 All SA 668 (SCA).

[9] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44 para 199.

[10] [2020] ZAGPPHC 429.

[11] *Vaal River Development Association (Pty) Ltd v Eskom Holdings SOC Ltd; Lekwa Rate Payers Association NPC v Eskom Holdings SOC Ltd* [2020] ZAGPPHC 429 para 38.

[12] See the majority in *Joseph v City of Johannesburg* [2009] ZACC 30; see also Dube, Felix, and Chantelle G. Moyo. "The right to electricity in South Africa." *Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad* 25.1 (2022) p 9 and Dugard, Jackie. "Power to

and fulfilment of these rights. All these rights are "rights" referred to in the definition of "administrative action" in section 1 of PAJA, that can be adversely affected by a decision.

[29] This was confirmed in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd*,[13] where the Constitutional Court stated that the substantial reduction of electricity supply in that case adversely affected several of the residents' fundamental rights as protected in the Bill of Rights,[14] and that this administrative action was taken without following a fair procedure. The court then states that this "is sufficient for purposes of a *prima facie* case founded on section 6(2)(c) of PAJA".[15] In that case, the electricity supply reduction was also made without notice.

[30] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd*[16] built on previous case law dealing with consumers who do not have a contractual nexus with Eskom but whose electricity supply was terminated. The Supreme Court of Appeal in *Resilient Properties (Pty) Ltd*[17] dealt with a situation where Eskom interrupted the bulk electricity supply to two local municipalities, as they contractually failed to pay for the electricity supplied by Eskom. Certain commercial entities who do not have a contractual relationship with Eskom and who have paid the municipalities for electricity made representations to Eskom as to why it should not continue with the proposed electricity supply interruptions. Eskom, however, informed them that their remedy is a mandamus against the municipalities to force them to pay their debts to Eskom. The court found that this provides little comfort to the end-users, and the decisions it took to reduce the electricity supply failed to

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the people? A rights-based analysis of South Africa's electricity services." *Electric capitalism: Recolonising Africa on the power grid* (2008) p 267.

[13] [2022] ZACC 44.

[14] The court listed the following rights: dignity, access to healthcare service, an environment that is not harmful to health or well-being, basic education and life.

[15] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44 para 197.

[16] [2022] ZACC 44.

[17] *Resilient Properties (Pty) Ltd v Eskom Holdings Soc* 1 All SA 668 (SCA).

take this relevant consideration into account.[18] Although this is not the argument in this case, it is important to highlight it as a similar argument was made in this case: the tenants must take the landlord to task in paying the bills. Complying with the procedural requirement in PAJA by giving adequate notice to the affected end-users allows such users to bring relevant considerations to the attention of Eskom for it to consider in its decision-making process. This includes whether such a mandamus against the landlord is a viable option.

[31] The procedural duties are set out in s 3 of PAJA. S 3(1) provides that an administrative action that materially and adversely affects any person's rights or legitimate expectations must be procedurally fair.[19] The "rights" in s 3(1) must be broadly interpreted.[20] S 3(2)(b) then specifically states

> (b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to
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> subsection (4), must give a person referred to in subsection (1)¬¨
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> (i) adequate notice of the nature and purpose of the proposed administrative action;
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> (ii) a reasonable opportunity to make representations;
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> (iii) a clear statement of the administrative action;
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> (iv) adequate notice of any right of review or internal appeal, where applicable; and
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> (v) adequate notice of the right to request reasons in terms of section 5.

[32] The question is to whom such notice must be given and what an "adequate notice" is. In *Joseph v City of Johannesburg*,[21] the Constitutional Court dealt with the question of whether City Power (as electricity supplier) had a duty to give adequate notice of disconnection to the tenants of a building, where there was a contractual nexus to the landlord but not to the tenants. It found that when City Power supplied electricity to the building, it did so in terms of its constitutional and statutory duties of local government to provide basic municipal services. When depriving them of

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[18] Para 91.

[19] In terms of s6(2)(c), a court has the power to judicially review an administrative action that was procedurally unfair.

[20] *Joseph v City of Johannesburg* [2009] ZACC 30 para 42.

[21] [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC).

the service, City Power was obliged to afford them procedural fairness before taking the decision which would materially and adversely affect that right.[22]

[33] The Court emphasised that the City's need for proper debt collection must be considered with reference to the procedural fairness obligations in PAJA. In that respect, procedural fairness required that the residents should also receive pre-termination notices, not merely the building owner (with whom the municipality did have a contractual nexus). The notice should contain all relevant information, including the date and time of the disconnection, the reasons for the disconnection, and how the parties can challenge the basis for the disconnection. It must also afford the tenants sufficient time to make the necessary enquiries and investigations, to seek legal advice and to organise themselves collectively if they so wished.[23] Placing it in a prominent place in the building and affording the minimum of 14 days pre-termination was considered fair and complied with the requirement of "adequate notice" in s 3(2)(b)(i) of PAJA.

[34] I have considered the argument of Eskom that *Josephs* dealt with the constitutional duties of local government and that Eskom is not local government as it deals with customers in terms of contracts of supply. The rights that flow from the supply of electricity are established because of a contractual nexus, they state, relying on *Eskom Holdings SOC Ltd v Masinda*.[24] It is so that there is an obligation on municipalities to supply municipal services, as set out in ss 152 and 153(a) of the Constitution, which obligation does not rest on Eskom. However, the relief sought does not rely on Eskom's duty to provide services but on Eskom's duty to comply with the prescripts of PAJA when deciding to disconnect electricity.

[35] This does not substantially interfere with Eskom's obligation to secure the integrity of the national grid, which includes the ability to recover payment for electricity supplied.[25] The court does not wish to sanction non-payment of electricity. Instead,

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[22] *Joseph v City of Johannesburg* [2009] ZACC 30 para 47.

[23] Para 61.

[24] 2019 (5) SA 386 (SCA) par 22.

[25] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44 para 8.

it seeks to ensure that people whose rights might be adversely affected by an administrative action are given adequate notice. As alluded to above, the duty to give tenants adequate notice when the administrator only had a contractual relationship with the landlord was set out in *Joseph v City of Johannesburg*[26]. The disconnection of electricity is an administrative action that adversely affects the end users' rights. As such, they also have a right to a fair procedure in terms of PAJA.

[36] By analogy, this should also apply when Eskom has a contractual relationship with the landlord and disconnects the tenants' electricity. I see no reason why end-users, in a situation where the electricity is supplied directly by Eskom and not City Power, should *not* be entitled to the same procedural protection in terms of PAJA.

[37] I, therefore, conclude that lawful disconnection of services in terms of PAJA includes that tenants themselves must be given adequate notice of the proposed action[27] and a reasonable opportunity to make representations.[28] They can only do so if Eskom complies with the prescripts in PAJA by giving them proper notice of the disconnection in line with *Joseph*.[29]

[38] I thus order the reconnection of the electricity supply pending proper notice being given to the tenants. The Applicants have met the requirements of an interim interdict.[30] The Applicant has a *prima face* right, notwithstanding that there is no contractual relationship between her and Eskom. Firstly, it has a right to just administrative action. Furthermore, Eskom is aware through its engagements with the landlord that the electricity is supplied to tenants in the property owned by the landlord. Even though the right to electricity is not specifically provided for in the Bill of Rights, it is inseparably intertwined with the enjoyment of socio-economic

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[26] [2009] ZACC 30.

[27] S 3(2)(b)(i).

[28] S 3(2)(b)(ii).

[29] *Joseph v City of Johannesburg* [2009] ZACC 30.

[30] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

rights.[31] When Eskom enforces its agreement with the landlord, that decision adversely affects those rights. When it does so, they have a right to just administrative action that includes a fair procedure, in that a disconnection must comply with the prescripts of s 3(2)(b) of PAJA. The disconnection of electricity causes harm in that the tenants' security is at risk; they have difficulty preparing meals and keeping food from going off in the fridges, hygiene becomes a problem, and it impacts on their work and schoolwork. The balance of convenience favours the tenants because Eskom's grid will not collapse should it reconnect the electricity in the interim while following a proper procedure before disconnecting should it wish to do so. There is no alternative satisfactory remedy for the immediate reconnection.

[39] During the argument, I made it clear that this court cannot force Eskom to continue to supply electricity free of charge to customers when it is entitled in terms of s 21(5) of ERA to disconnect customers who are not paying. What this court requires from Eskom, however, is that when it does decide to disconnect, it complies with its obligations in terms of PAJA and give proper notice to the tenants to enable them to participate in the decisions that will affect them and possibly influence the outcome of these decisions.

[40] In her notice of motion, the tenant asked that Eskom be interdicted and restrained from disconnecting the electricity supply pending the finalisation of the dispute lodged with Eskom. Eskom, however, denied that there was a dispute pending, as alluded to above. It was, furthermore, not a dispute lodged by her but by the landlord. I do not grant this prayer, as I am not convinced that a case was properly made out for granting it. What is clear and imminent in the urgent court is that the tenants' electricity was disconnected without proper notice as required in terms of PAJA, and that they should be granted the relief to have it restored, and if Eskom wishes to continue with the disconnection, that they must do so with proper notice.

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[31] Dugard, Jackie. "Power to the people? A rights-based analysis of South Africa's electricity services." *Electric capitalism: Recolonising Africa on the power grid* (2008) p 267; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* [2022] ZACC 44 para 59.

[41] Thus, I order the reconnection of the supply, with an order not to disconnect again unless proper notice is given to the tenants. This ensures that Eskom complies with its constitutional duties of just administrative action that is procedurally fair, as set out in PAJA, by giving adequate notice to the tenants affected by the decision. This will allow the tenants to make representations to Eskom if they so wish. It also allows Eskom and the tenants to consider alternative arrangements.

[42] To not sanction non-payment, I also deem it prudent to order that, pending the order being made final or disconnection in line with PAJA, the monies collected by the prepaid meters during this time are paid over to Eskom.

[43] As to costs, there is no reason why costs should not follow the result.

[4] Order

[44] I, therefore, make the following order:

1. Non-compliance with the Rules of the Court and service of process is condoned and the matter is heard as urgent in terms of Rule 6(12) of the rules of this court.
2. A *rule nisi* is issued calling upon the Respondents on 12 September 2023 to show cause why the following order must not be made final:
    a. That the Respondent be ordered to reconnect electricity supply to property described as Stand 231, Blesbok Street, Meyerton ("Ikamvalethu Gardens"), within 4 hours after receipt of this order.
    b. That the Respondent is not to disconnect the electricity supply to the property described in 2.1 unless there is proper notice given to the tenants of the property.
3. Notice in 2.2 will be to be deemed proper if a notice of disconnection is attached to the outside security gate of the property, as well as inside in the common area of the property, 14 (fourteen) days before such disconnection.
4. The landlord is to pay over all the moneys collected through the prepaid meters for consumption, from date of this order, until date of disconnection, if any, or the date of return, whichever comes first.
5. The Applicants must serve this order on the Second Respondent.
6. The costs of this application will be paid by the First Respondent.

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WJ DU PLESSIS

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. It will be sent to the parties/their legal representatives by email.

Counsel for the Applicant:	Mr J Schoeman
Instructed by:	Van der Walt attorneys
Counsel for the Respondent:	Mr Nalane SC
	Ms S Magxaki
Instructed by:	Ramatshila Mugeri Inc
Date of the hearing:	04 August 2023
Date of the order:	04 August 2023
Date of reasons for the order:	19 September 2023