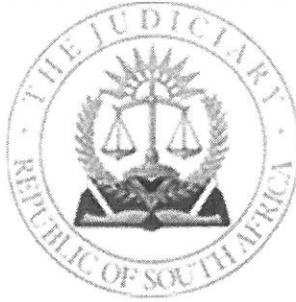


## REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA  
GAUTENG DIVISION, JOHANNESBURG

CASE NO: 27317/2018

[1] REPORTABLE: YES  
 [2] OF INTEREST TO OTHER JUDGES: YES/NO  
 [3] REVISED. ✓  
8.11.18  
 Date: W.H.G. VAN DER LINDE

## In the matter between:

|                                                               |                            |
|---------------------------------------------------------------|----------------------------|
| Cape Gate (Pty) Ltd                                           | 1 <sup>st</sup> Applicant  |
| ACT (Pty) Ltd t/a CBI-Electric: African Cables                | 2 <sup>nd</sup> Applicant  |
| Scaw South Africa (Pty) Ltd                                   | 3 <sup>rd</sup> Applicant  |
| Naledi Ringrollers, a subsidiary of Naledi Holdings (Pty) Ltd | 4 <sup>th</sup> Applicant  |
| Consolidated Wire Industries (Pty) Ltd                        | 5 <sup>th</sup> Applicant  |
| Glotan Steel (Pty) Ltd                                        | 6 <sup>th</sup> Applicant  |
| South African Role Company (Pty) Ltd                          | 7 <sup>th</sup> Applicant  |
| Emerald Safari Resorts                                        | 8 <sup>th</sup> Applicant  |
| and                                                           |                            |
| Eskom Holdings SOC Ltd                                        | 1 <sup>st</sup> Respondent |
| Emfuleni Local Municipality                                   | 2 <sup>nd</sup> Respondent |
| National Energy Regulator of South Africa                     | 3 <sup>rd</sup> Respondent |
| The Premier, Gauteng Provincial Government                    | 4 <sup>th</sup> Respondent |

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## JUDGMENT

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The court:

Introduction

- [1] The 2<sup>nd</sup> respondent local authority ("*Emfuleni*") owes the 1<sup>st</sup> respondent ("*Eskom*") more than R1billion for electricity consumption charges, and neglects to pay the Eskom bill for on-going consumption. Eskom now wishes to interrupt the supply of bulk electricity to it. The applicants are manufacturers (the 8<sup>th</sup> applicant a casino operator) in the municipal area of Emfuleni. Emfuleni reticulates the electricity that it receives in bulk from Eskom to consumers such as the applicants. If Eskom were to interrupt bulk supply to Emfuleni, consumers such as the applicants will be forced to shut down.
- [2] The 1<sup>st</sup> applicant therefore initiated interdict proceedings against Eskom and Emfuleni and, after an intervention by the 2<sup>nd</sup> to 4<sup>th</sup> applicants, and a consolidation with a similar application of the 5<sup>th</sup> to 8<sup>th</sup> applicants, all eight applicants bring an application against the respondents for both interim and final relief. The three sets of applicants were separately represented.
- [3] The final relief sought, which it is anticipated will only be heard in due course, is for a review of Eskom's decision to interrupt the supply of electricity to Emfuleni. Pending that review, the applicants, who largely make common cause, apply to interdict Eskom from implementing interruptions in bulk supply of to Emfuleni. The National Energy Regulator ("*Nersa*") was joined as 3<sup>rd</sup> respondent but did not participate in the proceedings.
- [4] The Part A interim relief included, apart from the primary prayer, three alternative prayers. The first alternative prayer was for an order directing Eskom, pending the review, to supply

electricity on an uninterrupted basis to Emfuleni *“on the basis that the applicant(s) will make direct payment to the 1<sup>st</sup> respondent for the supply of electricity to it”*.

- [5] The second alternative prayer was to order Emfuleni and/or the 4<sup>th</sup> respondent (*“the Premier”*) immediately to pay all outstanding amounts due to Eskom for the supply of electricity to Emfuleni in order to ensure that an interrupted supply of electricity is provided to the 2<sup>nd</sup> respondent from 6 August 2018.
- [6] In the third alternative prayer, the applicants asked for an order that Eskom, Emfuleni, and/or the Premier are ordered to agree, within three days, a payment plan in respect of Emfuleni’s indebtedness to Eskom so as to ensure that an uninterrupted supply of electricity is provided to Emfuleni. The 5<sup>th</sup> to 8<sup>th</sup> applicants did not join in asking for the alternative relief.
- [7] The applicants all, when they moved the application, sought only the primary interim interdict and not the alternatives to which we have referred. However, in the course of exchanges with the court while the applicants were replying, on the second day of the hearing, and in the context of debating whether relief under section 172(1)(b) of the Constitution was competent and appropriate, the issue of direct payment relief again surfaced.
- [8] Section 172(1)(b) of the Constitution empowers a court *“when deciding a constitutional matter within its power”*, to *“make any order that is just and equitable”*. The pertinence of section 172 of the Constitution in the debate before the court arose because, although the applicants initially moved the court for the interim interdict on the well-trodden Setlogelo<sup>1</sup> basis (a *prima facie* right although open to some doubt, etc), it appeared that the ever-prevalent underlay of the case, as the affidavits already presaged, was a dispute between organs of state within the context of sections 40 and 41 of the Constitution.

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<sup>1</sup> Setlogelo v Setlogelo, 1914 AD 221

- [9] Since the parties had not had an opportunity fully to develop their submissions concerning relief, the court afforded the parties a period after it had adjourned for the submission of further written argument on this issue.

#### The essential facts

- [10] As can be inferred from these remarks, the case concerns commercial enterprises who dutifully pay their local authority for the supply of electricity by the latter to the former, but the local authority persistently defaults in paying the electricity generator<sup>2</sup> (Eskom) for the bulk supply of electricity. Eskom, faced with a spiralling debt (at the time of the hearing, upward of R1 billion), and having unsuccessfully sought to coax Emfuleni to pay its bill, resolved to terminate the bulk supply of electricity to it. The immediate result, that of threatening the very existence of the commercial viability of the applicants, is no doubt disastrous, but that is a consequence which, says Eskom, is a function not of Eskom's lawful action, but of Emfuleni's unlawful inaction.
- [11] The milestones leading up to the matter before the court are these. By September 2016, Emfuleni was in arrears with payment owed to Eskom in the amount of R205m. Various interactions between these two sought to address this. In January 2017 they concluded a payment arrangement agreement. Emfuleni defaulted. In July 2017 Eskom wrote to the Premier of Gauteng Province and the Mayor, requesting intervention. On 31 July 2017 Eskom published its first notice advising consumers that it was considering the interruption of bulk supply of electricity to Emfuleni, and inviting representations.
- [12] Eskom first proposed specific interruptions to the electricity supply on 10 August 2017 with effect from 3 October 2017. In response some of the present applicants made detailed submissions to Eskom as to why this should not be done. They explained the catastrophic way in which they would be affected by the proposed interruptions. No response was

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<sup>2</sup> See the definition of "generator" in the Electricity Regulation Act 4 of 2001 ("ERA").

received, but the interruptions did not materialize. On 15 August 2018 Eskom wrote again to the Premier, updating him on the status of Emfuleni's debt, and on Eskom's (still) intended interruption of bulk supply.

- [13] On 6 September 2017 Eskom met with Emfuleni's chief financial officer, its municipal manager, the Provincial Treasury, and an advisor from National Treasury to discuss a possible payment arrangement. In the same month it concluded a second payment arrangement with Emfuleni. This covered both arrears and current obligations. Emfuleni defaulted, and it failed to respond to Eskom's many requests for payment and to discuss the default.
- [14] In January 2018 various discussions took place between Eskom and Emfuleni, and in February 2018 Eskom requested the Premier to intervene. In the meantime Nersa was made fully aware of the developments. On 6 February 2018 a meeting was arranged with a ministerial task team, coordinated by National COGTA (Department of Cooperative Governance and Traditional Affairs), "to intervene at national level to assist the process for a realistic affordable arrangement between municipalities". Emfuleni made numerous promises to Eskom, all to no avail.
- [15] On 20 February 2018 Eskom published a notice of a final decision to interrupt electricity supply from 8 March 2018. At that stage Emfuleni owed Eskom just short of R700 000. The notice explained that this consequence followed because Emfuleni had not honoured its repayment agreement; and that Eskom had considered all representations, and the negative effect that the interruptions would have, particularly on paying customers, but the decision was inevitable.
- [16] On 2 March 2018 Emfuleni assured the 1<sup>st</sup> applicant that a further payment arrangement had been agreed and the threatened interruptions would not occur. On 5 March 2018 the 1<sup>st</sup> applicant again advised Eskom of the disastrous effect of interruptions; in short, that it would lead to a complete shut-down of its plant and concomitant job-losses. The 1<sup>st</sup>

applicant suggested a payment arrangement between Eskom and Emfuleni whereby the 1<sup>st</sup> applicant would pay Eskom direct. Neither Eskom nor Emfuleni responded substantively to this proposal.

- [17] Various further discussions followed, resulting in an acknowledgment of debt and repayment plan agreement on 6 March 2018. That agreement makes provision for the repayment of the arrear debt of (by then) R641m in instalments (suggested by Emfuleni) by 16 January 2023, and for Emfuleni to pay its current bill as and when it fell due for payment. This agreement was made an order of court by Prinsloo, J on 6 March 2018. Emfuleni again defaulted. On 5 April 2018 Eskom wrote to the Mayor complaining about not only Emfuleni's default, but also about its failing even to respond to Eskom's correspondence and calls.
- [18] Some five months ago, on 11 June 2018 (unbeknown to the 1<sup>st</sup> applicant) the Gauteng Provincial Government ("GPG") published a media statement advising that since November 2015 both the Provincial Treasury and the (Provincial) COGTA had been working with Emfuleni and its Mayor to provide institutional support under s.154 of the Constitution. It stated that this notwithstanding, the financial position of Emfuleni was continuing to deteriorate to the point where Emfuleni was no longer able to guarantee the provision of minimum services without the intervention of both national and provincial government.
- [19] It said further that the Provincial Executive Council had decided to institute a comprehensive intervention plan under s.139 of the Constitution. This entailed amongst others five work streams, one of which would focus on energy and electricity. The Premier would convene monthly meetings with the Mayor, the MECs, and members of the Mayoral Committee to review the progress on intervention; and once a week the Premier and the Mayor would join the teams.
- [20] Next, on 11 and 12 June 2018 Eskom again published a notice inviting the public to make representations as to why Eskom should not interrupt bulk electricity supply to Emfuleni with effect from 20 July 2018. The anticipated interruptions were: in the first week, 06h00 to

09h00 and again 17h00 to 20h30 during the week, and 08h30 to 12h00 and again 15h00 to 19h00 on weekends. Then, as from 13 August 2018 until Emfuleni's breach was remedied, the interruption would be from 06h00 to 20h00 during both weekdays and weekends. It stated that if the debt situation did not improve, Eskom reserved the right entirely to disconnect electricity on 15 days' notice.

- [21] The notice stated that on 2 October 2017, Eskom had suspended the then proposed interruptions as Eskom and Emfuleni had reached an agreement regarding the manner in which Emfuleni would settle its debt to Eskom. The notice explained that Emfuleni had defaulted on this agreement and is also defaulting on its current usage obligations, which amounted to R200m per month, and had also defaulted on a court order. It said that Eskom was proceeding to execute on the court order. It invited the public to make representations by 29 June 2018 as to why the disruptions should not be implemented, and as to alternatives that Eskom should be considering.
- [22] On 14 June 2018 the Gauteng MEC for Finance, Ms Barbara Creecy, wrote to Eskom, saying that Emfuleni was experiencing major service delivery challenges; that Province had often assisted Emfuleni but to no avail; and that on 14 June 2018 the Provincial Executive Council of Gauteng resolved to intervene in terms of s.139(1)(b)(i) of the Constitution, and s.139(5) of the Constitution, read with s.139 of the Local Government: Municipal Finance Management Act 56 of 2003 ("MFMA"), by placing Emfuleni under administration. She requested too that Eskom not interrupt bulk supply pending the submission of a financial recovery plan, which would be concluded no later than 90 days after the date of the letter.
- [23] Eskom's affidavit says that its attitude in response to this latter was that *"Eskom was not willing to sit back and wait for a further ninety days for the recovery plan which the Government had promised."*
- [24] On 21 June 2018 the 1<sup>st</sup> applicant duly made submissions and again proposed direct payment. The next day, 22 June 2018, other applicants requested an urgent meeting with

Eskom and Nersa in order to find a solution. No response was received. These applicants also made a submission to Eskom in which they recorded amongst other things that during June 2018 the Provincial Minister: COGTA had placed Emfuleni under administration in terms of s.139(5) of the Constitution. These submissions were followed by another letter by the 1<sup>st</sup> applicant dated 29 June 2018, again underscoring the harm that the 1<sup>st</sup> applicant would experience if interruptions were to follow. No substantive response was received.

- [25] On 4 July 2018 Eskom sent a letter to Nersa, the government and Ms Creecy advising that in all the circumstances Eskom was left with no option but to interrupt the electricity supply to Emfuleni. Eskom proposed that going forward, Nersa permit and Emfuleni agree that certain large electricity consumers of Emfuleni – such as the applicants – pay Eskom direct for the electricity supply to them. In turn Eskom undertook that, for so long as those consumers paid Eskom direct then, pending the finalisation of the financial recovery plan, Eskom would not interrupt bulk supply to Emfuleni.
- [26] On 12 July 2018 the respondents replied, declining the invitation to meet to discuss the Eskom proposal, saying that the recovery plan will holistically address all the issues, and that it was anticipated to be ready by September 2018.
- [27] On 13 July 2018 the 1<sup>st</sup> applicant wrote again to Eskom, asking it to clarify whether it intended interrupting supply from 20 July 2018. As it happened, that was the very day on which Eskom decided that it would implement the interruptions in the bulk supply, and so it notified the 1<sup>st</sup> applicant that it had decided to implement its decision. The notice was said to be given in terms of PAJA; and it explained that Eskom had proactively approached the GPG to facilitate a position where electricity would not be interrupted, but no cooperation was received from either the GPG or Nersa. Eskom had therefore decided to implement its decision to interrupt from 6 August 2018.
- [28] In a subsequent letter of 23 July 2018 to the applicants, Eskom advised the 1<sup>st</sup> applicant that it had taken a final decision to proceed with the disruptions from 6 August 2018 since

Emfuleni was in persistent breach of its payment obligations. It said that Emfuleni did not have sufficient attachable movables to satisfy its judgment debt, and attaching the infrastructure was not on, because it would cause a collapse of Emfuleni's business.

- [29] The letter stated that Eskom had actively engaged the GPG since it had taken control of Emfuleni, and also Nersa, with a temporary direct payment proposition on behalf of seven companies (until the administrator of Emfuleni submitted a financial recovery plan that was acceptable to Eskom), in exchange for Eskom not interrupting electricity supply to Emfuleni. Eskom says that this all was to no avail. The 1<sup>st</sup> applicant was supportive, in principle, of the Eskom proposal to GPG and Nersa. Other applicants received a similar letter from Eskom.
- [30] On 24 July the 1<sup>st</sup> applicant launched its application, and on 30 July 2018 the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> applicants launched theirs. By order of court dated 31 July 2018 these applicants were granted leave to intervene in the 1<sup>st</sup> applicant's application. Collis, J ordered too that the parties were to enrol the application for hearing on 24 August 2018, and that Eskom, Emfuleni and the Premier file their answering affidavits by 10 August 2018, the applicants to reply by on 17 August 2018.
- [31] On 13 August 2018 the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> applicants brought their application. In it they too, supported by the 8<sup>th</sup> applicant (not by then yet a party), proposed that they make direct payment to Eskom so as to avoid Eskom terminating the electricity supply to Emfuleni.
- [32] In the meantime a dispute between the 1<sup>st</sup> applicant and Emfuleni concerning the tariff at which the 1<sup>st</sup> applicant should be billed had erupted, resulting in Emfuleni interrupting the 1<sup>st</sup> applicant's electricity supply. The 1<sup>st</sup> applicant approached the Johannesburg seat of the Gauteng Division urgently, and on 20 August 2018 Molahlehi, J made a consent order in that application, directing Emfuleni forthwith to reconnect electricity supply to the 1<sup>st</sup> applicant and associated relief.
- [33] The main application, having been enrolled on 24 August 2018 pursuant to the order of Collis J, came before Twala J who postponed the application sine die, granting the

respondents leave to file their answering affidavits by 31 August 2018, and the applicants to reply by 10 September 2018. The learned judge reserved costs. And on 4 September 2018 Mojapelo, DJP granted an order consolidating the prior applications into the one currently before this court.

[34]Emfuleni counter-applied for three prayers: the first, under section 152(1), read with section 153(1)(a) or (b), and (2)(b) of the Local Government: Municipal Finance Management Act No 56 of 2003 ("MFMA"). This relief is sought against the 1st, 2nd, 3rd and 4th applicants, as well as against Eskom, the National Energy Regulator of South Africa (NERSA), and the Premier.

[35]Those sections provide (commencing with section 152(1)), that if a municipality is unable to meet its financial commitments, it may apply to the high court for an order to stay (for a period not exceeding 90 days) all legal proceedings, including the execution of legal process, by persons claiming money from the municipality. Under section 153(1)(a) there is provision for the same relief and in section 153(1)(b), such an order may include an order "to suspend the municipality's financial obligations to creditors, or any portion of those obligations, until the municipality can meet those obligations".

[36]Under section 153(2)(b) of the MFMA, it is provided that a court may make such an order for the stay of all legal proceedings only if the Provincial Executive will have intervened in terms of section 139 of the MFMA; and a financial recovery plan to restore the municipality to financial health has been approved for the municipality; and the financial recovery plan is likely to fail without the protection of such a court order.

[37]The reference to section 139 of the MFMA is to a section which obliges the Provincial Executive promptly ("must promptly") to request the "municipal financial recovery service" to make certain enquiries and then to prepare an appropriate recovery plan for the municipality which is to be submitted to the MEC for finance in the province the termination

and assessment; and ultimately to consult the Mayor of the municipality to obtain its cooperation in implementing the recovery plan.

[38]The reference to the “municipal financial recovery service” is a concept defined in the MFMA; and it is established in terms of section 157(1) of the MFMA as an institution within the public service which forms part of and functions within the National Treasury. In short, Emfuleni in its counter-application A, patently applied to the court to order a stay of the whole proceedings against it on the basis that the Provincial Executive has intervened in terms of section 139, and a financial recovery plan has been approved, and the financial recovery plan is likely to fail without the protection of such a court order.

[39]By the time this matter was argued no financial recovery plan had been placed before the court, and so the court was not in a position to assess whether the financial recovery plan was likely to fail without the protection of the court order which Emfuleni sought. What was undoubtedly established on the papers, is that the Provincial Executive had intervened in terms of section 139 of the MFMA but also in terms of section 139 of the Constitution.

#### The applicants' case

[40] The 1<sup>st</sup> applicant opened its case by relying on *National Treasury v Opposition to Urban Tolling Alliance*<sup>3</sup> (“Outa”) for the proposition that the Constitutional Court refined the trite test laid down in *Setlogelo* for interim interdicts by stressing that those principles must still be applied, but cognisant of the normative scheme and democratic principles that underpin the Constitution. Counsel stressed that the first requirement, that of a *prima facie* right although open to some doubt is not satisfied by simply pointing to the right to approach a court to review administrative action; in addition, the right must be such that if the interdict is not issued, irreparable harm would ensue.

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<sup>3</sup> 2012 (6) SA 223 (CC)

- [41] Counsel submitted that the 1<sup>st</sup> applicant plainly crossed that hurdle since the harm to it, if Eskom were permitted to implement its decision to interrupt the supply of electricity to Emfuleni, was cataclysmic. To Eskom, so submitted counsel, the harm was financial (if it were interdicted against implementing its decision) and not as immediate as with the first applicant.
- [42] Counsel stressed that the 1<sup>st</sup> applicant could not afford even a lesser form of electricity interruption such as what is colloquially known as "*load-shedding*". Counsel stressed that the 1<sup>st</sup> applicant did not know where the Premier stood in this all; and the only relief which the 1<sup>st</sup> applicant sought against the Premier, was costs.
- [43] The 1<sup>st</sup> applicant submitted in relation to the counter-application by Emfuleni: the 1<sup>st</sup> applicant dealt only with the third prayer, which was for an order against the 1<sup>st</sup> applicant to pay it the amount of R11 million which had been billed to it by Emfuleni. Underlying this prayer was a factual dispute between the parties and the 1<sup>st</sup> applicant's response was accordingly that prayer C against it should be dismissed for foreseeable factual disputes with costs; or at least struck out for lack of urgency.
- [44] As regards prayer B this did not affect anyone other than Eskom, and was for an order directing Eskom first to attend to the requirement of alternative dispute resolution mechanism in terms of the IGR Act.
- [45] The 1<sup>st</sup> applicant, as regards costs, specifically asked for the costs that were reserved on 20 August 2018. That related to an urgent application which the 1<sup>st</sup> applicant launched when Emfuleni, at a meeting with Cape Gate at 11h00 on that date, told Cape Gate, the 1<sup>st</sup> applicant, that it was proceeding immediately to cut off the electrical supply to the 1<sup>st</sup> applicant since the 1<sup>st</sup> applicant had not paid it, there and then, the R11 million that was owing.
- [46] The 1<sup>st</sup> applicant launched the urgent application, prepared the papers, and served it on Emfuleni at 17h20 on 20 August 2018. At 18h48 on that day Emfuleni gave notice that it

intended opposing that application, but when at approximately 19h20 the 1<sup>st</sup> applicant's attorney of record was driving to court on that day, he received a call from Emfuleni's attorney of record, who advised him that the local authority had agreed to restore the electrical supply to the 1<sup>st</sup> applicant. The two legal teams met at court and Molahlehi, J by agreement made a court order which included an order that the costs of that day were to be determined in the present matter.

- [47] The first applicant asks not only for those costs but also that they be awarded on the punitive scale on the basis that the cut-off of the electricity by Emfuleni was malicious and intentional, when it knew that there was a *bona fide* dispute between the 1<sup>st</sup> applicant and Emfuleni as to whether or not Emfuleni was in fact owed the R11 million by the 1<sup>st</sup> applicant.
- [48] As to costs of the application for the interim interdict, the 1<sup>st</sup> applicant asked that those costs be in the cause of the application for final relief in Part B.
- [49] For the 2<sup>nd</sup> to 4<sup>th</sup> applicants, counsel opened their case by pointing to the fact that Emfuleni itself sought an order for an interim interdict in terms of prayer 2 of the 1<sup>st</sup> applicant's application; and that in fact, the Premier (although he did not formally counter-apply) also asked that Eskom's version be rejected and that it be made liable to pay the costs of the application on a punitive scale. Counsel submitted that Eskom's persistence in seeking to interrupt the supply of electricity in bulk to Emfuleni was offensive on various bases.
- [50] First, since organs of state have a duty to raise responsible arguments, Eskom ought not to have persisted in its attitude in the face of the unreported judgment of this court in *Resilient Properties (Pty) Ltd v Eskom Holding SOC Ltd and Others*.<sup>4</sup> Second, counsel submitted that Eskom itself concedes that the applicants will suffer cataclysmic harm. Third, Eskom has alternative remedies, counsel submitted.
- [51] This included the court order of 6 March 2018 in terms of which Eskom obtained judgment against Emfuleni. Eskom did not fully execute that judgment on the pretext that if Eskom

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<sup>4</sup> Case no 11316/2018 on 14 September 2018.

were to attach and sell in execution infrastructure belonging to Emfuleni, this would cause a total collapse of the business of Emfuleni (whilst not sharing the same concern for the businesses of the applicants). Further, counsel submitted that Eskom had available to it the mechanism of contempt of court proceedings for the failure of Emfuleni to comply with the court order of 6 March 2018 and here counsel relied on *Pheko and Others v Ekurhuleni Metropolitan Municipality (No 2)*.<sup>5</sup>

[52] There the Constitutional Court stressed that the Constitution enjoins organs of state like a municipality to adhere and give effect to its principles and provisions, as they must to court orders issued under the Constitution. Counsel submitted that Eskom was clearly embarking upon a debt collection measure as was evidenced by its submission that it had investigated the possibility of taking execution steps against the assets belonging to Emfuleni. But it was submitted that the current decision to implement the interruption of bulk electricity supply to Emfuleni clearly cannot achieve the debt collection purpose; therefore the decision is not rationally connected to any power that Eskom may have to discontinue the supply of electricity for non-payment.

[53] Finally, counsel submitted that Province has plainly embarked upon a process to resolve the issue of Emfuleni's non-payment of its liability to Eskom; and Eskom should not have turned its face against this process but should have honoured it.

[54] Counsel for the 2<sup>nd</sup> to 4<sup>th</sup> applicants submitted further that Eskom's response to the endeavour upon which Province had embarked to address Emfuleni's financial challenges, was to ignore it. This conduct, it was submitted, was constitutionally offensive for three reasons. First, it failed to meet the test of employing the least invasive means to obtain its object.

[55] Second, the Premier's evidence in these proceedings and his conduct in the correspondence preceding the proceedings, ought to be deferred to by the court under s.41(1)(h) of the

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<sup>5</sup> (CCT 19/11) [2015] ZACC 10; 2015 (5) SA 600 (CC); 2015 (6) BCLR 711 (CC) (7 May 2015) at paragraphs [61] and [63].

Constitution; that paragraph exhorts (“*must*”) all spheres of government and all organs of state within each sphere to cooperate with one another in mutual trust and good faith by, amongst others, avoiding legal proceedings against one another s.41(1)(h)(vi). Counsel referred in this regard to *Minister of Police and Others v Premier of the Western Cape and Others*.<sup>6</sup>

- [56] In that matter the Constitutional Court underscored (at [58] ff) that the court has a discretion to refuse to hear a dispute if it is not satisfied that the parties have made every reasonable effort to settle it. Parties are duty bound to make a meaningful effort to comply with the requirements of co-operative government and should not pay mere lip-service to the obligation; it involves much more than an effort to settle a pending court case. The court concluded at paragraph [64]:

*“Courts must be astute to hold organs of state to account for the steps they have actually taken to honour their co-operative governance obligations well before resorting to litigation.”*

- [57] And the third respect in which Eskom’s response (i.e. the decision to interrupt the supply) ignored the process embarked upon by Province, was that Eskom’s conduct did not meet the test of “*reasonable conduct of an organ of state*”; it amounted to “*collective punishment*”, aka “*bullying*”.

- [58] Counsel proposed that this court should, in the circumstances, grant the interdict sought in prayer 2, pending the resolution of Part B; but should also expressly refer the dispute back to the organs of state involved as envisaged in section 41(4) of the Constitution, and require the organs of state to report back to the court within 60 days of the progress that will have been made. A proposed handwritten draft order to this effect was handed up.

- [59] Counsel asked for the costs of Part A, and also that the court imposed timeframes for the hearing of the matter under Part B.

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<sup>6</sup> (CCT 13/13) [2013] ZACC 33; 2013 (12) BCLR 1365 (CC); 2014 (1) SA 1 (CC) (1 October 2013).

- [60] Counsel for the 5<sup>th</sup> to 8<sup>th</sup> applicants generally made common cause with the other applicants, and asked for an order in terms of prayer 2 (the interim interdict); and that costs should be in the cause.

Eskom's case

- [61] Eskom opened by stressing that it had no constitutional obligation to supply electricity, not to Emfuleni, nor to the applicants as end-users. Its licence conditions in fact precluded it from supplying electricity direct to end-consumers.
- [62] It followed that the applicants have not established a *prima facie* right at all. Relying on *Outa*, paragraphs [41], [48], [50], and [71] counsel submitted that the well-known requirements for the grant of an interim interdict set out in *Setlogelo* (subsequently refined) were qualified by the Constitutional Court. Counsel stressed that, as the Constitutional Court held at paragraph [50], the *prima facie* right required to be established by an applicant for an interim interdict was not merely the right to approach a court in order to review an administrative decision; what was required was in fact a right which, if not protected by an interim interdict, would result in irreparable harm ensuing for the applicant.
- [63] Since an interdict is meant to prevent future conduct and not decisions already made, quite apart from the right to review and to set aside impugned decisions, an applicant is required to demonstrate a *prima facie* right that is threatened by an impending or imminent irreparable harm.
- [64] Counsel stressed particularly paragraph [71] of *Outa*. There the Constitutional Court held that before granting interdictory relief pending a review court, an interdict court must – in the absence of *mala fides*, fraud or corruption – examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers.
- [65] The court held:

*"That would ordinarily be so, if, as in the present case, a state functionary is restrained from exercising statutory or constitutionally authorised power. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases."*

Counsel submitted that this *dictum* applied to Eskom: Eskom as an organ of state is sought to be restrained by the applicants from exercising a statutory authorised power to interrupt the supply of electricity to Emfuleni under section 21(5) of the Electricity Regulation Act 4 of 2006; granting the interdict would therefore be trespassing upon the wholly frail of separation of powers.

[66] Counsel stressed, in the context of the applicants' submissions that as an organ of state Eskom was somehow integrated with National, Provincial, and Municipal Government, that each part of Government operates independently (section 40(1) of the Constitution; compare also the minority judgment of Froneman, J in *Rademan*<sup>7</sup> at paragraphs [49], [50], [51] and [52]). Counsel submitted that it is Emfuleni as local authority, and not Eskom, that has the constitutional obligation to supply electricity under section 152(1)(b) of the Constitution.

[67] Counsel responded to the attack on the rationality of Eskom's decision by submitting that Eskom's reason for wishing to terminate the supply of electricity to Emfuleni was entirely rational: its object was to stop Emfuleni's debt from spiralling completely out of control. Eskom's power was granted for that purpose, as is evident from the ERA, Eskom's licence, Eskom's supply agreement with Emfuleni, and indeed the court order of 6 May 2018. Counsel eschewed the notion that Eskom's real purpose was merely to collect the debt.

[68] Counsel submitted that Eskom's decision was not only rational but in fact reasonable. He submitted that in any commercial context it was reasonable to stop supplying electricity if the supplier would not be paid for it.

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<sup>7</sup> *Rademan v Moghaka Local Municipality and Others* (CCT 41/12) [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC) (26 April 2013).

- [69] A central tenet of counsel's submission was that there was no "dispute" as envisaged in section 41 of the Constitution. With reference to judgments that interpreted the notion of a "dispute" for purposes of a reference to arbitration, counsel submitted that a debtor who admits its indebtedness to its creditor, but simply cannot pay and is seeking extensions of time, is not "disputing" the indebtedness.
- [70] Counsel bemoaned the absence of NERSA in the litigation; it was NERSA's statutory obligation to have taken steps against Emfuleni. Counsel submitted that Eskom did not have alternative means at its disposal to achieve its legitimate objective of preventing the debt spiralling out of control (or, as it was also put by counsel, to prevent Eskom supplying free electricity). Counsel submitted that contempt of court proceedings were not available under the already existing court order because the order was in fact an order *ad pecuniam solvendam*; and in any event expressly gave Eskom the right to terminate supply if payment in terms of the court order was not forthcoming.

#### Emfuleni's case

- [71] Emfuleni opposed only prayers 3 – 5, the alternative prayers, in the notice of motion. Counsel pointed out that Eskom was not itself claiming relief against Emfuleni, and submitted that since the applicants are not asking for the alternative relief at this stage, Emfuleni has succeeded against the applicants.
- [72] Counsel submitted that in fact Emfuleni was siding with the applicants against Eskom, in that on the date that Eskom took the decision to interrupt bulk supply, 90 days since the date of the media statement on 11 June 2018 concerning Province's intervention in Emfuleni, had not yet expired. The thrust of the submission was that Eskom resolved to press ahead with interruption of bulk supply despite the fact that s.139(5) of the Constitution, and s.139 of the MFMA, had been invoked.

- [73] Counsel submitted that Emfuleni was entitled to relief claimed in its counter-application prayer A, because it had come to court to say that Eskom was entitled by interrupting bulk supply, to interfere with the process that had been set in motion in terms of the Constitution and the MFMA. As to counter-application prayer B, the submission was that since the Constitution and the MFMA had been invoked, Eskom was obliged to act in terms of s.40 of the IGR Act. The IGR Act is national legislation as envisaged in terms of s.41(2) of the Constitution.
- [74] S.40 of the IGR Act obliges all organs of state to make every reasonable effort to settle intergovernmental disputes without resorting to judicial proceedings. S.44(1) of the MFMA likewise obliges organs of state to make every reasonable effort to avoid intergovernmental disputes, and the parties must *“as promptly as possible take all reasonable steps that may be necessary to resolve the matter out of court.”* Counsel for Emfuleni thus submitted that it was also entitled to that relief.
- [75] As to counter-application prayer C, counsel submitted that it was clear that the 1<sup>st</sup> applicant considered that the relief there sought was not urgent and, in any event, constrained by factual disputes. Emfuleni had no objection to that prayer being referred for oral evidence, or being postponed; but the 1<sup>st</sup> applicant was then liable for Emfuleni’s costs.
- [76] Counsel thus asked for dismissal of prayers 3 – 5, and for counter-application prayers A and B to be granted with costs, including the costs of three counsel. In addition, counsel asked for the costs reserved by Twala, J on 24 August 2018.

#### The Premier’s case

- [77] Counsel for the Premier opened by referring to section 139 of the Constitution, and sections 135, 139, and 141(2) of the MFMA. He stressed that the issue concerning Emfuleni’s non-payment of the debt owed to Eskom was being managed in terms of these sections. He referred particularly to section 157 of the MFMA to underscore the point that the municipal

financial recovery service forms part of and functions within the National Treasury; and that clearly National Government was already involved in the process.

[78] He submitted that the financial recovery plan has in fact been prepared and was in the process of being discussed with relevant stakeholders, ultimately to be submitted to amongst others the MEC for Finance in the Province for approval. He submitted that Eskom knew that this was the path along which the issue concerning Emfuleni was following and it was therefore inappropriate of Eskom to have embarked upon its decision to interrupt the supply of electricity.

[79] He submitted that, so far as pertains the 1<sup>st</sup> applicant, it was unnecessary for it to have joined the Premier since no case at all is made out in their founding papers against the Premier. He submitted that the high watermark of the 1<sup>st</sup> applicant's case was the argument that the Premier did not properly and fully appraise the public of the steps taken to address Emfuleni's debt. On his submission that does not aspire to a cause of action, and even if the Premier ought to have been joined for his interest, there was no basis upon which the 1<sup>st</sup> applicant could have asked for costs against the Premier. He accordingly asked that the application against the Premier be dismissed, and that the costs of the Premier be borne by the 1<sup>st</sup> applicant and Eskom jointly and severally.

#### Replying submissions

#### Applicants' reply

[80] The 1<sup>st</sup> applicant submitted that Eskom's attack on 1<sup>st</sup> applicant's lack of a *prima facie* right was unsound. All the 1<sup>st</sup> applicant need show was a right which, if it was not protected by an interdict, would result in harm flowing to the 1<sup>st</sup> applicant. As to Eskom's asserted object to be attained by the interruption of the electricity, he disputed that this was to arrest the spiralling debt. He submitted that Eskom took the decision to interrupt electricity supply

solely to attempt to recover long-outstanding historical debt, and the inability to resolve the dispute in that regard.

- [81] He submitted that all the alternative steps had the potential of resolving the dispute. Yet Eskom did not take the judgment against Emfuleni in its favour any further. In any event, it appears also that there are other steps that are available under section 139 of the Constitution and section 139 of the MFMA that can be taken to resolve the dispute concerning the outstanding debt, but that did not involve the drastic decision of interrupting electricity supply. He stressed that the consequences of the failure of an organ of state and a sphere of government to resolve a dispute should not be visited upon innocent citizenry.
- [82] Concerning Emfuleni, he submitted that the local authority was integrally involved in the litigation and could not avoid responsibility for its failure to pay its debt to Eskom by joining the applicants in seeking relief against Eskom. He submitted that Emfuleni was the direct cause of the threatened infringement of the applicants' constitutional rights and that therefore, if a costs order were made, at this stage, it should be made against Emfuleni.
- [83] Concerning the costs reserved on 24 August 2018, he referred to the court order and particularly paragraph 5, in terms of which the court indulged the parties and directed that the matter was to be enrolled for hearing on 24 August 2018. It was on that basis that all the parties attended court on that date. It was his submission that the costs that were reserved on 31 July 2018 and those that were reserved on 24 August 2018 ought to be directed to be costs in the cause.
- [84] However, the 1<sup>st</sup> applicant did seek costs on a punitive scale in respect of the appearance on 20 August 2018 when costs were reserved. That concerned case number 28716/2018 and the appearance which was brought about by the cutting of the 1<sup>st</sup> applicant's electricity by Emfuleni. Concerning the counterclaim prayer C by Emfuleni against the 1<sup>st</sup> applicant counsel submitted that if the claim is not struck off the roll for lack of urgency, then it is to be postponed in any event for factual disputes; the 1<sup>st</sup> applicant was entitled to a costs order

against Emfuleni brought about by such a postponement, on the basis that counterclaim prayer C should never have been brought in the first place.

- [85] He submitted that a counterclaim had to be judged for its own urgency, and could not rely on the urgency of the claim in convention, on the strength of *Luster Products v Magic Styles*.<sup>8</sup> Concerning the Premier, counsel submitted that the court should not take cognisance of what counsel stated from the Bar concerning the state of the recovery plan, as it was not on the affidavits. He submitted that there was no basis upon which to conclude that the recovery plan would be accepted and, indeed, no recovery plan was placed before the court.
- [86] Counsel made common cause with counsel for the 2<sup>nd</sup> to 4<sup>th</sup> applicants in asking that the court's oversight ought to be invoked on the back of an order which the court should make under section 41(4) of the Constitution, by referring the matter back to the organs of state involved. He submitted that the Premier was obliged to have been joined, and if a costs order is made at this stage, it should be against all of the respondents including the Premier, particularly since the Premier's own role remains unclear in the process under section 139 of the Constitution that had been embarked upon.
- [87] Concerning whether or not any costs order should be made on the application at this time, he gave notice that the 1<sup>st</sup> applicant had changed its stance; it was no longer that costs should be in the cause, but rather that the costs should be paid by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents jointly and severally (including the costs of two counsel), on the basis that the court hearing the Part B application would not be in a better position to consider the question of costs than this court. He submitted too that in fact Part B of the application may never be reached.
- [88] For the 2<sup>nd</sup> to 4<sup>th</sup> applicants, counsel contested Eskom's submission that the applicants had not shown a *prima facie* right. He typified Eskom's argument as being: we have a power to

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<sup>8</sup> 1979 (3) SA 13 (SCA) at paragraph [21].

cut; we are permitted to cut in terms of the licence for non-compliance; our power to cut prevails despite the catastrophic consequences.

- [89] Counsel submitted that this approach offended the conduit principle referred to in Joseph; it offends the constraints on the exercise of a public power in terms of which all decisions must be reasonable and also rational; Eskom is not permitted to delink the consequences, catastrophic as they are, from its asserted objective in terminating electricity supply, which is not to supply electricity free of charge.
- [90] Counsel submitted that the applicants' case is essentially that they are asking for continued performance by Eskom of what they had been receiving before. Counsel submitted that the applicants' right is to prevent a retrogressive impact by Eskom's decision on socio-economic rights, including the right to electricity supply, which the applicants had in fact been enjoying. Counsel relied on *Mkontwana v Nelson Mandela Metropolitan Municipality and Another*; *Bissett and Others v Buffalo City Municipality and Others*; *Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others* (*KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae*)<sup>9</sup> in this regard.
- [91] Counsel submitted that Joseph made it clear that there was in fact an obligation to supply electricity resting upon not the contractual party in that case (the local authority), but in fact on City Power which was a different entity. By parity of reasoning, so went the argument, Eskom owes the applicants a duty not to invade their rights by adopting retrogressive measures. Concerning Eskom's reliance on *Outa*, counsel stressed that *Outa* specifically concluded that it was not necessary to fashion a new test for an interim interdict. With reference to paragraph [47] of *Outa*, counsel submitted that in that matter there was no claim of an impact on rights that the applicants had been enjoying, as is the case here.
- [92] As to the Eskom submission that it had no alternative but to cut the electricity supply, counsel submitted that on the facts that contention relied on saving the national business of

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<sup>9</sup> [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

Eskom; however, saving the national business, submitted counsel, had nothing to do with the particulars of this case. This is because the potential loss if Eskom were to be interdicted temporarily is small in the context of the national perspective. But, submitted counsel, no matter how desperate Eskom's position was, there is no basis upon which innocent parties had to suffer catastrophic consequences. Counsel referred to page 596 where MEC Creecy said expressly that there was a recovery plan in place.

- [93] Counsel submitted that courts are not permitted to resort to a jurisprudence of exasperation, because in fact Eskom had not properly considered other options. Here counsel referred to the letter of MEC Creecy. Counsel referred also to the 6 March 2018 order at page 586 and in particular paragraph 1.3, in terms of which no rights of Eskom were being waived. In terms of paragraph 2.1 of that order, Emfuleni had to pay for the electricity consumption going forward.
- [94] Counsel submitted that s.40 of the Constitution and the failure of Eskom to have discharged its obligations under Chapter 3 opened the door to the court making an order under s.172(1)(b) of the Constitution, without having to decide whether or not the applicants had independently of this Chapter, established a *prima facie* right. Counsel referred in this regard to paragraph 97 of *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another*.<sup>10</sup>
- [95] The question of making a direct payment order to interdict not to interrupt electricity supply was raised with counsel. After some debate the court intimated and ultimately ordered the parties to submit further written submissions on the power and practicality, under s.172 of the Constitution, of making a direct payment order.
- [96] For the 5<sup>th</sup> to 8<sup>th</sup> applicants, counsel was not supportive of a direct payment order and submitted that the most practical way would be to order Emfuleni to pay direct to Eskom that which the applicants pay to Emfuleni. Otherwise, submitted counsel, the only

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<sup>10</sup> (CCT40/09) [2009] ZACC 32; 2010 (2) SA 415 (CC) ; 2010 (3) BCLR 177 (CC) (14 October 2009).

alternative would be to direct the applicants to pay Eskom direct in respect of the full amount raised by Emfuleni on the applicants. Counsel submitted that ultimately the 5<sup>th</sup> to 8<sup>th</sup> applicants asked for a temporary interdict against Eskom, and for costs to be in the cause. Alternatively, counsel submitted that if a different costs order were made in favour of the other applicants, the 5<sup>th</sup> to 8<sup>th</sup> applicants asked that the same order to be made in their favour.

#### Eskom's answer to Emfuleni's counter-application

- [97] Counsel submitted that ss.152 and 153 of the MFMA, and s.41(3) of the Constitution, all of them relating to inter-governmental disputes, have no application in this matter because, as counsel submitted in main argument, there was no "dispute" as there envisaged. Counsel referred to Emfuleni's replying affidavit, pointing out that it has never been the case of Emfuleni that there was such a dispute. Indeed, Eskom has exhausted all of the remedies available to it against Emfuleni; and Eskom has approached Nersa as well as government. This was to no avail.
- [98] Counsel submitted that the actions under the IGR Act envisage a different path to that which applies when there is governmental interference in terms of s.139 of the MFMA. In the case of the IGR Act, the declaration of a dispute is a prerequisite. Counsel submitted that Emfuleni plainly did not employ ss.151, 152 and 153 of the MFMA. Ultimately, submitted counsel, Emfuleni's counter-application cannot succeed and must be refused with costs.
- [99] Concerning the costs reserved on 24 August 2018, counsel submitted that the matter had not been improperly enrolled. It had been postponed by agreement and the costs there reserved should be costs in the cause of the Part A relief. And, following upon that, counsel submitted that the costs award in respect of Part A should be deferred for determination under Part B.

#### Emfuleni's reply

- [100] Counsel submitted with reference to page 742 that the Premier's affidavit clearly illustrates the existence of a dispute. He submitted that the IGR Act applies and clearly Eskom has a dispute with another organ of state. With reference to direct payment relief, counsel submitted that the applicants are now ambushing Emfuleni by asking for this, and that this was unfair. Counsel submitted that, as regards the costs that had been reserved on 24 August 2018, paragraphs 6 and 7 of the order is a prerequisite for the application of paragraph 5 of the order relating to enrolment. There was no point in enrolling the matter if the affidavits referred to in paragraphs 6 and 7 had not been first been provided.
- [101] Counsel submitted that the Deputy Judge President was approached and he then replied on 24 August 2018 and offered a meeting on 31 August 2018. Thereafter the 5<sup>th</sup> to 8<sup>th</sup> applicants filed their papers and needed to be joined. Consolidation was then raised. That being so, there was no need at all for the 1<sup>st</sup> applicant to have enrolled the matter for the 24<sup>th</sup> August 2018. The enrolment could only have served a purpose if the pleadings (in the form of the affidavits) had been filed. That being so, Emfuleni wanted the costs of the hearing on 24 August 2018 since they were forced to come to court.
- [102] Concerning counterclaim prayer B, counsel submitted that Eskom's argument that Emfuleni had not made out a case for relief under ss.40 and 41 of the Constitution, and that in fact it never refers to s.139 of the Constitution ("*provincial intervention in local government*"), was wrong. Counsel referred to page 618 paragraphs 11 and 12 and stressed that the court had an affidavit from the Premier who says that he was acting in terms of s.139. Ms Creecy also says in her letter that that section was being invoked. They, that is the Premier and Ms Creecy, were communicating to Eskom that Eskom had to act in accordance with the inter-governmental obligations resting upon it.
- [103] Counsel referred to page 648 and submitted that the Minister of Finance confirmed that he had received the recovery plan, and was expecting cooperation from Eskom. Counsel

submitted that the crisis had clearly been registered at National Governmental level, and that the court could not ignore what is at pages 618 paragraph 11 to page 619 paragraph 14. Counsel submitted that accordingly a process under s.139 of the Constitution is in place and Eskom was at all times aware of it. Counsel submitted that the true picture was that Eskom had deliberately decided to terminate electricity supply in the face of the inter-governmental actions that were being taken at the time.

- [104] Concerning direct payment relief, counsel submitted that the applicants had either abandoned such relief or conceded that it was inappropriate. He submitted that the constitutional process that had been invoked was to produce a rescue plan. This involved the finances of Emfuleni, including its revenue. This includes revenue from the applicants. For a court to cut off that revenue stream, would have the court interfere with the process that was already underway to address the crisis; it would also interfere with the separation of powers. Counsel submitted that any direct payment relief would involve an accounting problem for Emfuleni.

#### The Premier's reply

- [105] Counsel for the Premier relied on the process already in place between the organs of state. He denied that a dispute was not in place and referred in this regard to the matter of *Durban City Council v Minister of Labour*,<sup>11</sup> and the definition of "dispute" in that matter.

#### Discussion: introduction

- [106] A convenient place to start the discussion is with what these applicants ask of this court. They ask for an interim interdict pending a final administrative law review. An interim interdict is not a right; it is a remedy. And although every right may not have a remedy, certainly a prerequisite for an entitlement to a remedy is a right. This is relevant particularly

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<sup>11</sup> 1948 (1) SA 220.

here where it would appear from the papers and the submissions that organs of state might not have complied with their co-operative government obligations under the Constitution.

[107] If that is so, then the question arises whether this court should engage at all on the parties' respective rights and duties, or whether it should not under s.41(4) of the Constitution decline to deal with the matter and instead refer the matter back to the organs of state involved. If the court finds that there is a "dispute" as envisaged there in this case, and if the court were to refer the dispute back to the organs of state, that would necessarily imply that the court would in effect have declined even to consider the application for interim – not final – relief.

[108] And it would also imply leaving intact the contentious conditions that have pertained in the five months or so leading up to this application, including the intended interruption of bulk electricity supply to Emfuleni, resulting in the shut-down of the applicants' businesses without having considered whether they have made out a case for a temporary restraint. That takes one back to what a court should do if it were to resolve to refer a dispute back to organs of state under s.41(4) of the Constitution.

[109] One area in which an order under that section might appropriately feature in this case, is in the realm of an appropriate event to which an interim order, if it is granted, should be pended: either an appropriate event in the s.139 of MFMA process, or a final review under PAJA. Put differently, an order under s.41(4) fits appropriately in the relief section of this case, still leaving the applicants with the burden of making out a case for interim relief.

[110] But there is another, independent reason, why the applicants should be required independently to make out a case, even if an order under s.41(4) issues. The Constitutional Court stressed in *Outa* that given the separation of powers that is the leitmotif of the Constitution, even interim interdicts should not be granted against state organs unless a strong case for them is made out. This would suggest that even in those cases where a court is asked by an applicant to invoke its powers under s.41(4) of the Constitution, which could

arguably suggest that the court might not need to engage upon the merits of the applicant's case at all, then still a court will not grant restraining relief against an organ of state without the applicant first having established the four Setlogelo requirements.

- [111] But compliance with the s.41 obligations may be also pertinent in considering the rationality and reasonableness of Eskom's interruption decision for the purposes of PAJA, a matter further developed below. It is thus inevitable to examine whether the applicants have made out a case for an interim interdict.

The applicant's prima facie rights, generally

- [112] A prima facie right, although open to some doubt, is the first requirement.<sup>12</sup> What are the applicants' asserted prima facie rights? The 1<sup>st</sup> applicant argued for a prima facie right to a successful review under PAJA (and under the principle of legality) of Eskom's decision, principally on the basis that there were less drastic alternative measures that Eskom had failed to consider. The case made out in its founding papers is not explicitly based on PAJA. There its case really falls into two streams: a case built on an asserted right against both Eskom and Emfuleni to be supplied with electricity timeously and consistently; and a right that the infighting between Eskom and Emfuleni should not prejudice it. In neither case is there a reference to a specific statute.

- [113] It is arguable that reliance on a right to just administrative action under s.33 of the Constitution, as embodied in PAJA, has as its precondition the existence of another right, given the definition of "administrative action": a decision which "adversely affects the rights of any person". Only if such a decision will have been taken, will administrative action have occurred, and only then "any person" acquires under s.6 of PAJA the right to review such

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<sup>12</sup> The other three are a reasonable apprehension of irreparable and imminent harm to the right if the interdict is not granted, the balance of convenience must favour the grant of the interdict, and the applicant must have no other remedy.

administrative action. In other words, first a right that has been adversely affected by the decision, and then (another) right comes into existence – to review the decision.<sup>13</sup>

[114] The obverse proposition is that the right to just administrative action under PAJA avails whenever the right to just administrative action has been “adversely affected”, despite the apparent circuitry.<sup>14</sup> If the applicants do have rights, other than their PAJA just administrative action rights, that will be adversely affected by the interruption decision, this conceptual difference will not be relevant here. Then - provided that such other right has been adversely affected by the decision to interrupt - the applicants have PAJA rights to rationality and reasonableness reviews.

[115] The 2<sup>nd</sup> to 4<sup>th</sup> applicants also argued for PAJA rights, but they added three others: the right to electricity; a collection of constitutional rights (to dignity, property, freedom of trade and occupation, administrative fairness and the rule of law); and the right to insist that Eskom complies with its obligations of cooperative government. In their founding affidavit their case was based only on PAJA, and on a collection of other fundamental constitutional rights, coupled with the unarticulated premise of an entitlement directly to rely on these, despite the principle of subsidiarity. In particular, there was no reliance there, either explicitly or by necessary implication, on a right directly to enforce s.41(4) of the Constitution as against Eskom and Emfuleni.

[116] And the 5<sup>th</sup> to 8<sup>th</sup> applicants argued for a right to electricity, and for the s.22 and 25 constitutional rights. In their pleaded case the 5<sup>th</sup> to 7<sup>th</sup> applicants rely on these asserted rights, but also on “the principle of legality and the provisions of PAJA”. They say that Eskom’s decision is “unfair, unreasonable and irrational.” These applicants, although not identifying s.41 of the Constitution, also say that their rights are being trampled on by Emfuleni, Nersa and the Premier. The 8<sup>th</sup> applicant, whose case started off separately, followed the template laid down by the 5<sup>th</sup> to 7<sup>th</sup> applicants.

<sup>13</sup> See Cora Hoexter, *Administrative Law in South Africa*, 2<sup>nd</sup> ed, p224, fn 403.

<sup>14</sup> *Transnet Ltd v Goodman Brothers (Pty) Ltd*, 2001(1) SA 853 (SCA).

[117] The aggregation of all these asserted rights makes for a broad sweep and in an application where interim relief only is sought, it seems preferable – if the case can be decided on the basis of only one of them - not to engage on an examination of all the others. After all, the cases have been consolidated and the factual substrate of all the applicants' cases is the same; if one succeeds in showing a *prima facie* right and is granted an interim interdict, then that relief should inure to all.

The applicants' *prima facie* right

[118] The applicants' asserted right to be supplied with electricity by Emfuleni is not disputed. It finds in chapter 7 of the Constitution, in the set of national laws regulating local governance, including the GMFA and Local Government: Municipal Systems Act 32 of 2000, and in their electricity supply agreements with Emfuleni. This right would, it is suggested, comfortably qualify as a "right" in terms of the definition of "administrative action", which if "adversely affected" by Eskom's interruption of bulk supply, thus fulfilling the definition, will invoke the PAJA rights; in turn triggering an examination of whether the Eskom decision was rational and reasonable.

[119] The applicants argued however for a "right" against Eskom to be supplied with electricity which, if adversely affected by Eskom's decision to interrupt bulk supply to Emfuleni, would thus open up PAJA rights in relation to Eskom's decision. Given the fullness of the submissions it is appropriate to deal with this contention.

[120] The principal judgment relied on was *Joseph and Others v City of Johannesburg and Others*<sup>15</sup>, coupled with the principle that retrogressive measures, such as the phasing out or down-scaling of a particular social security scheme or grant, are *prima facie* incompatible with the obligation progressively to realise the right to access to social security and social assistance. Any such reduction or down-scaling will be subject to the courts' careful

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<sup>15</sup> (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) (9 October 2009).

consideration. The notion that retrogressive measures are incompatible with the progressive realisation of a right, such as those envisaged in s.26 and 27 of the Constitution, is still predicated on the prior existence of such a right; see s.26(2) and s.27(2).

[121] What exactly did Joseph decide on this point? In that case the tenants of a building had a contractual relationship with their landlord, and paid it for electricity supply. They were up to date, and thus not in breach of their contract. It can be assumed that the landlord had a contractual obligation in turn to supply them with electricity. The landlord breached that obligation because City Power, the service provider of the local authority, terminated the supply. It did so because the landlord was in breach of its contractual obligation to City Power to pay it for the supply of electricity to the building.

[122] The court described the relationship between City Power, the landlord, and the tenants in this context, as follows:<sup>16</sup>

*"Moreover, in viewing the issues through an entirely contractual lens, the High Court misdirected itself insofar as it failed to take account of the link between the contractual relationship between Mr Nel (the landlord) and the applicants on the one hand, and that between Mr Nel and City Power on the other. Mr Nel concluded a contract as a "customer" with City Power for the sole purpose of facilitating the supply of electricity to tenants in his building. He was a conduit. In supplying electricity to Ennerdale Mansions, City Power knew that it was providing electricity to tenants living in the building. It is therefore, in my view, artificial to think of the contractual relationship between Mr Nel and City Power as being unrelated to the benefits that accrued to the applicants under this contract."*

[123] The question that arose was whether the tenants could rely on PAJA as against City Power or the local authority despite not being in contractual privity with City Power or the local authority. The court examined specifically whether the tenants had a right which was adversely affected by City Power's decision to terminate the electricity supply. Skweyiya J for

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<sup>16</sup> At [22]

the court was unpersuaded that any contractual rights which the tenants held against their landlord were adversely affected by City Power's decision to terminate the electricity supply.<sup>17</sup> The court defined the real issue as being whether the broader constitutional relationship that exists between a public service provider and the members of the local community gives rise to rights that could invoke the application of PAJA.<sup>18</sup>

[124] It held, relying on *Mkontwana*, that a local authority had a public duty to provide water and electricity to the residents in its area. It held that, *"Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society."*<sup>19</sup> It founded that duty on s.152 and 153 of the Constitution, and on the Systems Act.

[125] The court went further. It relied on *Walele v City of Cape Town and Others*<sup>20</sup> for the proposition that "right" for the purposes of s.3(1) of PAJA must be interpreted "generously"; and on *Premier, Mpumalanga, and Another v Executive Committee, Association of State-Aided Schools, Eastern Transvaal*<sup>21</sup> for the proposition that a notion of "right" broader than that used in private law may well be appropriate.<sup>22</sup>

[126] The court held that the corollary of the local authority's duty to provide electricity, was a concomitant right on the part of the residents to receive the electricity.<sup>23</sup> The Joseph court then concluded:<sup>24</sup>

*"In my view, proper regard to the import of the right to administrative justice in our constitutional democracy confirms the need for an interpretation of rights under section 3(1) of PAJA that makes clear that the notion of "rights" includes not only vested, private law rights but also legal entitlements that have their basis in the constitutional and statutory*

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<sup>17</sup> At [32]

<sup>18</sup> At [33]

<sup>19</sup> At [34]

<sup>20</sup> [2008] ZACC 11; 2008 (6) SA 129 (CC); 2008 (11) BCLR 1067 (CC)

<sup>21</sup> [1998] ZACC 20; 1999 (2) SA 91 (CC); 1999 (2) BCLR 151 (CC)

<sup>22</sup> At [41]

<sup>23</sup> At [39]

<sup>24</sup> At [42]

*obligations of government. The preamble of PAJA gives expression to the role of administrative justice and provides that the objectives of PAJA are inter alia to "promote an efficient administration and good governance" and to "create a culture of accountability, openness and transparency in the public administration or in the exercise of a public power or the performance of a public function". These objectives give expression to the founding values in section 1 of the Constitution, namely that South Africa is founded on the rule of law and on principles of democratic government to ensure accountability, responsiveness and openness."*

- [127] Applying this reasoning to the present matter leads, it is suggested, to the following. Eskom is an organ of state. It performs a public function by exercising the powers and performing the duties set out in its licence and in the ERA.<sup>25</sup> Eskom knows that the electricity that it supplies to Emfuleni is not all consumed by Emfuleni, but is passed through (reticulated) to private consumers; that is expressly laid out in s.27(d), (f), and (i) of the very Act (the ERA) under which it is licenced to supply electricity to Emfuleni.
- [128] In terms of the same Act, Eskom has a right to terminate supply of electricity to its customer if the customer has contravened its payment conditions; in this case, if Emfuleni has not paid it.<sup>26</sup> It was held in *Resilient* that Eskom's entitlement to do this is subject to the constraints of just administrative action as envisaged in s.33 of the Constitution, as have percolated down into PAJA. That implies at least a rationality threshold, but likely too a reasonableness threshold.<sup>27</sup>
- [129] Undoubtedly Emfuleni has a right, deriving from s.21(5)(c) of the ERA as interpreted in the light of Eskom's status as an organ of state, to insist that Eskom acts in accordance with the constitutional constraints on the exercise of public power which, if adversely affected by

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<sup>25</sup> S.23(1) of the ERA.

<sup>26</sup> S.21(5)(c); *Rademan v Mqhaka Local Authority*, 2013 (4) SA 225 (CC) at [36]; *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd and others*, Case no 2018/11316, Gauteng Division, Johannesburg (unreported, delivered 14 September 2018) at [69] ff.

<sup>27</sup> S.6(2)(f)(iii); s.6(2)(h) of PAJA.

Eskom's decision, would entitle it to invoke PAJA rights against Eskom. But do the applicants, as retail consumers next in line, have a comparable right, even if in an expanded sense of that word? It is suggested that they do, for the following reasons.

- [130] First, by parity of reasoning with Joseph, there exists a "special cluster of relationships" between Eskom, Emfuleni, and retail consumers of electricity such as the applicants. Eskom supplies electricity to Emfuleni, knowing full well that Emfuleni reticulates it through to the applicants. The applicants pay Emfuleni, knowing full well that Emfuleni, having deducted its margin, on-pays those very funds to Eskom for that very supply of electricity. Emfuleni is thus in the Joseph sense a mere conduit: it passes on from Eskom upstream the electricity downstream to the applicants (on the way it retains some of it for its other consumers, and for itself); and it passes back upstream the applicants' payment (on the way it retains some of it, its margin, for itself).
- [131] Second, Eskom has a public law duty – founded in the ERA and its licence – to supply electricity to Emfuleni; and in turn, Emfuleni has a public law duty – founded in the Constitution and the Systems Act – to on-supply that electricity on to the applicants.
- [132] Third, Emfuleni has, as a corollary to the public law duty that Eskom owes it to supply the electricity to it, the right to enforce against Eskom the right to just administrative action by Eskom in Eskom's supply of electricity to it.
- [133] Fourth, Emfuleni has a public law duty to supply electricity to the applicants; and the applicants have, as a corollary to the public duty that Emfuleni owes them, the right to enforce against Emfuleni the right to just administrative action by Emfuleni in its supply of electricity to them.
- [134] Fifth, the concept of a "right" in this scenario is not to be understood in the usual circumscribed private law sense. It has a wider more generous meaning here, in a public law sense. And as has been seen, public law imposes a duty on each supplier of electricity top down; and reciprocally proper discharge of that duty can be enforced upwards.

- [135] In these circumstances it would be incongruous if the ultimate beneficiary of and payer for the electricity stream downwards did not have the right to enforce due performance by the initiating supplier of the electricity of a public law duty owed by it to the conduit of the electricity and the payment for it.
- [136] Assuming therefore, without deciding, that the applicants do not have a right directly enforceable against Eskom to supply of electricity, it is suggested that they have at least the right directly enforceable against Eskom, in a broad public law sense, to insist that Eskom discharges its public law duty of the supply of electricity downstream to Emfuleni, duly and properly in a manner which, in the language of Joseph,<sup>28</sup> accords with constitutional values and is responsible, respectful and fair. That right, if adversely affected by the interruption decision, results in the decision to interrupt constituting “administrative action”, triggering the entitlement on the part of the applicants to rely on the PAJA rights to just administrative action.
- [137] This conclusion fits Eskom’s own view of its ultimate obligations. Although Eskom submitted that the applicants had no direct right against Eskom to electricity, it did accept that the applicants had the right at least to insist that Eskom complies with the tenets of just administrative action before terminating the supply. Its contention was that, as a fact, it did comply with those tenets.
- [138] Will the applicants’ rights be adversely affected by the interruption decision? The consequences of the decision is, without being hyperbolic, to shut-down the applicants’ businesses. Their rights will become meaningless and devoid of real content, and this qualifies as “a direct, external legal effect”.

#### Rationality and reasonableness

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<sup>28</sup> Joseph, [45] to [47].

- [139] The decision to interrupt is thus “administrative action”, and the applicants are entitled to challenge it under the PAJA standard. Does the Eskom decision to terminate comply with tenets of rationality and reasonableness? If the objective was to recover arrear debt, likely not.<sup>29</sup> It may be tested this way. Emfuleni now owes Eskom in excess of R1 billion. If the electricity supply is terminated, the applicants all envisage severe job losses and an economic assault on the very viability of their businesses.
- [140] The applicants are consumers who actually pay for their electricity. It would seem to follow axiomatically that Emfuleni’s ability to collect arrear electricity debts from its direct consumers is dependent on the consumers actually owing Emfuleni a debt in respect of past consumption of electricity. And the applicants do not. But more important: there is just no suggestion that terminating the supply of electricity in the manner suggested would result in R1billion being recovered. The obverse, that it will not make one iota of a difference, seems self-evident.
- [141] Eskom contends that no case for either unreasonable or irrational conduct has been established against it. It says that it has done all it could to try exact payment from Emfuleni: it has sued and taken judgment against it, to no avail; it has contacted the Premier to become involved, but that has not produced satisfactory results either. The Premier and Emfuleni drag their heels and do not appear appreciative of the gravity of Eskom’s problems.
- [142] Its objective in terminating supply in the manner it intends, if permitted, is not to coerce Emfuleni into paying all of its mammoth arrears. Its objective is simply to stop supplying Emfuleni with free electricity. In examining the traction of this proposition, it is not necessary to differentiate between reasonableness and rationality for the purposes of PAJA. Eskom drew no such distinction, and the 2<sup>nd</sup> to 4<sup>th</sup> fourth applicants argued that none existed.

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<sup>29</sup> Joseph at [53].

- [143] The enquiry must therefore turn to whether Eskom's stated purpose in taking the decision, that to terminate electricity supply in the current circumstances is aimed at preventing Eskom from having to supply free electricity to Emfuleni, is rationally connected: to the result that will follow (s.6(2)(f)(ii)(aa)); or to the purpose for which the power to terminate (in the ERA) was given (s.6(2)(f)(ii)(bb)). The 1<sup>st</sup> applicant must establish either of these two. Or it must establish that the decision to terminate was so unreasonable that no reasonable person would have taken it (s.6(2)(h)).
- [144] It is necessary to reflect for a moment on Eskom's position. Under the ERA, a customer is defined as someone who "purchases" electricity or a service related thereto. The objects of the Act include to achieve sustainable electricity supply infrastructure in South Africa (s.2(a)); it includes to ensure that the interests and needs of both present and future consumers and end users are safeguarded, having regard to the efficiency and long-term sustainability of the electricity supply industry (s.2(b)); and it includes to facilitate investment in the electricity supply industry (s.2(c)).
- [145] The Regulator may include in any licence conditions relating to the quality of electricity supply and service (s.14(1)(j)); and relating to the need to maintain facilities in a fully operational condition (s.14(1)(x)). In terms of the Act, electricity infrastructure does not, as would be the case under the common law, accede to the land on which it is situated (s.23(1)). And such infrastructure may not be attached in execution of any debt, nor may it be subject to the common law landlord's hypothec for rent (s.23(2)).
- [146] Eskom is not part of a state department. It is, in terms of the Eskom Conversion Act 13 of 2001, an incorporated public company with a share capital and a shareholder. Other than by way of loans and other forms of financial assistance, monies are not appropriated from fiscus on an annual basis to enable it to survive financially, and discharge its public obligation as the only public supplier of electricity in South Africa. Eskom thus has to be operated on a financially secure basis. It must be able to raise finances off its own balance sheet, and upon its

own security, both here and in the international market. It therefore cannot, at least not on a meaningful scale, supply limitless free electricity into the future.

[147] Eskom's stated purpose therefore cannot be faulted. Is the termination decision and its consequence rationally connected to that purpose? Or is it so unreasonable that no reasonable person would so have resolved (s.6(2)(h))?

[148] The context in which the decision was taken really flows from the background that was set out above. From that context it is evident that there are only two sources of funds on which Eskom can rely for payment in respect of on-going supply of electricity to Emfuleni. The one is Emfuleni's paying consumers, and the other is, ultimately, National Treasury. And since in this country civilized society cannot exist and the economy cannot function without Eskom remaining economically viable, National Treasury and ultimately National Government must inevitably step in when and where local authorities fail; that is what the Constitution expressly envisages.<sup>30</sup>

[149] What are the likely consequences if Eskom were to interrupt bulk supply? The applicants' affidavits tell one. Most of the applicants, perhaps not the eighth applicant, cannot sustain their operations, and will perforce shut down, causing job-losses in a country where judicial cognisance may be taken of the high unemployment rate. Eskom's riposte is not to join issue with this evidence; its response is that that consequence should be laid at the door of Emfuleni. That may be so, but it is no answer to the problem. The point is, the effect of the interruption decision will be not only to destroy one of two sources of funds for the bulk electricity, but also to destroy viable business and job opportunities.

[150] Moreover, Eskom's evidence does not suggest that there is any hope that the decision will get Emfuleni to pay. Nor is it rationally comprehensible why it should. If the businesses of large, paying consumers of electricity are destroyed, how would Emfuleni be better positioned to pay?

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<sup>30</sup> S.139(7).

- [151] The problem clearly lies elsewhere; and the likely place is with the financial mismanagement at Emfuleni, where payment arrangements deliberately entered into are not honoured. And that leads on to the next consideration. The only other source of funds for the bulk electricity, National Treasury, have actually become involved in attempting to resolve the admitted financial crisis. Both Provincial and National Government have stepped into the breach, and had statutorily stepped into the breach by the time Eskom decided on 20 July 2018 to implement its interruption decision. GPG had invoked s.139 of the Constitution, and of the MFMA. That implies, given the role and function of the Municipal Financial Recovery Service under s.157 of the MFMA, the direct participation of National Treasury.
- [152] Eskom's response, as already alluded to above, was that it could not wait any longer. But wait no longer for what? In this case, different from the facts in Resilient, the applicants have shown that given the nature of their businesses (at least the first seven applicants), they could not even survive a lesser form of staggered load-shedding. They had expressly informed Eskom of this fact long before the interruption decision was taken. The interruption decision could not, reasonably or rationally speaking, given Emfuleni's admitted financial crisis, bring it the payment Eskom suggested it would.
- [153] It follows that, at a prima facie level, the applicants have shown that the interruption decision is reviewable under PAJA.

Irreparable, balance of convenience and other remedy?

- [154] If the interruption is proceeded with, the applicants, and potentially other consumers in similar positions, will shut down. That will render their review right moot. Yet Eskom will not be destroyed if the interruption decision is not implemented. It may have to wait before National Treasury devises a recovery plan that will ensure payment for it, but that is a far lesser fate than awaits the applicants. And the applicants have no alternative than that to seek a restraint on Eskom's right to interrupt the supply of electricity.

## Remedy

- [155] There is no contestation that in this case the court is called upon to decide a “constitutional matter” as envisaged in terms of s.172 of the Constitution. This court accordingly “may make any order that is just and equitable.”
- [156] The intergovernmental nature of the differing positions of Eskom on the one hand and National Treasury, the GPG and Emfuleni on the other, has been referred to above. Is this a “dispute” between them for purposes of s.41(3) of the Constitution? Eskom submits, relying on the unreported judgement in the Free State High Court, in *Ngwathe Local Municipality v Eskom Holdings SOC Ltd and others*,<sup>31 32</sup> that in fact there is no dispute between them: Emfuleni admits that it owes the money; it simply neglects to pay it.
- [157] The facts in *Ngwathe* were very different from here. There National Treasury and Provincial Government had not (yet) invoked s.139 of the Constitution; in fact, Eskom applied for an order compelling the Provincial Government to do so. The court declined the relief sought on the basis that the Premier had not been joined.<sup>33</sup> Further, the *Ngwathe* court was able to find that the local authority, every time Eskom threatened drastic action, would start implementing a proper debt collection system.<sup>34</sup>
- [158] Eskom’s argument cannot be upheld. The notion that no dispute exists between creditor and debtor where the debtor admits the quantum of indebtedness and is simply not paying, derives from private law, specifically in the context of the interpretation of arbitration agreements that refer a “dispute” to arbitration. The creditor would sue for its money, only to be met by a recalcitrant debtor employing the delaying tactic of pleading a stay of proceedings on the basis that the dispute has been referred to arbitration. The courts have

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<sup>31</sup> Case no 4425/2014, delivered on 28 May 2018.

<sup>32</sup> At [25] ff, per Jordaan, J.

<sup>33</sup> At [40]

<sup>34</sup> At [33]

been dismissive of such a defence, precisely on the basis that there was no dispute to be referred to arbitration.

[159] Here there are not only more parties involved (National Treasury and the GPG as well), but the “dispute” is also more multi-faceted than simply whether or not the amounts Eskom claims are in fact owing. It concerns how to resolve the indebtedness, given that Emfuleni is not paying, ostensibly cannot pay, and admittedly has what the Constitution has described<sup>35</sup> as a “crisis in its financial affairs”, whatever the cause. The GPG has embarked on the constitutionally and statutorily envisaged route, that of procuring an appropriate recovery plan for Emfuleni. But, as pointed out above, Eskom was not prepared to wait. This attitude of Eskom is the kernel of the dispute.

[160] It follows that a “dispute” exists for the purposes of s.41(3) of the Constitution. Mechanisms and procedures have been provided for purposes of settling the dispute. These mechanisms are embodied in, amongst others, s.139 of the Constitution; s.35, s.40, s.41, and s.45 of the IGR Act; and s.44 and s.139 of MFMA. The GPG became involved some five months ago. There was some dispute at the Bar as to whether a recovery plan had been prepared by the time the application was argued, to be true. But no-one suggests that that route will not, if only eventually, open access by Eskom to National Treasury intervention.

[161] In these circumstances the organs of state have not made every reasonable effort to settle the dispute by means of these mechanisms and procedures, and accordingly the court has the power under s.41(4) to refer the dispute back to the organs of state involved and should exercise it.

[162] If Eskom is then be interdicted on a temporary basis from interrupting bulk supply of electricity to Emfuleni, and if the dispute between the organs of state is then to be referred back to them for resolution, two questions arise: what event should terminate the

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<sup>35</sup> S.139

application of the interim interdict, and what should happen to the applicants' electricity payments, given that they do not – as a fact - pass through Emfuleni upwards to Eskom?

- [163] As to the first question: the applicants apply for interim relief pending a final review of Eskom's decision. But since the conclusion is that the dispute should be referred back to the state organs for resolution, a final review is not envisaged; unless of course the reference back fails. The interim interdict should therefore pend the resolution of the dispute by the state organs, but within a limited time-frame. Six months is a reasonable time, given the background.
- [164] As to the second question, the parties have made further written submissions, for which the court is grateful. The 1<sup>st</sup> applicant associates itself with the 2<sup>nd</sup> to 4<sup>th</sup> applicants on the issue of the legal competence of direct payment relief. On the issue of the practicality of such an order, the 1<sup>st</sup> applicant explains that its tariff to Emfuleni does not include a mark-up for Emfuleni; the 1<sup>st</sup> applicant thus pays what it calls "the Eskom tariff", being tariff 8.1. If direct payment were to be ordered, the 1<sup>st</sup> applicant asks that an order in the following terms also issues: "Nothing in this order shall detract from the existing obligations and duties owed by Emfuleni Municipality to the applicants in terms, inter alia, of the licence granted to the Emfuleni Municipality by the National Energy Regulator, or in terms of any other law."
- [165] The 2<sup>nd</sup> to 4<sup>th</sup> applicants submit that in terms of the broad powers availed under s.172 of the Constitution, this court has the power to direct those applicants that pay tariffs that are made up of both the Eskom tariff, and Emfuleni's "municipal portion", to pay the Eskom tariff direct to Eskom, and to continue paying the municipal portion to Emfuleni. They propose the following order in this regard:
- "pending the outcome of Part B of this application, and subject to appropriate oversight by Nersa in the discharge of its statutory obligations pursuant to the judgment of this court, the applicants are authorised to discharge the debts that they incur to Emfuleni Municipality in respect of the ongoing supply of electricity to them, by:

- (a) making payment for electricity consumed at the rate of the Eskom tariff directly to Eskom, and furnishing Emfuleni Municipality with proof of such payments to Eskom;
- (b) continuing to pay the difference between the municipal tariff and the Eskom tariff (i.e. the municipal portion) to the municipality.”

[166] In support of the submission that the court has the power to make such an order, the 2<sup>nd</sup> to 4<sup>th</sup> applicants contend: that the power under s.172 is not dependant on a finding of constitutional invalidity;<sup>36</sup> that the power includes granting relief which is at odds with current statutory arrangements;<sup>37</sup> no legal principle is immune from the just and equitable remedial jurisdiction under s.172;<sup>38</sup> courts are mandated to forge appropriate relief;<sup>39</sup> the court may legitimately leave it to the parties to fashion the internal mechanics of direct payment.<sup>40</sup>

[167] The 5<sup>th</sup> to 8<sup>th</sup> applicants also make common cause with the 2<sup>nd</sup> to 4<sup>th</sup> applicants. They ask that Emfuleni be ordered to render invoices to them reflecting both the Eskom tariff and the Emfuleni mark-up.

[168] Eskom supports the concept that the applicants should be permitted to pay the Eskom tariff direct to Eskom. It submits that the court has the power to make such an order. But it contends that the entire amount, including Emfuleni’s margin, should be paid over to it, and it undertakes then to credit Emfuleni with the full amount. In other words, it will use the Emfuleni margin of the Applicants’ payments in partial discharge of the balance of Emfuleni’s liability for bulk supply. Thus the applicants’ payments will be used in part to pay for electricity used by other consumers in Emfuleni’s municipal area.

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<sup>36</sup> Hoërskool Ermelo at [97].

<sup>37</sup> Electoral Commission v Mhlope [2016] ZACC 15; 2016(5) SA 1 (CC); 2016(8) BCLR 987 (CC) at [130].

<sup>38</sup> Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others 2018(2) SACR 442 (CC) at [77].

<sup>39</sup> President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd 2005(5) SA 3 (CC) at [52].

<sup>40</sup> Ramakatsa and Others v Magashule and Others, 2013 (2) BCLR 202 (CC); [2012] ZACC 31 at [125].

- [169] Emfuleni opposes the notion of direct payment relief. It submits that counsel for the applicant had conceded that they were not entitled to direct payment relief in terms prayers 3 and following, and that the court was bound by that concession. Counsel submitted further that s.12 relief was in any event inappropriate in Part A proceedings.
- [170] Even if there was a concession as submitted (the recollection of the bench is that counsel were simply not pressing for that relief), that cannot preclude a court from making an order under the power conferred in terms of s.172. It is correct that direct payment relief was raised by the court on the second day of the hearing, but the parties were given full opportunity to make further written submissions on the issue.
- [171] It is suggested that the power of a court under s.172(1)(b) of the Constitution cannot be constrained other than by the interests of justice itself. In this case it would unjust and inequitable to require of the applicants to continue paying the Eskom margin to Emfuleni, when Emfuleni does not pay that margin, or all of that margin, over to Eskom. This is particularly so in view of both the applicants and Eskom supporting direct payment relief. But it would not be just and equitable to allow Eskom to use the applicants as a means to obtain payment in respect of electricity consumed by others.
- [172] Emfuleni's counter-application is for relief in terms of s.152(1) of the MFMA (A); an order directing Eskom first to exhaust the alternative dispute resolution procedures under the IGR Act before interrupting bulk electricity supply (B); and for judgment against the 1<sup>st</sup> applicant in the amount of R11m. In view of a reference back to the organs of state, relief in terms of the MFMA is not now appropriate. That prayer should be dismissed. As to prayer B, the order made below does substantively include that relief, but not in the terms sought. In any event, it may yet transpire that the root of the intergovernmental dispute is in fact Emfuleni's own mismanagement, and so it is appropriate at this time simply to reserve those costs. Prayer C cannot be granted for factual disputes.

#### Costs

[173] The submissions concerning costs cover the areas of the costs of this interim application, the costs reserved by Molahleli J on 20 August 2018, the costs reserved by Twala J on 24 August 2018, and the costs of Emfuleni's counter-application. The latter has been dealt with above. Emfuleni caused the urgent passage to court on 20 August 2018, and it should pay those costs on the ordinary scale. Before Twala J the matter could never have been ripe for hearing. Each party should carry its own costs.

### Order

[174] In the circumstances the following order issues:

- (a) The dispute between the four respondents concerning the non-payment by the 2<sup>nd</sup> respondent to the 1<sup>st</sup> respondent for bulk electricity supply and the manner and timing of its resolution given the intervention of the 4<sup>th</sup> respondent is, in terms of s.41(4) of the Constitution, referred back to the respondents for resolution in terms of s.41(3) of the Constitution.
- (b) In the event that the said dispute is not resolved within six months of date of this order, any party may set down this application for the determination of Part B.
- (c) The 1<sup>st</sup> respondent is interdicted from implementing interruptions in electricity supply to the second respondent pending resolution of the aforesaid dispute within six months of date of this order or, if the dispute is not so resolved, pending the outcome of the final determination of Part B of this application, whichever is the earlier.
- (d) For as long as the interim interdict ordered above applies:
  - (i) the applicants are authorised, subject to appropriate oversight by the 3<sup>rd</sup> respondent in the discharge of its statutory obligations pursuant to the judgment of this court, to discharge the debts that they incur to the 2<sup>nd</sup> respondent in respect of the ongoing supply of electricity to them, by:

(aa) making payment directly to the 1<sup>st</sup> respondent for electricity they consume at the rate of the Eskom tariff, and furnishing to the 2<sup>nd</sup> respondent proof of such payments to the 1<sup>st</sup> respondent;

(bb) continuing to pay, in the case of the 2<sup>nd</sup> to 8<sup>th</sup> applicants, the difference between the municipal tariff and the Eskom tariff (i.e. the municipal portion) to the 2<sup>nd</sup> respondent;

(ii) the 2<sup>nd</sup> respondent is directed, in invoicing the 5<sup>th</sup> to 8<sup>th</sup> applicants, to specify separately the Eskom tariff which the 2<sup>nd</sup> respondent would have paid to the 1<sup>st</sup> respondent in respect of the electricity supplied by the 2<sup>nd</sup> respondent to the 5<sup>th</sup> to 8<sup>th</sup> applicants under that invoice, were it not for this order, and the municipal tariff in respect of such electricity;

(iii) the 2<sup>nd</sup> respondent is interdicted from interrupting supply of electricity to the applicants for any reason other than that the applicants will not have complied with their payment obligations as set out in this order;

(iv) the respondents, including the 3<sup>rd</sup> respondent, are directed to do all things necessary and to take all reasonable steps to give effect to this temporary order.

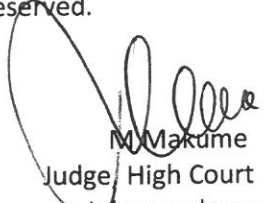
(e) Nothing in this order shall detract from the existing obligations and duties owed by the 2<sup>nd</sup> respondent to the applicants in terms, inter alia, of the licence granted to the 2<sup>nd</sup> respondent by the 3<sup>rd</sup> respondent, or in terms of any other law.

(f) Prayer A of the 2<sup>nd</sup> respondent's counter-application dismissed.

(g) Except for costs, no order is made on prayer B of the 2<sup>nd</sup> respondent's counter-application.

(h) Prayer C of the 2<sup>nd</sup> respondent's counter-application is referred to trial, the notice of counter-application to stand as simple summons.

- (i) The 2<sup>nd</sup> respondent is directed to pay the 1<sup>st</sup> applicant's costs of 20 August 2018 under case number 28716/2018.
- (j) The parties are each to pay its own costs that were reserved on 24 August 2018.
- (k) Save as otherwise herein provided, all other issues as to costs are reserved.

  
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Judge, High Court  
Johannesburg

  
WHG van der Linde  
Judge, High Court  
Johannesburg

  
R Keightley  
Judge, High Court  
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Dates argued: 15 & 16 October 2018, with further submissions on 23 & 30 October 2018.

Date judgment: 8 November 2018.