



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, MAKHANDA)**

**Of interest**

Case no. 2026-095915

In the matter between:

**DR BEYERS NAUDE LOCAL MUNICIPALITY**

Applicant

and

**ESKOM HOLDINGS SOC LTD**

First Respondent

**NATIONAL ENERGY REGULATOR  
OF SOUTH AFRICA (NERSA)**

Second Respondent

**MINISTER OF COOPERATIVE GOVERNANCE  
AND TRADITIONAL AFFAIRS**

Third Respondent

**MINISTER OF FINANCE**

Fourth Respondent

**MINISTER OF ELECTRICITY AND ENERGY**

Fifth Respondent

**SOUTH AFRICAN LOCAL GOVERNEMENT  
ASSOCIATION**

Sixth respondent

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## JUDGMENT

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### LAING J

[1] This is a two-part application pertaining to the supply and payment of electricity. The applicant ('the Municipality') seeks interim relief under Part A, ordering the first respondent ('Eskom') to continue to supply electricity to Willowmore, Steytlerville, and Jansenville. It also seeks an order for the convening of a meeting in terms of section 42 (1) of the Intergovernmental Relations Framework Act 13 of 2005 ('IRFA'), pursuant to its having declared a dispute. Furthermore, under Part B, the Municipality applies for the review and setting aside of Eskom's decision to interrupt the supply. It requests an order interdicting the interruption of supply to any area within its municipal boundaries for the ostensible purpose of Eskom's compelling the Municipality either to conclude a Distribution Agency Agreement or to make payment.

[2] In a counter application, Eskom seeks an order directing the Municipality to comply with its payment obligations regarding its current account. It also seeks an order in relation to the ring-fencing of electricity revenue.

### **The Municipality's case**

[3] Upon its establishment in 2016, the Municipality inherited various debts incurred by former local municipalities. These included an amount of approximately R 30 million allegedly owed for the bulk supply of electricity. In 2018, the Municipality raised disputes over the terms of both supply and so-called wheeling agreements<sup>1</sup> that it had previously concluded with Eskom. These have never been resolved.

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<sup>1</sup> A commercial wheeling agreement, in this context, is understood as an arrangement for Eskom to use existing municipal infrastructure to supply electricity to its direct consumers.

[4] On 23 October 2020, Eskom threatened to interrupt the supply of electricity to Willowmore, Steytleville, and Jansenville because of non-payment. This prompted the Municipality to institute urgent proceedings under case number 2270/2020. It sought substantially the same relief as that sought in the present matter. Similarly, Eskom brought a counter application. The parties agreed to refer the dispute to arbitration, which formed part of the order made by Smith J (as he was then) on 15 December 2020. They subsequently concluded a pre-arbitration agreement and met on 1 March 2023, resolving to invite the Department of Cooperative Governance and Traditional Affairs ('COGTA') to participate in the arbitration proceedings. COGTA declined. On 28 July 2023, the parties agreed to compel COGTA's participation. These developments were overtaken by the Municipality's decision on 29 September 2023 to participate in the National Treasury's Municipal Debt Relief programme, introduced in terms of section 34 (2) of the Local Government: Municipal Finance Management Act 56 of 2003 ('MFMA').<sup>2</sup>

[5] The Municipality has consistently disputed the historic and current amounts owed to Eskom. Under the arbitration proceedings, the Municipality requested information to verify the extent of its indebtedness. Eskom refused or failed to do so.

[6] On or about 21 November 2025, Eskom invited the Municipality to a presentation at which the concept of Delivery Agency Agreement ('DAA') was introduced. It appeared to recognize that there would be need for compliance with the provisions of both the Local Government: Municipal Systems Act 32 of 2000 ('MSA') and the Electricity Regulation Act 4 of 2006 ('ERA').

[7] On 22 February 2026, while the Municipality was still a participant in the Municipal Debt Relief programme, the National Treasury noted that the Municipality had consistently underpaid Eskom, resulting in escalating debt. Its breach of the debt relief conditions entitled the National Treasury to exclude it from participation in the programme unless the municipal council resolved, by 27 March 2026, to conclude a DAA with Eskom. The failure to do so would result in exclusion from the programme

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<sup>2</sup> This was done in terms of MFMA Circular No. 124, 31 March 2023. Section 34 (2) of the MFMA enjoins the national and provincial governments to support the efforts of municipalities to identify and resolve their financial problems.

with effect from 1 April 2026. In the event of such exclusion, the Municipality would be required to repay all arrears, interest, and penalties, while maintaining its current account. If, however, the Municipality elected to continue to participate in the programme, then its municipal council was required to follow the procedure contained in section 78 of the MSA for reviewing and deciding on the appropriate mechanism for the provision of electricity. This process had to be completed by 1 September 2026, failing which exclusion from the programme would follow. Where the Municipality elected to use an external mechanism, such as Eskom, the DAA would serve as the basis for the appointment and would comprise standard terms approved by the National Treasury and other interested parties. The Municipality has, to date, received neither a draft of the DAA nor any indication of the terms envisaged.

[8] Eskom notified the Municipality, on 3 March 2026, of its intention to interrupt the bulk supply of electricity because of persistent non-payment. The outstanding amount was R 909 975 653. This was followed by a public notice on 6 March 2026. It referred to the Municipal Debt Relief programme, the Municipality's failure to adhere to its conditions, and invited comment by 13 April 2026 on why Eskom should not proceed with the intended interruption of supply. The notice set out the options available to the Municipality: it could inform the National Treasury by 27 March 2026 of council's resolution to conclude a DAA with Eskom; it could permit Eskom to convert the supply to a pre-payment arrangement; or it could allow consumers to pay Eskom directly. Eskom would consider the comments made and communicate its decision by 24 April 2026.

[9] The Municipality said that there had been ongoing engagement with both Eskom and the National Treasury, as envisaged under IRFA. This had been demonstrated recently by the National Treasury's presentation on the Municipal Debt Relief programme. Consequently, the Municipality sent correspondence to the parties on 20 March 2026, denying that the IRFA dispute resolution process had been concluded. Furthermore, the Municipality stated that it had yet to receive a draft DAA and had yet to be fully informed about the terms thereof. It pointed out that the DAA would amount to a service delivery agreement, requiring compliance with the relevant provisions of the MSA, as well as the ERA. Its council was unable to consider, let alone approve, the possible conclusion of a DAA with Eskom by 27 March 2026. The

Municipality requested a draft DAA, NERSA's consent to the conclusion thereof, a reasonable opportunity to comply with the MSA, and Eskom's withdrawal of its public notice.

[10] The council met on 25 March 2026 to consider the Municipality's conclusion of a DAA. It resolved, inter alia, as follows: it would seek legal advice before embarking upon further steps; it would continue to participate in the Municipal Debt Relief programme while engaging in negotiations pertaining to the proposed DAA; it would prepare and submit a financial recovery and repayment proposal to the National Treasury in relation to the Eskom debt; it would implement the procedure in section 78 of the MSA regarding electricity distribution before taking a decision on the DAA; and it would seek engagement with Eskom, COGTA, the Deputy Minister of Electricity and Energy, and the National Treasury, to set out its financial position and for purposes of a coordinated government intervention. A few days later, on 27 March 2026, the Municipality sent separate correspondence to the National Treasury and Eskom, recording the parties' lack of response to its earlier communication but reaffirming its commitment to continued engagement. It set out the details of the council resolution and asserted that it had complied with the National Treasury's requirements for the continuation of the Municipal Debt Relief programme. Furthermore, it demanded the withdrawal of Eskom's public notice by 1 April 2026, failing which it would declare a formal dispute in terms of IRFA or institute urgent proceedings.

[11] Eskom responded on 31 March 2026. It recognized that the parties had previously commenced with the IRFA dispute resolution process and that the Municipality was a participant in the Municipal Debt Relief programme. It pointed out, however, that it was entitled to give effect to its credit control mechanisms. Eskom would only take a decision regarding the possible interruption of supply after the stipulated deadline of 13 April 2026.

[12] The Municipality subsequently declared a formal dispute on the date of the deadline. It alleged that Eskom, COGTA, the Department of Electricity and Energy ('DEE'), and the National Treasury, had refused or failed to make themselves available for the meeting contemplated in terms of section 42 (1) of IRFA. It contended, moreover, that it was impossible to escalate the matter because the relevant ministers

refused to engage further under the legislation in question. Eskom responded to the Municipality's declaration on 21 April 2026, recording that the dispute about wheeling agreements had been resolved. Nevertheless, it had not received any comments that demonstrated how it could continue a sustainable supply to the Municipality. Consequently, it would issue another public notice, indicating that it would interrupt the supply with effect from 8 May 2026. It issued the public notice on 24 April 2026, repeating what it had already conveyed to the Municipality about the comments received but also stating that the council had failed to resolve to conclude a DAA with Eskom, convert the supply to a pre-payment arrangement, or allow consumers to pay Eskom directly. Consequently, Eskom had decided to proceed with the interruption of supply as previously warned.

[13] The Municipality refuted Eskom's assertion that the dispute had been resolved. It referred to correspondence from 11 December 2025, in terms of which it acknowledged agreement in relation to a specific period (January 2005 until February 2018) but also set out the remaining areas of dispute: verification of the arrears both prior to and after the establishment of the Municipality (August 2016), and the details of a payment arrangement for such amounts as were due.

[14] Regarding Eskom's threatened interruption of supply, the Municipality alleged that this would have catastrophic effects. It would compromise the water supply and sanitation services for Willowmore, Steytlerville, and Jansenville. It would have a negative impact on the local hospital and clinics, funeral parlours, schools and residential facilities for older persons, law enforcement agencies, traffic and fire departments, courts, farms, businesses, and telephonic communications. The Municipality went on to allege that Eskom had ignored the comments submitted to it and that its decision to proceed with the interruption of supply contravened the provisions of the Promotion of Administrative Justice Act 3 of 2000 ('PAJA'). It set out the grounds upon which it relied for the review and setting aside of Eskom's decision, as well as the basis for the interim relief sought and an order for the convening of a meeting in terms of section 42 (1) of IRFA.

## **Eskom's case**

[15] The current proceedings, contended Eskom, were essentially the same as those that the Municipality had instituted under case number 2270/2020. The difference was that the Municipality sought the continued supply of electricity without recognizing its reciprocal obligation to make payment. Eskom referred to the order that the parties obtained by consent on 29 October 2020. Pending the finalization of arbitration proceedings or the application itself, the Municipality was ordered to settle the outstanding amount owed on its current account and to continue to make payments thereon as they fell due. Eskom alleged that the Municipality had continually failed to do so, notwithstanding an uninterrupted supply. It was not entitled to free electricity. The recent public notice of 24 April 2026 had nothing to do with the Municipality's old debt, said Eskom, it was intended to prevent the existing debt from spiralling out of control.

[16] Addressing the immediate application, Eskom referred to National Treasury's Municipal Debt Relief circular issued on 31 March 2023. In that regard, Eskom would write off municipal debt subject to certain conditions, including a one-third write-off for each period of 12 consecutive months during which a municipality met the conditions, limited to three years in total. The Municipality had failed to do so, triggering Eskom's initiation of its credit control processes.

[17] Eskom averred that the Municipality collected electricity payments from its customers but failed to pay over any of the required portion. It was alleged that the Municipality used the revenue to cross-subsidize salaries and other amounts owed to various creditors. Eskom tabulated the Municipality's account, indicating that, over a three-year period ending on 31 March 2026, the total supply bill amounted to R 588 189 299 of which only R 55 972 160 had been paid, leaving an outstanding balance of R 532 217 139.

[18] Turning to the relief sought under section 42 (1) of IRFA, Eskom pointed out that the National Treasury had convened a meeting with the Municipality on 14 June 2024. In this regard, the provincial treasury had set out the Municipality's performance under the Municipal Debt Relief programme, highlighting areas that needed attention. Eskom had addressed the extent of the arrears, and the Municipality had explained its difficulty in meeting the conditions of the programme. On 13 September 2024, the

Municipality met with Eskom to secure a further indulgence and to propose a new payment strategy, while acknowledging its outstanding debt. There were several follow-up meetings, the most recent having been on 21 November 2025.

[19] The DAA, argued Eskom, would not result in the take-over of the Municipality's powers and functions as the supplier of electricity to consumers. Eskom was a bulk supplier. Furthermore, the National Treasury had never attempted to compel the Municipality to conclude the DAA; a decision on the way forward remained the prerogative of its council. The terms of the DAA had not been disclosed because they remained subject to negotiation.

### **In reply**

[20] The Municipality pointed out that the order obtained by consent on 29 October 2020 went further than Eskom contended. It stipulated that, pending the finalization of part A of the application brought under case number 2270/2020, Eskom was ordered to restore uninterrupted supply to Willowmore, Steytlerville, and Jansenville. Its intended implementation of the public notice of 24 April 2026 would contravene the provisions of the order, which remained in force. The public notice was unlawful.

[21] Furthermore, admitted the Municipality, it was unable to meet its financial obligations all the time. The communities residing within its municipal boundaries were mostly rural and indigent. The equitable share from the National Treasury as well as the amount of revenue that the Municipality was able to generate were inadequate. This was a reality that needed to be addressed by way of arbitration proceedings that included both COGTA and NERSA. The Municipality has consistently disputed how Eskom calculated what was owed, especially the old debt.

### **Counter application**

[22] Eskom brought a counter application under the same proceedings. It sought an order: directing the Municipality to comply with its obligations in relation to its current account, as envisaged in terms of the electricity supply agreement ('ESA') previously concluded and as contemplated under the order granted on 29 October 2020; declaring that the Municipality was obligated in terms of the relevant provisions of the ERA and its electricity distribution licence to ring-fence a portion of the monthly revenue derived from its sale of electricity; and ordering the Municipality to do so and to pay such portion to Eskom. The Municipality opposed the counter application.

### **Issues to be determined**

[23] The most immediate issue to be decided is whether the urgency of the matter justified the severely truncated timeframes for both the main and the counter application. If so, then the court is required to decide whether the Municipality has met the usual requirements for interim relief and whether Eskom has demonstrated the basis upon which to order the Municipality to comply with the ERA, the previous order, and the ESA.

[24] An overview of the principles follows.

### **Legal framework**

[25] Dealing with the question of urgency, rule 6 (12) (a) of the Uniform Rules of Court ('URC') grants wide discretionary powers. A court must, however, exercise such powers in accordance with well-established principles. In *Luna Meubel Vervaardigers (Edms) Bpk v Makin and Another (t/a Makin's Furniture Manufacturers)*,<sup>3</sup> the court stated that practitioners must carefully analyse the facts of each case to determine whether a greater or lesser degree of relaxation of the rules was required. The degree of relaxation should not be greater than the exigency that the case demanded. It must

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<sup>3</sup> 1977 (4) SA 135 (W).

be commensurate therewith.<sup>4</sup> Subsequently, in *IL & B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarkets (Pty) Ltd and Another*,<sup>5</sup> the court held that its power to abridge the prescribed periods and to accelerate the hearing must be exercised with judicial discretion. The applicants had to show 'sufficient and satisfactory grounds'. There were three major considerations: (a) the prejudice that the applicant might suffer by having to wait for a hearing in the ordinary course; (b) the prejudice that other litigants might suffer if the application was given preference; and (c) the prejudice that the respondent might suffer by the abridgment of the prescribed periods and an early hearing.<sup>6</sup>

[26] Furthermore, rule 6 (12) (b) stipulates that an applicant must demonstrate, explicitly, the circumstances that make a matter urgent. The applicant must state the reasons for why he or she would not obtain substantial redress at a hearing in due course.

[27] In *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite (Pty) Ltd*,<sup>7</sup> Notshe AJ explained that:

'... the procedure set out in rule 6 (12) is not there for the taking. An applicant has to set forth explicitly the circumstances which he avers render the matter urgent. More importantly, the applicant must state the reasons why he claims that he cannot be afforded substantial redress at a hearing in due course. The question of whether a matter is sufficiently urgent to be enrolled and heard as an urgent application is underpinned by the issue of absence of substantial redress in an application in due course. The rules allow the court to come to the assistance of a litigant because if the latter were to wait for the normal course laid down by the rules it would not obtain substantial redress.'<sup>8</sup>

[28] Turning briefly to the requirements for an interim interdict, they comprise the following: (a) a prima facie right; (b) a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually granted; (c) a

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<sup>4</sup> At 137E–F.

<sup>5</sup> 1981 (4) SA 108 (C).

<sup>6</sup> At 112H–113A.

<sup>7</sup> 2011 JDR 1832 (GSJ).

<sup>8</sup> At para 6.

balance of convenience in favour of the granting of the interim relief; and (d) the absence of any other satisfactory remedy.<sup>9</sup> The requirements are well-established, having been set out more than a century ago in *Setlegelo v Setlegelo*.<sup>10</sup> The test must, however, be interpreted within the context of our modern constitutional dispensation. This was apparent from the decision of the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* ('OUTA'),<sup>11</sup> where the applicant questioned the suitability of the test, urging the court to resort to another standard or to adapt the test when the grant of an interim interdict trespassed on the exclusive domain of the executive or the legislature.<sup>12</sup> The court, per Moseneke DCJ, referred to *Gool v Minister of Justice and Another*,<sup>13</sup> where a full bench had been called upon to restrain the minister, *pendente lite*, from exercising certain statutory powers. In that case, Ogilvie-Thompson J found that the court had jurisdiction to entertain the application, but it would only be exercised in exceptional circumstances and when a strong case had been made out for relief.<sup>14</sup> Moseneke DCJ went on to say that:

' . . . The common law annotation to the *Setlegelo* test is that courts grant temporary restraining orders against the exercise of statutory power only in exceptional cases and when a strong case for that relief has been made out. Beyond the common law, separation of powers is an even more vital tenet of our constitutional democracy. This means that the Constitution requires courts to ensure that all branches of government act within the law. However, courts in turn must refrain from entering the exclusive terrain of the executive and the legislative branches of government unless the intrusion is mandated by the Constitution itself.'<sup>15</sup>

[29] The learned judge continued:

' . . . It seems to me that it is unnecessary to fashion a new test for the grant of an interim interdict. The *Setlegelo* test, as adapted by case law, continues to be a handy and ready guide to the bench and practitioners alike in the grant of interdicts in busy magistrates' courts and high courts. However, now the test must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers

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<sup>9</sup> At 227.

<sup>10</sup> 1914 AD 221.

<sup>11</sup> 2012 (6) SA 223 (CC).

<sup>12</sup> Para 42.

<sup>13</sup> 1955 (2) SA 682 (C).

<sup>14</sup> At 689B–C.

<sup>15</sup> *OUTA*, para 44.

whether to grant an interim interdict it must do so in a way that promotes the objects, spirit, and purport of the Constitution.<sup>16</sup>

[30] The above principles constitute a rudimentary framework for the determination of the matter. The most immediate issue for consideration is the question of urgency.

## **Urgency**

[31] The applicant launched the application on Wednesday, 29 April 2026. It required the respondents to indicate their opposition by Thursday, 30 April 2026, and to deliver answering papers by Friday, 1 May 2026, which was a public holiday. The matter was set down for hearing on Tuesday, 5 May 2026, in the unopposed motion court. The applicant's earlier attempt to seek permission under rule 12 (d) of the Joint Rules of Practice<sup>17</sup> for the matter to be heard other than on a day normally reserved for motion court, i.e. Wednesday, 6 May 2026, was unsuccessful. Subsequently, the matter was postponed until Thursday, 14 May 2026, for argument, by which time Eskom had filed its counter application. At the hearing itself, the issue of urgency was still very much alive. To all intents and purposes, it remains the position, despite Eskom's having provided an undertaking not to implement its decision, pending the outcome of the matter.

[32] From the papers, it is evident that Eskom's threat to interrupt the supply has existed for several years. It formed the premise of the previous application, brought under case number 2270/2020, and underpinned the National Treasury's efforts to secure the Municipality's cooperation by means of the Municipal Debt Relief programme and more recently the DAA. The National Treasury's letter to the Municipality on 22 February 2026 was a clear indication that its patience had run out. It would refuse the Municipality's continued involvement in the programme with effect from 1 April 2026 unless the Municipality embarked upon a process that involved the

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<sup>16</sup> Para 45.

<sup>17</sup> See Joint Rules of Practice for the High Courts of the Eastern Cape Province, in DE van Loggerenberg Erasmus: *Superior Court Practice* (RS 26, 2025), F2–8A.

likely conclusion of the DAA. Importantly, the National Treasury also made it clear that Eskom would be required to take strict credit control measures, including legal proceedings, in the event of the termination of the Municipality's participation.<sup>18</sup>

[33] This seems to have prompted Eskom's letter of 3 March 2026, notifying the Municipality of its intention to interrupt the supply. The public notice of 6 March 2026 followed, inviting comment as to why Eskom's intention should not be given effect. The Municipality was, by then, fully aware of the imminent threat. It does not assist for the Municipality to contend, as it did in argument, that it would have been premature to have sought interdictory relief at that stage. Considering the scale of the disruption and the magnitude of the harm that would follow if the supply was interrupted, a reasonable approach would have been for the Municipality to have taken immediate steps to mitigate the risk. It failed to do, waiting until 20 March 2026 before seeking the withdrawal of the Public Notice and a suitable undertaking. The Municipality made a final demand on 27 March 2026, warning that it would 'declare a formal dispute in terms of section 41 (1) of IRFA and/or launch an urgent application' if Eskom failed to accede by 1 April 2026. To this, Eskom merely responded on 31 March 2026 that it would not make a final decision before the closing date for comment, i.e. 13 April 2026. The Municipality declared a formal dispute on the closing date, which Eskom acknowledged on 16 April 2026.

[34] Neither Eskom nor the National Treasury suggested that credit control measures would not be implemented if the Municipality refused to cooperate. From as early as 22 February 2026, the Municipality was undoubtedly alert to the precarious position in which it found itself, its persistent failure to have paid its current account having increased its debt to a staggering R 532 217 139. It ought to have known, moreover, that the council resolution taken on 25 March 2026 would not have won favour or alleviated its plight.

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<sup>18</sup> The Municipal Debt Relief circular, issued on 31 March 2023, indicated that the success of the national government's debt relief package for Eskom was contingent upon Eskom's implementation of credit control measures in relation to defaulting municipalities.

[35] In *National Union of Metalworkers of SA and Others v Bumatech Calcium Aluminates*,<sup>19</sup> the Labour Court held that:

'Urgency must not be self-created by an applicant, as a consequence of the applicant not having brought the application at the first available opportunity. In other words, the more immediate the reaction by the litigant to remedy the situation by way of instituting litigation, the better it is for establishing urgency. But the longer it takes from the date of the event giving rise to the proceedings, the more urgency is diminished. In short, the applicant must come to court immediately, or risk failing on urgency.'<sup>20</sup>

[36] The Constitutional Court observed, similarly, in *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law intervening)*,<sup>21</sup> that self-created urgency should not usually be countenanced in the High Court.<sup>22</sup> More recently, in this division, the court simply declined to entertain a matter on the basis of self-created urgency, finding that it would have been prejudicial to the respondent.<sup>23</sup>

[37] Where an applicant has unreasonably delayed in the institution of proceedings and rushed to court at the 11<sup>th</sup> hour, immediately placing his or her opponent at an unfair advantage, then the court would be justified in refusing to assist. The situation is aggravated in circumstances, such as these, where the applicant has served a substantial set of papers, raising complex and constitutionally relevant issues pertaining to the delivery of a basic service and potentially having an adverse impact on the everyday lives of ordinary members of the community. It is aggravated further when the applicant has afforded the respondents less than 48 hours within which to respond and to deliver their answering papers. This is not conduct commensurate with the responsible exercise of a constitutional right of access to the courts, especially where the litigant is an organ of state. As the Constitutional Court remarked in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd t/a Eye and Lazer Institute*,<sup>24</sup> per Cameron J:

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<sup>19</sup> (2016) 37 ILJ 2862 (LC).

<sup>20</sup> Para 26.

<sup>21</sup> 2017 (3) SA 335 (CC).

<sup>22</sup> Para 36.

<sup>23</sup> *Tyekes Security Services v Member of the Executive Council for Department of Public Works and Infrastructure and Others* 2024 JDR 2221 (ECMA), paras 11 and 16.

<sup>24</sup> 2014 (3) SA 481 (CC).

‘ . . . there is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.’<sup>25</sup>

[38] The duty applies equally, if not more so, when the respondents are also organs of state. There is no reason why the parties’ conduct in litigation should not reflect the principles and values of cooperative government and intergovernmental relations envisaged in terms of section 41 (1) of the Constitution and given legislative effect under IRFA. At the least, litigation should be embarked upon reluctantly. If the parties have genuinely been unable to avoid or settle a dispute, despite every reasonable effort, then they are nevertheless required to conduct themselves, as litigants, in the spirit of the Constitution and without infringing the objects of IRFA, as described in terms of sections 4 and 5.

[39] Consequently, the proper approach would be for the court simply to strike the matter from the roll. The difficulty with this, however, is that the threat of interruption to the supply would remain, placing in jeopardy the welfare of the communities residing within the applicant’s municipal boundaries. To put it another way, striking the matter from the roll would prejudice the applicant by guaranteeing that it would not obtain substantial redress in due course, considering the proximity and active nature of the threat. It would also compel the parties to return to court later to resolve the same set of issues, thereby possibly prejudicing other litigants and placing further pressure on scarce judicial resources. In the circumstances, the court is disinclined to strike the matter from the roll but is persuaded that the applicant’s conduct attracts censure by means of an appropriate costs order.

[40] The same considerations apply to the counter application. As counsel for the Municipality pointed out, Eskom sought condonation for non-compliance with the rules but failed, puzzlingly, to deal with the question of urgency in its founding papers. It can only be assumed that this aspect was a casualty of the extreme haste with which this

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<sup>25</sup> Para 82.

matter proceeded. Eskom seeks an order directing the Municipality to comply with its payment obligations regarding its current account, as well as an order regarding the ring-fencing of electricity revenue. The criticisms made in relation to the main application apply similarly to the counter application. The issues involved are complex and potentially capable of being more adequately addressed by NERSA, with the participation of COGTA and the National Treasury. At the least, Eskom has failed to demonstrate why it would not obtain substantial redress in due course. No urgency attaches to the counter application, which falls to be struck from the roll.

### **Prima facie right**

[41] As a point of departure it may be helpful to restate a few basic principles. In *Joseph and Others v City of Johannesburg and Others*,<sup>26</sup> the Constitutional Court emphasised that the provision of basic municipal services was a cardinal function, if not the most important function, of local government. Such services included the provision of electricity.<sup>27</sup> Any decision taken by Eskom to interrupt the supply of electricity to a customer such as the Municipality qualifies as administrative action that is subject to judicial review,<sup>28</sup> entitling a litigant to invoke the remedies available under PAJA if he or she can establish one or more of the grounds listed under section 6 (2). This forms the focus of the enquiry under Part B of the application. In *Economic Freedom Fighters v Gordhan and Others*,<sup>29</sup> however, the Constitutional Court held that before a court may grant interim relief, such as that envisaged under Part A, it must be satisfied that the applicant has good prospects of success in the review proceedings. His or her application must be based on strong grounds that are likely to succeed. This requires the court to ‘peek into the grounds of review’ and to assess their strength. Khampepe ADCJ went on to state that:

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<sup>26</sup> 2010 (4) SA 55 (CC).

<sup>27</sup> Para 34.

<sup>28</sup> See *Afriforum NPC and others v Eskom Holdings SOC Limited and others* [2017] 3 All SA 663 (GP) para 149; *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Limited* [2019] 2 All SA 185 (GJ) para 74; and the full bench decision in *Cape Gate (Pty) Ltd and others v Eskom Holdings SOC Limited and others* [2019] 1 All SA 141 (GJ) paras 127 to 129.

<sup>29</sup> 2020 (6) SA 325 (CC).

'It is only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict. The rationale is that an interdict which prevents a functionary from exercising public power conferred on it impacts on the separation of powers and should therefore only be granted in exceptional circumstances.'<sup>30</sup>

[42] The above principles are consistent with the accepted common law position. Where an applicant seeks a temporary restraint against the exercise of a statutory power, *Setlegelo*, qualified by *Gool*, remains the *locus classicus*. But within the context of our constitutional dispensation, the traditional principles regarding the requirements for interim relief that impacts upon the exercise of a statutory power must be measured, in terms of *OUTA*, against the objects, spirit, and purport of the Constitution — and be deemed to have been satisfied, under *Economic Freedom Fighters*, only in exceptional circumstances.

[43] It is necessary to pause and consider the argument that the Municipality is required to demonstrate not just a prima facie right but a clear right. Eskom asserted, with reference to the case law, that an order for the supply of electricity was final in effect, requiring the Municipality to satisfy the requirements for final, not interim, interdictory relief. To that effect, Eskom relied primarily on *International Trade Administration Commission v SCAW South Africa (Pty) Ltd*<sup>31</sup> and *Tshwane City v Afriforum and Another*.<sup>32</sup> The focus in both cases was, however, the appealability of orders made for interim relief. The common law test was previously whether the order was final in effect or dispositive of a substantial portion of the relief sought in the main application. In *Tshwane City*, the Constitutional Court held that the test had been subsumed under the constitutional interests of justice standard.<sup>33</sup> Crucially, the court did not revisit the requirements for obtaining interim relief.

[44] Eskom also referred to *Lekwa Rate Payers Association NPC v Eskom Holdings SOC Ltd*,<sup>34</sup> regarding an interim order specifically for the increase or restoration of the supply of electricity. The court found that this was final in nature because it had

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<sup>30</sup> Para 42.

<sup>31</sup> 2012 (4) SA 618 (CC).

<sup>32</sup> 2016 (6) SA 279 (CC).

<sup>33</sup> Paras 39 – 41.

<sup>34</sup> 2021 JDR 1455 (GP).

irreversible consequences. The finding was, nevertheless, for purposes of deciding a contempt application and not whether the applicant had satisfied the usual interim relief requirements. In *United Democratic Movement and others v Eskom Holdings SOC Ltd*,<sup>35</sup> to which Eskom also referred, a full bench considered the effect of an interim order for ensuring a sufficient supply to public health establishments, public schools, and police stations within the context of 'loadshedding'. The court observed that:

'The applicants couched the relief as being pending the determination of Part B of their Notice of Motion. Notionally this would make the compelling orders which they seek interim in nature as they may still be amended or varied by this court. However, the applicants were constrained to concede that, once electricity is supplied, by what alternate means, that event has passed and no amount of revisiting will undo that. In that sense, even though the orders sought might be in the form of an interim interdict, the effects thereof are permanent in nature. This might oblige the applicants to satisfy the requirements for a final interdict, being the establishment of a clear right, an act of interference, and the absence of another remedy.'<sup>36</sup>

[45] The court went no further than that. It was ambivalent about whether the relief sought should be characterised as interim or final, but found, nevertheless, that the applicant had demonstrated that there had been infringements of fundamental constitutional rights. This entitled it to the relief in question, irrespective of its characterisation.<sup>37</sup> Eskom also mentioned the recent decision of the Supreme Court of Appeal in *Eskom Holdings SOC Ltd and Another v Sonae Arauco (Pty) Ltd*,<sup>38</sup> where the court a quo had granted interim relief, interdicting the implementation of loadshedding in relation to where the applicant's factory was situated. Smith JA found that the order was final in effect. The issue to be decided was, however, the appealability of the order, not the requirements for interim relief.

[46] In the present matter, the Municipality seeks the continued supply of electricity, pending the review of Eskom's decision. The court is not persuaded that the cases mentioned above provide authority for the proposition that the Municipality is required

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<sup>35</sup> 2023 JDR 1634 (GP).

<sup>36</sup> Para 11.

<sup>37</sup> Para 48.

<sup>38</sup> 2025 (3) SA 78 (SCA).

to establish a clear right. The accepted common law position remains the same, notwithstanding that the effect of the contemplated relief may be final in nature. This may have a bearing on issues such as appealability or contempt, but does not mean, at this stage, that the Municipality is obliged to demonstrate more than a prima facie right.

[47] The Municipality's argument is straight-forward. It has a constitutional duty to provide its residents with electricity and Eskom's threat to interrupt the supply interferes with such obligation. Consequently, it says, it has a prima facie right to the review and setting aside of Eskom's decision. The review is based on several grounds. The court, in this regard, is unconvinced that Eskom failed to follow the correct notice and comment procedure, as outlined in section 4 (3) of PAJA, read with regulations 18 to 20 of the Regulations on Fair Administrative Procedures, 2002.<sup>39</sup> There may, nevertheless, be merit in the Municipality's contention that the interruption of supply specifically to Willowmore, Steytlerville, and Jansenville — and nowhere else — amounts to discrimination between customers or classes of customers in the absence of objectively justifiable and identifiable differences approved by NERSA under section 21 (2) of the ERA. Similarly, regarding the DAA, Eskom appears to have dismissed or merely paid lip service to the relevant statutory provisions. The Municipality is required, in terms of sections 78 (2) (b) and 78 (3) of the MSA, to do the following: notify the local community of its intention to explore the provision of electricity via the DAA; assess the various service delivery options available, taking into account, inter alia, the costs and benefits thereof; and conduct a feasibility study that considers, inter alia, the projected impact of the DAA on municipal staff, assets and liabilities, integrated development plan, and budgets. Furthermore, before the Municipality concludes the DAA, it is obligated under section 80 (2) to establish a programme for community consultation and information dissemination regarding the possible appointment of Eskom, as well as the contents of the DAA. In addition, section 21 (1) of the ERA stipulates that a licensee such as the Municipality may not cede, transfer, or assign any power or function set out in its licence without NERSA's prior written consent. All of this takes time. The conclusion of the DAA with Eskom cannot be treated as an inevitable consequence. NERSA's views on the proposed DAA are, moreover,

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<sup>39</sup> Published under GN R1022 in GG 23674 of 31 July 2002, as subsequently amended.

completely unknown. It is simply not apparent that Eskom has properly considered the implications of the process prescribed by the legislation in question.

[48] A further ground of review listed by the Municipality is the ‘catastrophic effect’ that the intended interruption would have on the communities. In its founding papers, the Municipality carefully detailed the likely impact thereof, pointing out that the pump stations at Steytlerville and Jansenville would be unable to pump sewage to the wastewater treatment works, leading to spillages. The water supply for Willowmore and Steytlerville would be compromised and the borehole pumps for Jansenville would be inoperable, leading to the widescale disruption of water services. The hospitals in Willowmore and Jansenville would be reliant on generators for the provision of health services; the clinic at Steytlerville has neither a generator nor any other form of back-up power. Mortuaries and funeral parlours would be affected. Schools would be affected. The residential facilities for older persons in all three of the towns lack generators or back-up power, rendering caregiving and other life support equipment useless. Law enforcement agencies would be unable to access, properly, their databases, security systems, and communication networks. The same applies to traffic and fire departments. Courts would be affected. Telkom and private mobile telecommunications operators would be affected. Farmers would be unable to supply water for livestock or the irrigation of crops, and the overall functioning of dairy and chicken farms, as well as abattoirs, would be compromised. Businesses would be affected. It is unclear whether Eskom has properly considered, at all, the comments submitted by AfriForum NPC or the Steytlerville Residents Forum.

[49] The catastrophic effect of any interruption of the supply has emerged in recent case law as a key ground of review. In *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd and Others*,<sup>40</sup> Van der Linde J held that the power afforded to Eskom under section 21 (5) of ERA could not be exercised in a manner that would result in ‘widespread human catastrophe.’ The means was not rationally connected to the purpose for which that power was conferred.<sup>41</sup> The court granted interim relief. A similar approach was adopted in *Newcastle Municipality v Eskom SOC Ltd*,<sup>42</sup> *Tokologo*

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<sup>40</sup> 2019 (2) SA 577 (GJ).

<sup>41</sup> Paras 75 and 76.

<sup>42</sup> 2019 JDR 1967 (KZP).

*Local Municipality v Eskom Holdings SOC Ltd*,<sup>43</sup> and *Letsemeng Local Municipality v Eskom Holdings SOC Ltd*,<sup>44</sup> where the respective courts found that the catastrophic effect of the interruption removed any rational connection between the means employed and the objective of securing payment. The subject subsequently came before the Supreme Court of Appeal in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others*.<sup>45</sup> After setting out the constitutional and statutory framework regarding the duties of local government in relation to the provision of basic municipal services, Petse DP found that Eskom was entitled to invoke section 21 (5) of the ERA without need for prior judicial authorization. The court, nevertheless, went on to remark as follows:

'Terminating the supply of electricity to an entire municipality in the circumstances provided for in s 21 (5) would be a radical step. Such reduction or termination of the supply of electricity would adversely affect every consumer within the affected municipality. indeed, it would have the effect of collapsing the entire municipality, rendering it unable to fulfil its constitutional and statutory mandate to provide basic services. The objects of local government spelt out in s 152 of the Constitution would be subverted. And a municipality whose electricity supply is terminated by Eskom would not be able to "give members of the local community equitable access to the municipal services to which they are entitled" as required by s 4 (2) (f) of the Municipal Systems Act. Nor would such a municipality be able to provide services in respect of water, sanitation and electricity in terms of s 9 (1) (a) (ii) of the Housing Act as these services rely on electricity for their functionality.'<sup>46</sup>

[50] Considering the authorities mentioned above, the court is satisfied that the same principles operate in the present matter. The catastrophic effect of Eskom's intended interruption of the supply undermines the rationality of its decision. This, on its own, serves as a compelling ground of review.

[51] Turning to the remaining grounds, the court is not convinced that Eskom's decision was taken in bad faith. It presented three options to the Municipality to avoid the interruption of supply. These included the Municipality's informing the National Treasury by 27 March 2026 of the municipal council's resolution to 'enter a DAA with

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<sup>43</sup> 2019 JDR 2572 (FB).

<sup>44</sup> 2020 JDR 1504 (FB).

<sup>45</sup> 2021 (3) SA 47 (SCA).

<sup>46</sup> Para 58.

Eskom.’ No such resolution was adopted. Instead, council resolved to seek legal advice while engaging in negotiations pertaining to the proposed DAA; it would also implement the procedure in section 78 of the MSA before reaching a decision about the possible conclusion of the DAA. As a distinctive sphere of government, the Municipality was entitled — if not statutorily obligated — to have done so. Conversely, however, the resolution clearly fell short of Eskom’s conditions and it made its decision accordingly.

## **Relevance of IRFA**

[52] And so to IRFA. Whereas the Municipality indicated at the hearing that it no longer pursued the IRFA-related relief under Part A, Eskom’s refusal or failure to engage in the dispute resolution process was a further ground upon which the Municipality sought to review its decision. In that regard, section 41 (1) (*h*) of the Constitution enjoins all spheres of government and all organs of state within each sphere to cooperate with one another in mutual trust and good faith; section 41 (2) stipulates that an Act or Parliament must establish or provide for structures and institutions to promote and facilitate intergovernmental relations, and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes. IRFA was enacted for these very purposes. Under section 5, all spheres of government must seek to achieve the objects of IRFA by, inter alia: considering each other’s circumstances, material interests, and budgets, as well as those pertaining to other organs of state, when exercising or performing their statutory powers and functions. Furthermore, all spheres of government must participate both in intergovernmental structures of which they are members and in efforts to settle intergovernmental disputes. The term is defined as:

‘ . . . a dispute between different governments or between organs of state from different governments concerning a matter —

(a) arising from —

(ii) a statutory power or function assigned to any of the parties; or

- (ii) an agreement between the parties regarding the implementation of a statutory power or function; and

(b) which is justiciable in a court of law,

and includes any dispute between the parties regarding a related matter . . .’

[53] The settlement of intergovernmental disputes forms the subject of chapter 4. To that effect, section 40 states that:

‘(1) All organs of state must make every reasonable effort —

(a) to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and

(b) to settle intergovernmental disputes without resorting to judicial proceedings.’

[54] The declaration of a formal dispute is addressed in terms of section 41, which provides that:

‘(1) An organ of state that is a party to an intergovernmental dispute with another government or organ of state may declare the dispute a formal intergovernmental dispute by notifying the other party of such declaration in writing.

(2) Before declaring a formal intergovernmental dispute the organ of state in question must, in good faith, make every reasonable effort to settle the dispute, including the initiation of direct negotiations with the other party or negotiations through an intermediary.’

[55] The consequences of such declaration are set out in section 42. The parties must promptly convene a meeting to determine the nature of the dispute, identify any mechanisms or procedures other than judicial proceedings that could assist in the settlement of the dispute, agree on an appropriate mechanism or procedure, and designate a person to act as facilitator. If the parties fail to convene a meeting, then, depending on the circumstances, the relevant Minister or the MEC for local government may do so.

[56] IRFA envisages a three-stage process for the settlement of intergovernmental disputes. The first stage entails informal engagement; the second, a formal declaration and the facilitation that follows; and the third, judicial proceedings, but only as a last resort. The refusal or failure to adhere to the process contemplated in either the first or second stage would most certainly constitute a ground upon which to challenge the proceedings in the third — or the lawfulness of a decision such as that which forms the subject of the present matter.

[57] In *Sabie Chamber of Commerce and Tourism and Others v Thaba Chweu Local Municipality and Others*,<sup>47</sup> the court held that the failure on the part of Eskom and municipalities to pursue IRFA processes constituted a ground of review. On appeal, Petse DP remarked as follows:

‘Was Eskom required to comply with s 41 (3) of the IRFA before taking the decision to interrupt electricity supply to the municipalities herein concerned because of their failure to pay for the electricity supplied? The short answer to this question is: Yes.’<sup>48</sup>

[58] The learned judge went on to discuss the principles of cooperative government and intergovernmental relations, finding that disputes arising between different spheres of government and other organs of state ‘are subject to the strictures of the IRFA.’<sup>49</sup> Petse DP found that Eskom’s decision to interrupt the supply of electricity to an entire municipality without prior compliance with sections 40 and 41 of IRFA was inimical to the constitutional obligations that it bore.<sup>50</sup> In doing so, Eskom circumvented the consequences flowing from the prohibitions contained in sections 40 and 41. Nothing less than a reasonable effort to resolve the dispute, made in good faith, would suffice.<sup>51</sup> Regarding the contention that section 39 (1) of IRFA placed the dispute outside its jurisdiction because section 30 of the ERA provided dispute resolution mechanisms or procedures, the learned judge held as follows:

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<sup>47</sup> (2295/2017, 83581/2017) [2019] ZAGPPHC 112 (7 March 2019).

<sup>48</sup> *Resilient Properties*, n 45 above, para 61. The reference to section 41 (3) of IRFA was clearly an error; section 41 (2) is pertinent.

<sup>49</sup> Para 64.

<sup>50</sup> Para 80.

<sup>51</sup> Para 81.

'These contentions cannot be upheld. Section 30 deals with disputes arising out of the ERA, and even then only if the dispute is between licensees, and the Regulator [NERSA] has been requested "by both parties to the dispute" to act as a mediator. It therefore cannot apply to a dispute where Eskom seeks to interrupt bulk electricity supply to a municipality which, although willing to settle its indebtedness, is unable to do so because it is not only facing financial crisis but also contests Eskom's right to interrupt electricity. Such a dispute would trigger the application of ss 40 and 41 of the IRFA. And absent every reasonable effort to settle the dispute, including negotiations through an intermediary, it was not open to Eskom to implement its interruption decision without first exhausting the avenues prescribed under ss 40 and 41. In addition, there is s 41 of the MFMA which prescribes the process that must be followed whenever a dispute of a financial nature arises between organs of state, one of which is a municipality. This section, too, requires the organs concerned to take all reasonable steps necessary to resolve the dispute out of court.'<sup>52+</sup>

[59] The Supreme Court of Appeal, in *Eskom Holdings SOC Ltd v Letsemeng Local Municipality and Others*,<sup>53</sup> subsequently reiterated the importance of proper adherence to the principles contained in IRFA. Organs of state must make every reasonable effort to settle disputes.

[60] Returning to the present matter, it was common cause that there had been informal engagement amongst the parties. This had proved unsuccessful. The Municipality pointed out that Eskom had failed to verify the arrears that accumulated both prior to after the establishment of the Municipality; the parties were also at odds about how the outstanding amount would be paid. Eskom's public notice of 6 March 2026 triggered the Municipality's formal declaration. For its part, Eskom acknowledged that there had been informal engagement, but contended that this had come to an end when the Municipality refused or failed to comply with the conditions of the Municipal Debt Relief programme. An inability or unwillingness to pay did not give rise to a dispute. Furthermore, the orders previously obtained by consent still stood; the Municipality could not escape its obligations in that regard by relying on IRFA.

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<sup>52</sup> Para 84.

<sup>53</sup> 2022 JDR 0433 (SCA).

[61] The difficulty with Eskom's argument is that, on a proper reading of the orders, they do not hold the meaning suggested. Dealing with the order of 29 October 2020, the Municipality undertook to pay its current account of R 8 522 639 as well as an amount of R 21 000 000 towards arrears. This was to be done 'pending the finalization of Part A of the application.' The order of 15 December 2020 indicated that the terms of the earlier order remained in force. In addition, the Municipality was ordered to pay a further R 8 515 853 and to continue to pay its current account monthly. Similarly, this was to be done 'pending the finalization of the arbitration or the application, whichever is the sooner.' To all intents and purposes, both the arbitration and the application proceedings have been concluded, albeit with no outcome. COGTA's refusal to join the proceedings and the Municipality's subsequent participation in the Municipal Debt Relief programme had the effect of entirely altering the circumstances under which the orders were made. It simply cannot be said that either the arbitration or the application proceedings remain intact, awaiting finalization.

[62] Regarding the existence or otherwise of a dispute, Eskom's assertions regarding the Municipality's inability or unwillingness to pay are misplaced. The amounts claimed by Eskom have never been verified, the parties differ on how much is owed. More importantly, the parties differ on precisely how the Municipality can settle its debt. It is plain to see that only intergovernmental cooperation of the type envisaged under IRFA will ensure real progress. Consequently, the court is persuaded that Eskom's failure to have considered or complied with the relevant IRFA provisions constitutes a further ground of review.

[63] Viewed cumulatively, the grounds discussed above are sufficient for the Municipality to demonstrate a prima facie right to the review of Eskom's decision. It was made because irrelevant considerations were taken into account or relevant considerations were not considered;<sup>54</sup> the decision itself was not rationally connected to the purpose for which it was taken or the information before Eskom;<sup>55</sup> and is otherwise unconstitutional or unlawful.<sup>56</sup> What remains to be decided is whether the Municipality has demonstrated a well-grounded apprehension of irreparable harm, a

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<sup>54</sup> Section 6 (2) (e) (iii) of PAJA.

<sup>55</sup> Section 6 (2) (f) (ii) (aa) and (cc).

<sup>56</sup> Section 6 (2) (i).

favourable balance of convenience, and the absence of any other satisfactory remedy. These aspects are addressed below.

### **Remaining requirements**

[64] There is considerable overlap between an analysis of whether the Municipality has demonstrated a prima facie right, based on the review grounds contained in section 6 of PAJA, and the remaining requirements for interim relief. The likely impact of the intended interruption of supply has been canvassed extensively. For week 1, the supply would be interrupted during the week for periods of at least three hours at a time, increasing to a maximum of four hours over the weekend; for week 2 onwards, the interruptions would be for periods of 14 hours at a time, both during the week and over the weekend. The catastrophic effect on the communities requires no further elaboration; that there is a well-grounded apprehension of irreparable harm is irrefutable.

[65] Regarding the balance of convenience, the Municipality's refusal or failure to maintain payments in relation to its current account is unacceptable. There can be no doubt that it places at risk the sustainability of an ongoing supply to the communities residing within its municipal boundaries. As Eskom observed, non-payment also means that its ability to pay for coal, carry out repairs on the national grid, and maintain the transmission and distribution of electricity throughout South Africa becomes increasingly compromised. In *Rademan v Moqhaka Local Municipality*,<sup>57</sup> the Constitutional Court held that the supply may be reduced or terminated in terms of section 21 (5) of the ERA when a customer has contravened the relevant payment conditions.<sup>58</sup> Eskom contended that the powers under section 21 (5) became available when the Municipality refused or failed to maintain payments on its current account. An order for interim relief limited such powers. In *OUTA*, the Constitutional Court stated that when a court weighs up the balance of convenience, it may not fail to consider

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<sup>57</sup> 2013 (4) SA 225 (CC).

<sup>58</sup> Para 46.

the probable impact of the restraining order on the constitutional and statutory powers and duties of the organ of state. The court continued as follows:

'The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted in only the clearest of cases and after a careful consideration of separation of powers harm. It is neither prudent nor necessary to define "clearest of cases." However, one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights. This is not such a case.'<sup>59</sup>

[66] In the present matter, the intended interruption of supply threatens the communities' fundamental right to basic municipal services. It will interfere with, inter alia: the right to human dignity; to an environment that poses no harm to health or well-being; to adequate housing; and to health care, food, water, and social security. An order for interim relief, ensuring the continued supply of electricity to Willowmore, Steytlerville, and Jansenville, undeniably prevents Eskom from exercising the powers available to it in terms of section 21 (5) of the ERA. Nevertheless, the nature and extent of the threat posed to the fundamental rights of the communities in the present matter places it squarely within the category of 'clearest of cases' that the Constitutional Court envisaged.

[67] Turning to the final requirement for interim relief, it is readily apparent that neither Eskom nor the National Treasury was willing to cooperate with the Municipality pursuant to its declaration of a formal intergovernmental dispute. IRFA provided no remedy. Eskom argued, however, that it was incumbent upon the Municipality to have invoked the dispute resolution provisions of the ERA, entailing NERSA's involvement as either a mediator or an arbitrator in terms of section 4 (b) (i). Upon closer examination, the potential remedy is not so straightforward. Section 30 suggests that

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<sup>59</sup> Para 47.

NERSA would be required to settle the dispute 'by such means and on such terms' as it deemed fit. Furthermore, section 32 contemplates the investigation of a complaint and the preparation of a preliminary report that could lead to a formal investigation in due course. The legislation is silent on precisely how NERSA could or would deal with the imminent threat of an interruption to the supply and within what sort of timeframe. Considering the circumstances of the present matter and the potentially catastrophic effect of Eskom's implementation of the interruption, ERA's dispute resolution provisions were patently inadequate. There was no other satisfactory remedy when the Municipality instituted these proceedings.

### **Remedy and order**

[68] For the reasons set out in previous paragraphs, the court is persuaded that the Municipality has met the requirements for interim relief under Part A. The application must follow the usual course for the determination of Part B. As to costs, the parties' conduct in relation to urgency does not warrant a favourable order; it would be fair merely to require each party to pay its own costs. No adverse order is made against the remaining parties, notwithstanding that their absence from these proceedings, especially on the part of NERSA, COGTA, and the National Treasury, deprived the court of what could have been useful insights in how best to adjudicate a dispute with far-reaching consequences.

[69] The following order is made:

- (a) A rule nisi is granted, calling upon the respondents to make representations and to show cause, on a date to be decided in consultation with the registrar, why the following order should not be made:

That, pending the finalization of Part B of the application, the first respondent (Eskom) be and is hereby ordered to continue to supply electricity to the areas of Willowmore (point of supply: CBS5-Willowmore), Steytlerville (point of supply: CBS50-Steytlerville, and Jansenville (point of supply: CBS51-Jansenville).

- (b) The relief set out in paragraph (a), above, shall operate as an interim interdict with immediate effect, pending the finalization of Part B.
- (c) The counter application of the first respondent (Eskom) is struck from the roll for want of urgency.
- (d) Each party is ordered to pay its own costs.

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**JGA LAING**  
**JUDGE OF THE HIGH COURT**

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