IN THE HIGH COURT OF SOUTH AFRICA

MPUMALANGA

Case no.: 2295/17

For hearing: 15 March 2018

In the matter between:

SABIE CHAMBER OF COMMERCE AND TOURISM	First Applicant
LYDENBURG CHAMBER OF COMMERCE AND TOURISM	Second Applicant
GRASKOP CHAMBER OF COMMERCE AND TOURISM	Third Applicant

And

THABA CHWEU LOCAL MUNICIPALITY	First Respondent
MUNICIPAL MANAGER: THABA CHWEU LOCAL MUNICIPALITY	Second Respondent
EXECUTIVE MAYOR: THABA CHWEU LOCAL MUNICIPALITY	Third Respondent
CHIEF FINANCIAL OFFICER: THABA CHWEU LOCAL MUNICIPALITY	Fourth Respondent
ESKOM HOLDINGS SOC LIMITED	Fifth Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Sixth Respondent
MINISTER OF ENERGY	Seventh Respondent
MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Eighth Respondent
MINISTER: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Ninth Respondent
THE PREMIER, MPUMALANGA	Tenth Respondent

APPLICANTS' HEADS OF ARGUMENT

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INTRODUCTION AND RELIEF SOUGHT

1 These heads of argument are filed pursuant to an Order granted on 30 January 2018 by the honourable Roelofse AJ in terms of which:

1.1 Part A and Part B of the application were postponed to 15 March 2018;

1.2 The Fifth Respondent ("*Eskom*") was interdicted from interrupting the supply of power to the First Respondent ("*TCLM*") pending "*judgment in the application*";

1.3 All parties and all interested persons were called upon to show cause why:

1.3.1 The Eighth Respondent ("*MEC: COGTA*") should not be directed to comply with the provisions of section 134 of the Local Government: Municipal Finance Management Act 56 of 2003 ("*MFMA*");

1.3.2 The Tenth Respondent ("*Premier*") should not be directed to comply with the provisions of section 139 of the MFMA; and

1.4 All parties were directed to deliver submissions in writing by no later than 16h00 on 1 March 2018.[1]

2 The Applicants, three Chambers of Commerce within the Thaba Chweu Local Municipality ("*TCLM*"), launched this application on an urgent basis following the disconnection of electricity supply by Eskom to the entire municipal area of TCLM on 9 October 2017, from Monday to Friday between 06:00-08:00 and 17:00-19:30 and over weekends between 08h30-11h00 and 15h00-17h30.[2]

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[1] A copy of the Order of 31 January 2018 appears at Record Vol 8, p. 874.

[2] Founding Affidavit, para 3, Record Vol 1.p. 10.

3 On 27 December 2018, an Order was granted in terms of which:

3.1 Eskom undertook to restore the full supply of electricity to TCLM until 31 January 2018;

3.2 the parties were directed to attempt to resolve the matter amicably; and

3.3 it was recorded that, in the event that the matter could not be resolved amicably, Part B of the application would be enrolled during March 2018 on the opposed motion roll.[3]

4 Multiple and various attempts were made to resolve the matter amicably, but no acceptable solution has been reached.[4]

NATURE OF THE RELIEF SOUGHT

5 This application was launched in two parts:

5.1 In Part A, the Applicants seek an Order that Eskom may not terminate or interrupt the supply of electricity to TCLM pending the finalisation of the relief sought in Part B.[5]

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[3] The Order of 27 December 2017 appears at Record Vol 5, p. 486.

[4] These attempts are detailed in the Applicants' Further Supplementary Affidavit dated 25 January 2018, Record vol. 5, p. 472.

[5] Prayer 2 of the Notice of Motion, in terms of which the Applicants had sought an order directing TCLM to pay the amount of R79,5 million is no longer persisted with, since it is clear from the papers that TCLM is unable to pay the amount which Eskom claims is owing.

5.2 The relief in Part A remains relevant, because Eskom persists in its stance before this Court that it is entitled to terminate or interrupt the electricity supply to TCLM.

5.3 In Part B, the Applicants seek the following substantive prayers:

5.3.1 Eskom's decision, taken in or around September 2017, to interrupt the supply of electricity to the TCLM ("*the decision*") is declared inconsistent with the Constitution and invalid;

5.3.2 The decision is reviewed and set aside;

5.4 It is declared that the Municipality's failure to ensure that the electricity supply to TCLM was not interrupted is unconstitutional and invalid; and

5.5 It is declared that the failure of the Provincial Government to take steps to intervene in TCLM in order to avert the crisis which resulted in the interruption of electricity supply to TCLM by Eskom from 9 October 2017 is unconstitutional and invalid.

6 The Applicants contend that the affidavits which have been filed in response to Part A by the Municipality and Eskom confirm that the relief sought in Part B falls to be granted in that they record that the Municipality is <u>unable</u> rather than merely unwilling to pay its electricity debt.

7 Moreover, it is clear that Eskom's decision to interrupt the electricity supply to TCLM was irrational inasmuch as the decision was not rationally connected to the purpose for which the decision was taken: i.e. debt collection.

8 Once the Court comes to the conclusion that Eskom's decision was irrational and therefore unlawful, it must declare it to be so under section 172(1)(a) of the Constitution. As Moseneke DCJ held in **Mazibuko v Sisulu**:[6]

> *"once we have found, as we have, that the Rules regulating the business of the Programme Committee are unconstitutional, we must so declare. An order of constitutional invalidity is not discretionary. Once the Court has concluded that any law or conduct is inconsistent with the Constitution, it must declare it invalid."*

9 Following a finding of unconstitutionality, the Court has a discretion to grant an order which is just and equitable under section 172(1)(b) of the Constitution.[7]

10 Furthermore, given the failure of the Municipality to comply with the constitutional requirement of providing basic services,[8] there was (and is) an obligation on the provincial government (represented in these proceedings by the Premier) to step in under section 139 of the Constitution, and to intervene in the Municipality's running of its electricity business.[9]

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[6] Mazibuko v Sisulu and Another 2013 (6) SA 249 (CC) at para 70. See too the decision of the Supreme Court of Appeal in Acting Chairperson: Judicial Services Commission v Premier of the Western Cape 2011 (3) SA 538 (SCA) at paragraph 25, which emphasised that the provision is in imperative terms of there is no discretion.

[7] Section 172(1)(b) allows a court when deciding a constitutional matter, to "make any order which is just and equitable" and section 38 enables a court to grant "appropriate relief" when a person alleges that a right in the Bill of Rights has been infringed or threatened.

[8] See section 152 of the Constitution.

[9] Section 139 of the Constitution provides:

"When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—
(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to —

11 Accordingly, the Applicants support the relief set out in paragraph 4 of the Order of 31 January 2018 in terms of which:

11.1 the MEC: COGTA is required to report to Parliament in respect of the actions taken by MEC's for local government to address issues raised by the Auditor-General in audit reports on financial statements of municipalities and municipal entities; and

11.2 the Premier is directed to comply with the provisions of section 139 of the MFMA which deals with "*mandatory provincial interventions arising from financial crises*".

12 In what follows, we deal briefly with:

12.1 The legal framework for the supply of electricity; PAJA and the Constitutional Court's decision in *Joseph*;

12.2 The Part A relief: the requirements for interim relief; and

12.3 The Part B relief: the review;

12.4 The relief aimed at Province's intervention; and

12.5 Conclusion.

(i) maintain essential national standards or meet established minimum standards for the rendering of a service;

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step."

ELECTRICITY- A VIRTUALLY INDISPENSIBLE PUBLIC SERVICE

13 In *Joseph*,[10] the Constitutional Court held that residents have a "*right*" to receive electricity – a "*virtually indispensable*" public service - as a basic municipal service. The Court held:

> *"The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In Mkontwana,[25] Yacoob J held that "municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty."[26] Electricity is one of the most common and important basic municipal services and has become virtually indispensable,[27] particularly in urban society.*

14 This accords with section 153 of the Constitution, in terms of which a municipality is obliged to priories the basic needs of the community and to promote the social and economic development of the community,[11] and section 152 in terms of which the Municipality is required within its financial and administrative capacity to achieve the objects set out in section 152(1) including the provision of services to communities in a sustainable manner.

15 The Constitutional Court continued:

> *Taken together, these provisions impose* ***constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law.*** *Although, in*

[10] Joseph and Others v City of Johannesburg and Others (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) (9 October 2009).

[11] See too the Local Government: Municipal Systems Act 32 of 2000 which gives legislative content to the constitutional duties of local government.

> *contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide.* ***The respondents are certainly subject to the duty to provide it****.*

16 Given the importance of electricity and the constitutional obligation on local government to provide basic municipal services which include electricity, the Courts have confirmed that any decision to interfere with these rights (including through the termination or interruption of supply by Eskom to a municipality) is an administrative action which must comply with the prescripts of administrative fairness.

The role of PAJA

17 In ***Afriforum v Eskom***,[12] Murphy J held as follows, regarding a decision by Eskom to interrupt the electricity supply to a municipality in analogous circumstances:

> *Although constitutional rights may be impacted, Mediclinic categorised the decision taken by Eskom on 22 December 2016 as administrative action as defined in PAJA. The categorisation is correct.* ***The decision is undoubtedly a decision taken by an organ of state exercising a public power or performing a public function (pursuant to its constitutional obligation to provide electricity to the public) in terms of legislation which adversely affects the rights of any person and which has a direct, external legal effect****. The decisions being administrative action, there is no merit in Eskom's contention that because it has no contractual relationship with the applicants in any of the applications it is immunised by the doctrine of privity.*

18 The interruption decision which is challenged in Part B is accordingly subject to the requirements of administrative fairness as set out in the Promotion of Administrative Justice Act 3 of 2000.[13]

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[12] Afriform NPC and Others v Eskom Holdings SOC Limited and Others (99984/2015) [2017] ZAGPPHC 199; [2017] 3 All SA 663 (GP) (24 May 2017)

[13] The provision of electricity is a constitutional issue. See Rademan v Moqhaka Local Municipality and Others (CCT 41/12) [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC) (26 April 2013) at para 10.

19 Section 6(2) of PAJA sets out a number of grounds on which administrative action is reviewable.[14] Of particular relevance to this application is section 6(2)(f)(ii) which provides that a decision is unlawful if it is not rationally connected to:

19.1 the purpose for which it was taken;

19.2 the purpose of the empowering provision;

19.3 the information before the administrator; or

19.4 the reasons given for it by the administrator.

20 As set out below, on any one of these grounds, the decision is irrational and cannot be upheld.

21 We turn now to consider the relief sought in Part A.

REQUIREMENTS OF INTERIM RELIEF

22 In order to succeed in respect of the relief sought in Part A, the applicants must establish:

22.1 A *prima facie* right although open to some doubt;

22.2 A reasonable apprehension of irreparable harm to the right if the interdict were not granted;

22.3 The balance of convenience favorable to the grant of the interim interdict; and

[14] For ease of reference we annex an extract of section 6 of PAJA to these Heads of Argument.

22.4 The absence of any other adequate remedy.[15]

23 These requirements are to be assessed together and are not to be judged in isolation.[16] The Court must furthermore consider whether the granting of an interim interdict would promote the objects, spirit and purport of the Constitution.[17]

Prima facie right

24 In ***National Treasury and Others v Opposition to Urban Tolling Alliance and Others*** the Constitutional Court held as follows in respect of this requirement:[18]

> *"A claimant must establish a prima facie right that is not merely a right to approach a court in order to review an administrative decision. It should be a right to which, if not protected by interdict, irreparable harm would ensue. 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, the applicants should have demonstrated a prima facie right that is threatened by an impending or imminent irreparable harm. The right to review the impugned decisions did not require any preservation pendente lite."*

25 In the current instance, the Applicants have established a strong *prima facie* right to review and set aside Eskom's decision. However, the applicants must also show a right other than the right to review which requires protection now.

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[15] Tshwane City v Afriforum and Another 2016 (6) SA 279 (CC) ("Afriforum") at para 49, referring to Setlogelo v Setlogelo 1914 AD 221 at 227 and Webster v Mitchell 1948 (A) SA 1186 (W).

[16] Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others (74192/2013) [2014] ZAGPPHC 191 (14 March 2014) ("Afrisake") paras 8-10.

[17] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) ("OUTA") at para 45.

[18] National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 (CC) ("OUTA") at para 50.

26 In addition to the "right to review", the applicants have a right to just administrative action and the protection against arbitrary deprivation of property which must inform the purpose of Eskom's power to interrupt its supply to third-party distributors like TCLM. It must also be informed by responsibility for default. No purpose is served by acting to the ultimate detriment of the end-user where, like here, the end-users are multiple innocent parties who have paid their electricity accounts to the Municipality.

27 The Applicants have a further right to require that Eskom would consider all other possible means of debt collection before resorting to this drastic and draconian measure of interruption. Despite asking for information as to what other measures were considered, Eskom has provided none. Eskom's failure to consider these alternatives adequately or at all renders its decision unlawful, irrational, and unreasonable. Its decision falls to be reviewed and set aside on the basis of section 6(2)(e)(iii), 6(2)(e)(vi), 6(2)(f)(ii), 6(2)(h) and the principle of legality.

28 Moreover, Eskom's decision to interrupt electricity supply to TCLM is contrary to its constitutional duties as an organ of state, and hence also reviewable under section 6(2)(i) of PAJA. In this regard, sight must not be lost of Eskom's central role in the provision of basic municipal services like electricity. Eskom ought to have been guided by its duties in terms of section 195 of the Constitution. Eskom has failed these duties because:

28.1 the significant economic costs caused by interrupting electricity supply to TCLM will be the antithesis of development-orientated public administration, as required by section 195(1)(c); and

28.2 interruption in the face of (a) significant economic prejudice, and in particular extensive job losses, and (b) less drastic but as effective alternatives would be

ineffective human-resource management and minimise human potential, contrary to the developmental injunction of section 195(1)(h).

29 Eskom's decision to interrupt electricity supply to TCLM is contrary to its constitutional duties as an organ of state inasmuch as its decision will directly undermine or threaten to undermine the property rights of the Applicants and their right to trade, guaranteed by sections 25 and 22 of the Constitution respectively.

30 For those businesses that will close because they cannot run without a continuous supply of electricity (and cannot themselves provide through back-up generators the required amount of energy), their rights to property and to trade will be destroyed by Eskom's regulatory decision – and the destruction will be irreparable. Furthermore, in respect of those persons who are currently employed by those businesses who may lose their jobs if the businesses are forced to close, there will be irreparable violations to their rights to property, fair labour practices and dignity.[19]

31 For the limited number of businesses that will be able to limp along (for a short period of time, at best), that will only be because of emergency measures taken by them but which will come at the heavy expense of their profits and with a concomitant impact on their rights to property (which includes the right to profits) and their right to freely trade.

32 We turn now to consider the question of irreparable harm if the interim relief is not sustained pending the outcome of Part B.

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[19] The harm which is suffered by the Applicants when electricity interruptions are included is set out in the Supplementary Affidavit dated 19 December 2017, Record vol 4, p. 379 and the confirmatory affidavits annexed thereto from Record vol 4, p. 414.

Reasonable apprehension of irreparable and imminent harm

33 The Constitutional Court has held in respect of this requirement that: [20]

> *"Before an interim interdict may be granted, one of the most crucial requirements to meet is that the applicant must have a reasonable apprehension of irreparable and imminent harm eventuating should the order not be granted. The harm must be anticipated or ongoing…*
>
> *Within the context of a restraining order, harm connotes a common-sensical, discernible or intelligible disadvantage or peril that is capable of legal protection. It is the tangible or intangible effect of deprivation or adverse action taken against someone. And that disadvantage is capable of being objectively and universally appreciated as a loss worthy of some legal protection, however much others might doubt its existence, relevance or significance. Ordinarily the harm sought to be prevented through interim relief must be connected to the grounds in the main application.*
>
> …
>
> *Afriforum had to satisfy the High Court of its reasonably entertained belief that harm that is not too complex or mysterious to understand, would befall them and others should the interim order not be granted.*
>
> *"Irreparable implies that the effects or consequences cannot be reversed or undone. Irreparable therefore highlights the irreversibility or permanency of the injury or harm. That would mean that a favourable outcome by the court reviewing allegedly objectionable conduct cannot be an order that would effectively undo the harm that would ensue should the interim order not be granted".*

34 The applicants have clearly established a reasonable apprehension of irreparable harm which meets this threshold.

35 Interrupting TCLM's electricity supply will have a multiplicity of disastrous consequences. Given the large-scale, industrial nature of certain of the Applicants' businesses, constant and uninterrupted supply of electricity is vital. Eskom's proposed

[20] Afriforum at paras 55-59.

interruption will cause significant financial loss and potential foreclosures. Interruption of electricity supply will cause significant, if not total, losses to production.[21]

36 The loss is not confined to the hours when there is no electricity. There are incalculable knock-on effects. Many of the larger industries in TCLM run continuous production processes that require advance shut down and lengthy start-up procedures. In short, large-scale, industrial production processes cannot be switched on and off in an instant. A failure to follow start-up and shutdown protocols will result in irreparable damage to machinery and equipment. In addition, a shut down that occurs during an incomplete production cycle will cause significant and irrecoverable wastage and scrap. It is likely that any interruption to TCLM's electricity supply will cause up to 12-hour production losses each day.

37 Ultimately, the financial impact of Eskom's decision to interrupt electricity to TCLM is incalculable and irreparable.

38 The Applicants and the persons whom they represent in this litigation have no means to ameliorate these losses. Most are not able to operate using stand-by generators due to their electricity load requirements (in other words, generators are unable to provide sufficient electricity for the Applicants' production needs). And the financial loss (and loss of profit) cannot be recovered through price increases. It will have a devastating impact on industry in TCLM, and is likely to precipitate wholesale disinvestment.

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[21] The harm which is suffered by the Applicants when electricity interruptions are included is set out in the Supplementary Affidavit dated 19 December 2017, Record vol 4, p. 379 and the confirmatory affidavits annexed thereto from Record vol 4, p. 414.

39 For those businesses that will be able to limp along and that will not immediately have to close, to avoid foreclosure and disinvestment such of the Applicants will be forced to take drastic measures, including retrenching potentially thousands of employees. This will cause disastrous, irreparable harm not only for the Applicants and their financial sustainability, but also (and obviously) for their employees.

40 Many of the employees who stand to lose their employment are sole or primary breadwinners, meaning that the true impact of Eskom's decision on employees and their families will be much greater.

41 The cuts implemented by Eskom, which increased to 5 and a half hours during the week and 7 hours per day on the weekends had a devastating effect of the Municipality.

42 The cuts threaten the very fabric of society: hospitals are unable properly to function during this period, businesses are disrupted, the water system (including the sewerage network) shuts down and cannot immediately be turned back on, children have no electricity to do their homework or get ready for school, and industry is forced to shut down during these "off" periods.

43 The further economic and social reverberations are obvious. The businesses which the Applicants represent are the lifeblood of the TCLM economy.

Balance of convenience favours the granting of interim relief

44 The prejudice that will be suffered by the Applicants if interim relief is not granted pending the outcome of Part B, far outweighs any prejudice that will be suffered by Eskom if interim relief is granted.

45 The prejudice that will be caused to the Applicants and the public at large is manifest and far-reaching. The loss suffered will not merely be financial, but may and probably will affect the viability of the Applicants' businesses and the livelihoods of those persons who live and work in TCLM. The demise of the Applicants' productivity will have serious onward effects to the local, regional, and national economies.[22]

46 It is difficult to identify any prejudice that will be caused to Eskom if interim relief is granted. Interrupting TCLM's electricity supply does not benefit Eskom financially. Even if Eskom were to benefit financially from interrupting supply, that benefit is outweighed by the huge financial impact of interruption on the Applicants' businesses, their employees, the economy of TCLM and the livelihoods of the persons who live and work in TCLM. Furthermore, if the Applicants' application fails ultimately, Eskom will still be able to implement whatever debt-collection measures are necessary and appropriate.

[22] The harm which is suffered by the Applicants when electricity interruptions are included is set out in the Supplementary Affidavit dated 19 December 2017, Record vol 4, p. 379 and the confirmatory affidavits annexed thereto from Record vol 4, p. 414.

47 Part B is already before this Court and will be argued on 15 March 2018. Even if Eskom were able to show genuine prejudice if interim relief is granted (which is denied), that prejudice would be contained and, in the circumstances, negligible.

No alternative remedy

48 Given the irreparable harm that will be caused to the Applicants, as well as others (such as their employees and the broader community and economy), the Applicants have no alternative remedy. They have attempted to engage with Eskom, TCLM, NERSA and the Premier with no effect. They have waited for the promised political solution, and relied on the Municipality's exhortations that the matter was "*under control*" which has been illusory.

49 The most recent attempts at engagement following the Court Order of 27 December 2017 are set out in the Supplementary Affidavit filed by the Applicants on 25 January 2018.[23] Notwithstanding a direction by this Court that the parties must attempt to resolve the matter amicably, Eskom maintains its supine approach, and the lackadaisical attitude of the other organs of state in this application is also to be lamented.

Conclusion on Part A

50 The Applicants have satisfied the threshold for interim relief in constitutional matters as set out in *OUTA*, and the granting of the interim relief is appropriate in the circumstances.

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[23] Record vol 5, p. 472.

PART B: THE REVIEW

51 In part B of the Application, the Applicants seek to declare unlawful, review and set aside Eskom's termination decision on the grounds of irrationality and unconstitutionality.

52 The Applicants also seek an Order that the Municipality's conduct in reaching such a state of financial turmoil that it is unable to pay its electricity debts is unconstitutional.[24]

53 Both Eskom and the Municipality have filed further affidavits in respect of Part B:[25]

54 The Municipality (appears to) support the review relief, but denies that the declaratory relief that the Municipality has acted in an unconstitutional manner.[26]

55 In the light of the objective facts contained in the Premier's Report concerning the historical conduct of the Municipality (notwithstanding that it appears that the Municipality is on a better path going forward), there can be no doubt that the Municipality has failed to live up to its constitutional obligation to provide basic services. On this ground alone, the declaratory relief in Prayer 8 of the Notice of Motion is justified.

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[24] Section 152 of the Constitution enjoins the Municipality within its financial and administrative capacity to achieve the objects set out in subsection (1) which inter alia includes the provision of services to communities in a sustainable manner.

[25] The Municipality's Answering Affidavit (Part B) appears from Record, vol 7, p. 755; Eskom's Affidavit appears from Record vol 9, p. 794.

[26] Municipality's Answering Affidavit (Part B), para 21 Record vo l7, p. 763.

56 Eskom has filed a further lengthy Answering Affidavit in respect of Part B.[27] The submissions therein do not take the matter further for Eskom. In fact, they justify the relief sought in Part B.

57 Eskom's decision to impose electricity supply interruptions as a debt collection measure (which Eskom has confirmed is the sole purpose of the interruptions) is irrational insofar as the Municipality cannot pay. That Eskom has sought to introduce supply cuts as a debt collection measure is apparent even from Eskom's most recent affidavit in Part B where Eskom admits that this is the rationale for its termination of electricity supply.[28]

58 The decision to terminate electricity supply was not rationally related to the purpose for which the decision was taken (i.e. to collect Eskom's debt) because no amount of cutting off of the electricity can make a Municipality which cannot pay, pay.

59 In addition, the decision was unreasonable and capricious in that it was taken as a debt collection mechanism in the face of less drastic alternatives – alternatives that would address the true problem: TCLM's financial precariousness, and alternatives that would not punish innocent electricity users such as the Applicants for TCLM's financial, political and administrative mishaps.

60 Given the aforegoing, the Applicants pray for an order in terms of prayers 6 and 7 of the Notice of Motion.

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[27] Eskom's Answering Affidavit (Part B), Record vol 8, p. 794.

[28] See Eskom's Answering Affidavit, Part B, paras 39-43, Record vol. 8, p. 809;

Eskom's "defence"

61 Eskom asserts that it has a right to terminate or interrupt the electricity supply to the Municipality in light of section 21(5) of the Electricity Regulation Act.[29]

62 The Applicants deny that these provisions empower Eskom to act in the way that it has done – namely to terminate or interrupt electricity supply to a municipality without judicial or NERSA oversight, and without permitting the Province an opportunity to intervene in the Municipality.

63 This requires an analysis of the electricity supply framework in South Africa and legal matrix applicable to the decision.

The electricity supply framework in South Africa

64 The supply of electricity in South Africa is divided into three component parts:

64.1 Generation: the production of electricity by any means;[30]

64.2 Transmission: the operating of power lines and substation equipment that operate at a nominal voltage of 132kV and above;[31] and

64.3 Distribution: the function of owning, operating and distributing electricity through an electricity network at a nominal voltage of less than 132kV.[32]

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[29] Eskom's Answering Affidavit, Part B, para 62, Record vol 8, p. 815.

[30] Electricity Regulation Act section 1 and EPP p. 5.

[31] Electricity Regulation Act section 1 and EPP p. 5.

[32] Electricity Regulation Act section 1 and EPP p. 5.

65 The functions of Generation and Transmission of electricity in South Africa are carried out by Eskom. It is the only holder of a licence for the generation and transmission of electricity and exercises a licensed monopoly over the supply of electricity in South Africa. The Distribution function is either carried out by Eskom directly to electricity consumers (who are referred to as "*Eskom Direct customers*") or it may be carried out by one of a number of licensees, whom NERSA has licensed to distribute electricity, the majority of whom are municipalities. TCLM is one such licensee.

66 Municipalities are in turn, licensed by NERSA to distribute electricity to end users such as the Applicants and the general public at tariffs approved by NERSA.

67 This means that once electricity is delivered by Eskom to the municipal switchgear, the Municipality is responsible for performing the Distribution function, including:

67.1 providing the electricity grid to distribute electricity to its end consumers;

67.2 maintaining and servicing the supply grid within the Municipalities;

67.3 providing substations for step-down facilities from greater than 132kVA to less than 132kVA;

67.4 distributing electricity to end consumers;

67.5 administering, billing, and recovering all charges relative to electricity consumption by end consumers;

67.6 all credit risk and credit controlling functions relative to the electricity supply business from receiving electricity at its switchgear, until delivering the electricity to its end consumers; and

67.7 paying to Eskom the cost of bulk electricity received, at the Supply Tariff approved by NERSA.

68 Users pay for their electricity usage monthly to the municipalities who are, in turn, obliged to pay Eskom in accordance with their licence conditions and the supply agreements concluded between Eskom and the municipalities.[33]

69 This relationship is governed by the following legal framework which forms the context within which Eskom is to act.

The Constitution

70 The Constitution is the supreme law of the Republic, and the exercise of all public power is subject to it.[34] Recently in **South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others**,[35] the Supreme Court of Appeal summarised the impact of the supremacy of the Constitution on the exercise of public power thus:

> *"The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the principle of legality, which is part of that law. The principle of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power."*

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[33] Founding Affidavit para 5, Paginated Bundle p. 10.

[34] Section 1 of the Constitution: "South Africa is one, sovereign, democratic state founded on the following values: … supremacy of the Constitution and the rule of law".

[35] South African Broadcasting Corporation Soc Ltd and Others v Democratic Alliance and Others, [2015] 4 All SA 719 (SCA) at para [59].

71 Section 7(2) of the Constitution provides that, "[*t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights*". Section 8(1) of the Constitution, moreover, provides that, "[t]*he Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state*." Thus, organs of state, including Eskom, are required to act so as to give effect to their obligations under section 7(2) of the Constitution.[36]

72 Section 33(1) of the Constitution gives a right to administrative action that is "*lawful, reasonable and procedurally fair*."

73 The powers and functions of municipalities are set out in section 156 of the Constitution. In terms of section 156, municipalities have executive authority in respect of and have the right to administer the local government matters listed in Part B of Schedules 4 and 5 of the Constitution, as well as any other matter assigned to them by national or provincial legislation.[37]

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[36] Rail Commuters Action Group v Transnet Ltd t/a Metrorail 2005 (2) SA 359 (CC) at paras [47] and [69]. See too Mohamed v President of the RSA 2001 (3) SA 893 (CC).

[37] Section 156 of the Constitution states:

(1) A municipality has executive authority in respect of, and has the right to administer-

(a) The local government matters listed in Part B of Schedule 4 and Part B of Schedule 5; and

(b) Any other matter assigned to it by national or provincial legislation.

(2) A municipality may make and administer by-laws for the effective administration of the matters which it has the right to administer.

(3) Subject to section 151(4), a by-law that conflicts with national or provincial legislation is invalid. If there is a conflict between a bylaw and national or provincial legislation that is inoperative because of a conflict referred to in section 149, the by-law must be regarded as valid for as long as that legislation is inoperative.

(4) The national government and provincial governments must assign to a municipality, by agreement and subject to any conditions, the administration of a matter listed in Part A of Schedule 4 or Part A of Schedule 5 which necessarily relates to local government, if-

(a) That matter would most effectively be administered locally; and

(b) The municipality has the capacity to 78administer it.

(5) A municipality has the right to exercise any power concerning a matter reasonably necessary for, or incidental to, the effective performance of its functions.

74 Part B of Schedule 4 of the Constitution gives Municipalities power over "*Electricity and gas reticulation*", which is a national as well as a municipal function, over which the national and local governments have concurrent jurisdiction.

75 One of the objects of a local government is, *inter alia*, to ensure the provision of services (including electricity) to communities in a sustainable manner.[38]

Electricity Regulatory Framework

76 The supply of electricity in South Africa is governed by the Electricity Regulation Act.

The Electricity Regulation Act

77 The Electricity Regulation Act establishes a national regulatory framework for the electricity supply industry. In terms of section 7 thereof, NERSA must issue licences for operating any generation, transmission or distribution facility, as well as the trading of electricity.

78 Section 7(1)(a) provides that "*No person may, without a licence issued by the Regulator in accordance with this Act operate any generation, transmission or distribution facility*."

79 Section 27 of the Electricity Regulation Act sets out the duties of Municipalities, which include (amongst others) the duty to comply with all the technical and operational requirements for electricity networks determined by NERSA and the duty to execute their reticulation functions in accordance with relevant national energy policies.

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[38] Section 152(b)

80 Section 21 of the Electricity Regulation Act is headed "*powers and duties of licensee*". Section 21(5) is of particular relevance. It states:

> *"(5) A licensee may not reduce or terminate the supply of electricity to a customer, unless -*
>
> *(a) the customer is insolvent;*
>
> *(b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or*
>
> *(c) the customer has contravened the payment conditions of that licensee."*
>
> *(Emphasis added).*

81 Section 21(5) grants no "*power*" to Eskom to terminate or interrupt supply to its customer – any such power (to the extent that it exists) must be read in as being implied from the section.

82 In determining and interpreting the scope of the implied power, cognisance must be taken of the Constitution and the statutory and regulatory framework which places limits on Eskom's powers.

83 In other words, when this Court is interpreting the ambit of Eskom's power and determining whether the termination decision was taken lawfully in terms of section 21(5), it must attempt to formulate the power in line with the constitutional and statutory framework and must prefer an interpretation which is more constitutionally compliant.[39]

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[39] It is so that in legal interpretation and the application of legislation, if there are two possible interpretations, one of which is constitutional whereas the other is not, the constitutional interpretation must be preferred. See for example National Director of Public Prosecutions and Another v Mohamed NO and Another 2003 (4) SA 1 (CC) at [35], where Ncgobo J stated:

> It is now a settled principle of constitutional construction that where a statute is capable of more than one reasonable construction, with one construction leading to constitutional validity while the other not, the former construction being in conformity with the Constitution must be preferred to the latter, provided always that such construction is reasonable and not strained.

Furthermore, when there are two possible interpretations, both of which are constitutionally compliant, the interpretation which is more constitutional – i.e. better promotes the spirit, purport and objects of the bill of

84 Eskom's argument around section 21(5) is misplaced and fails to acknowledge that:

84.1 the "implied power" in section 21(5) is not an absolute power – it is circumscribed by the rights of those affected by the exercise of that power (including the Applicants);

84.2 NERSA is obliged in terms of section 30 of the Electricity Regulation Act to "*settle*" any dispute between an end user (such as the Applicants) and Eskom "*by such means and on such terms*" as it thinks fit. This is, presumably, one of the factors that NERSA will take into account when determining what a reasonable period of notice would be for Eskom to give to a municipality regarding a potential termination or interruption decision; and

84.3 Where a Municipality is unable to fulfil a constitutional function, the Province is empowered to intervene in section 139 of the Constitution, and obliged to intervene in section 139 of the MFMA.

85 Accordingly, Eskom's decision to interrupt electricity supply to TCLM is contrary to its constitutional duties as an organ of state, and hence also reviewable under sections 6(2)(h) and (i) of PAJA.

86 In the alternative, the Applicants submit that the termination decision was unlawful, invalid and reviewable because Eskom failed to comply with the requirement relating to judicial oversight of Eskom's decision in the particular circumstances of this case.

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rights – should be preferred. See Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd 2008 11 BCLR 1123 (CC) at para [47]:

> "By the same token, where two conflicting interpretations of a statutory provision could both be said to be reflective of the relevant structural provisions of the Constitution as a whole, read with other relevant statutory provisions, the interpretation which better reflects those structural provisions should be adopted."

The requirement of judicial oversight

87 The Constitution sets high standards for the exercise of public power by State institutions and officials. Section 41 of the Constitution provides that:

> *"(1) All spheres of government and all organs of state within each sphere must*
>
> *(a) preserve the peace, national unity and the indivisibility of the Republic;*
>
> *(b) secure the well-being of the people of the Republic;*
>
> *(c) provide effective, transparent, accountable and coherent government for the Republic as a whole;*
>
> *(d) be loyal to the Constitution, the Republic and its people;*
>
> *(e) respect the constitutional status, institutions, powers and functions of government in the other spheres;*
>
> *(f) not assume any power or function except those conferred on them in terms of the Constitution;*
>
> *(g) exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere; and*
>
> *(h) co-operate with one another in mutual trust and good faith by*
>
> *(i) fostering friendly relations;*
>
> *(ii) assisting and supporting one another;*
>
> *(iii) informing one another of, and consulting one another on, matters of common interest;*
>
> *(iv) co-ordinating their actions and legislation with one another;*
>
> *(v) adhering to agreed procedures; and*
>
> *(vi) avoiding legal proceedings against one another." (own emphasis)*

88 Section 195 of the Constitution "*Basic values and principles governing public administration*" provides in relevant part as follows:

> *"(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:*
>
> *(a) A high standard of professional ethics must be promoted and maintained.*
>
> *(b) Efficient, economic and effective use of resources must be promoted.*
>
> *(c) Public administration must be development-oriented.*
>
> *(d) Services must be provided impartially, fairly, equitably and without bias.*

> *(e) People's needs must be responded to, and the public must be encouraged to participate in policy-making.*
>
> *(f) Public administration must be accountable.*
>
> *(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.*
>
> *(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.*
>
> *(i) Public administration must be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.*
>
> *(2) The above principles apply to*
>
> *(a) administration in every sphere of government;*
>
> *(b) organs of state; and*
>
> *(c) public enterprises."*

89 Eskom is a Major Public Entity under the PFMA.[40] It is subject to these provisions of the Constitution, and the public has a right to its good corporate governance in compliance with those provisions.

Judicial oversight, the Rademan decision and the Afriforum decision

90 The Applicants submit that on a proper interpretation of the Electricity Regulation Act read with the Constitutional Court's decision in *Rademan* and the *Afriforum* decision of Murphy J, and on the particular facts before this Court, Eskom is not lawfully (alternatively should not be) permitted to terminate the electricity supply to the Applicants without first obtaining an order of Court authorising it to do so and taking into account what is just and equitable in the circumstances.

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[40] Public Finance Management Act 1 of 1999 ("PFMA"), Schedule 2; DA FA para 42, p20.

91 This relief not only accords with the law, but also seeks to ensure that Eskom does not simply abuse the PAJA process by launching a new termination notice tomorrow. Indeed, this is a tactic which Eskom has employed in this Municipality and other Municipalities.

92 Accordingly, the Applicants seek an Order that on the facts of this case, Eskom is not permitted to terminate or interrupt the electricity supply to TCLM without an Order of Court authorising it to do so.

93 The facts in **Rademan**[41] were briefly thus:

93.1 The Applicant, Ms Rademan, was a resident of Kroonstad, in Moqhaka Local Municipality, and a member of the Moqhaka Ratepayers and Residents Association. In June 2008 the Ratepayers Association declared a dispute with the Municipality which related to the Association's dissatisfaction with the Municipality's alleged failure to provide efficient services to its residents. As a result, members of the Association, including Ms Rademan, withheld payment of property rates in protest. However, Ms Rademan paid her electricity and other accounts for municipal services in full. On or about 17 August 2009, the Municipality disconnected Ms Rademan's electricity supply as a result of her failure to pay her rates and taxes.

93.2 Ms Rademan challenged the Municipality's decision. She alleged that the Municipality was precluded from disconnecting her electricity supply by the

[41] Rademan v Moqhaka Local Municipality and Others 2013 (4) SA 225 (CC).

Electricity Regulation Act because none of the grounds upon which the Municipality may cut off a resident's electricity supply was applicable to her.

93.3 The Constitutional Court dismissed Ms Rademan's application on the basis that the Municipal Systems read with the by-laws entitled a Municipality to consolidate various accounts and to cut off Ms Rademan's electricity as she had not paid the rates component of the consolidated account. The Court held that the consolidation provisions in the Systems Act precludes a resident from picking and choosing which components to pay to the Municipality.

94 **Rademan** may accordingly be authority for, and **only** for:

94.1 The proposition that the supply of electricity may be terminated or interrupted on the basis of Section 21(5) of the ERA **by a municipality**, for non-payment of any type of municipal service, without the sanction of a Court Order; and

94.2 Confirmation that the constitutional rights of residents to receive electricity, even (sic) **from a Municipality**, are in fact limited by the provisions of section 21(5) of the ERA.

94.3 The application of **Rademan** is narrow in scope. It is certainly not authority, as Eskom suggests, for the proposition that Eskom may terminate or interrupt the electricity supply to a municipality at will, upon default, as long as it provides 14 calendar days notice.

95 Any decision by Eskom to terminate or interrupt the supply of electricity to a municipality must be exercised consistent with not only the provisions of Section 21(5) of the Electricity Regulation Act and the requirements of PAJA, subject to the

Constitution, and conditional upon various other requirements being met. These requirements, include, inter alia

95.1 Compliance by Eskom with its licence conditions;

95.2 Compliance by Eskom and NERSA with the requirements of Section 30[42] of the Electricity Regulation Act;

95.3 NERSA, in discharging its obligations under Section 30 of the Electricity Regulation Act, acting in accordance with the NERSA Act, particularly Section 25 of the NERSA Act;

95.4 Eskom obtaining a judicial *imprimatur* for its proposed disconnection action; and

95.5 Province taking appropriate action in terms of section 139 of the Constitution and 139 of the MFMA.

96 In *Afriforum*, Murphy J found that in the circumstances of that case, an *ex post facto* review was sufficient to protect the Applicant's rights.[43] The Applicants in this application assert that Murphy J's reasoning failed properly to take into account the constitutional rights of the Applicants, was the result of a formalistic reading of section 21(5) and did not properly apply the Constitutional Court's jurisprudence dealt with in the following paragraph. Accordingly, this decision should not be followed.

97 In any event, however, in the current matter, the facts are distinguishable: Eskom is clear that the termination decision was taken as a debt collection measure; the Municipality

[42] Formerly section 42.

[43] Afriform NPC and Others v Eskom Holdings SOC Limited and Others (99984/2015) [2017] ZAGPPHC 199; [2017] 3 All SA 663 (GP) (24 May 2017) at para 126.

has recorded that it cannot pay. Moreover, Province has indicated that it will step in and has taken steps to attempt to resolve the matter.

98 In these circumstances, it is submitted that prior judicial oversight must be imposed to protect the Applicants' rights and to prevent Eskom from simply taking another termination decision.

The requirement for judicial oversight

99 The Constitutional Court has in a number of judgments established a general principle that there must be judicial oversight where an Applicant seeks an order to execute against or seize control of the property of another person.[44]

100 The requirement for judicial oversight stems from sections 1(c) and section 34 of the Constitution. In terms of section 1(c), South Africa is founded on the principle of the rule of law. Section 34 requires that "*any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land*".[45]

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[44] Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC); Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC); Gundwana v Steko Development CC and Others 2011 (3) SA 608 (CC); University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others 2016 (6) SA 596 (CC).

[45] Chief Lesapo v North West Agricultural Bank and Another 2000 (1) SA 409 (CC). See too University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others 2016 (6) SA 596 (CC).

101 In **Jaftha**, the Constitutional Court defined judicial oversight as denoting a decision by a court, following a consideration of relevant facts. In that case, the Court observed (at para 59):

> *"Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution . . . Even if the process of execution results from a default judgment the court will need to oversee execution against immovables. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act."*

102 In **Stellenbosch Law Clinic**, Cameron J emphasised that: "*a debtor's section 34 right of access to court is breached by an execution process not sanctioned by a court. Moreover, taking away the basic income that indigent debtors rely on for subsistence, without court supervision, rubs right up against the right to dignity (which underlies all the socio-economic rights of housing, food and health care). It may also implicate the protection against arbitrary deprivation of property afforded under section 25*."[46]

103 In the same way, given the vast and devastating effects if electricity supply is terminated or interrupted, the Applicants submit that judicial oversight is required over a decision by Eskom to terminate or interrupt electricity to a municipality.

104 In other words, when properly interpreted, Eskom's "implied power" in section 21(5) of the Electricity Regulation Act to terminate or interrupt the electricity supply to a municipal licensee may not be exercised unless and until such termination or interruption has been authorised by a High Court on consideration of all relevant factors.

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[46] University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others; Association of Debt Recovery Agents NPC v University of Stellenbosch Legal Aid Clinic and Others; Mavava Trading 279 (Pty) Ltd and Others v University of Stellenbosch Legal Aid Clinic and Others 2016 (6) SA 596 (CC) at para 133.

105 This interpretation balances the rights of Eskom to enforce its debt-collection measures against the rights of those who would be affected by the decision.

106 There can be no doubt that the termination or interruption of electricity supply by Eskom to a municipal licensee constitutes a significant "*constraint*" on a vast number of rights of persons and properties. These include:

106.1 The rights of the municipality itself which is constitutionally obliged in terms of section 159 of the Constitution to provide electricity and municipal services to persons within its municipal boundaries and whose ability to provide electricity and other municipal services will be significantly impaired if the impugned decision is implemented;

106.2 The rights of the Applicants, who will suffer significant losses and whose businesses will likely shut down if the interruption commences as planned. These losses are set out in the founding affidavit and are not repeated here. This is a violation of the Applicants' rights in section 22, 25, 26 and 34 of the Constitution; and

106.3 The rights of other persons within the municipality whose rights are represented by the Applicants in terms of the broad public interest standing claimed by the Applicants in terms of section 38(c) of the Constitution and, given the nature of the litigation in question and the fast-moving pace at which the application is proceeding, who may not have had an opportunity to place their evidence before the Court.

107 The rights of the public which may be violated (without justification) include the rights to dignity (section 10), life (section 11), freedom of trade and occupation (section 22), fair labour relations (section 23), the environment (section 24), property (section 25), housing (section 27), healthcare (section 27), the rights of the child (section 28) and the right to education (section 28).[47]

108 In terms of the principles in section 34 of the Constitution (which requires that every dispute capable of being determined by application of law is to be determined in a court of law or equivalent tribunal), the termination or interruption decision (which constitutes a constraint on all these rights) can only be made following recourse by Eskom to a court recognised in terms of the law of the land and judicial sanction of the proposed constraint.

109 Once their electricity is cut off (suspended) by Eskom in terms of section 21(5), an *ex post facto* application by the Applicants to Court does not give effect to the Applicants' section 34 rights. On the contrary, it is only by requiring judicial oversight before the decision is taken that these rights (and the other rights relied on in the founding affidavit) are respected. (See Jaftha v Schoeman at para 55 and Gundwana at paras 41 and 52). An *ex post facto* review by the Courts does not adequately protect the Applicants' rights.

110 There are compelling reasons for the judicial oversight requirements in section 34 of the Constitution to apply:

110.1 First, if application is made to court, all relevant circumstances (including, importantly the circumstances under which the debt to Eskom allegedly arose)

[47] Second Supplementary Founding Affidavit, para 15, Bundle p. 590.

will be placed before a judge as impartial arbiter of whether the draconian measure of disconnection constituting a violation of constitutional rights is justified;

110.2 Secondly, the application will ensure that all relevant parties who are affected by the decision will come to be aware of the decision and will have an opportunity to make representations regarding the appropriateness of the decision; and

110.3 Thirdly, the court will be in a position to assess all relevant factors, including the effect of the decision on "innocent" third parties, and whether there are alternative less-invasive means for Eskom to enforce its debt, and come to a decision as to whether it would be just and equitable to terminate or interrupt the electricity supply to a municipality.

111 These requirements are particularly relevant where it is clear from the papers that the Municipality cannot pay its electricity debt.

112 It is conceivable that such circumstances exist where it would clearly not be in the interests of justice for such drastic action to be taken by Eskom – for example where the debt owing is minimal or it has only been outstanding for a short period of time, or where the harm caused by the cut-off to innocent third parties would be disproportional to the debt and would result in serious violations to constitutional rights.[48]

113 In such instances, the court would operate to "*avoid an imbalance between the adverse and beneficial effects… of an action and to encourage the administrator to consider both*

[48] S v Manamela 2000 (3) SA 1 (CC) at para 34.

the need for the action and the possible use of less drastic or oppressive means to accomplish the desired end".[49]

114 There are a number of other options available to Eskom to enforce its rights other than terminating or interrupting electricity supply which would be taken into account by a court in a judicial oversight role and which ought to be considered by Eskom before resorting to the radical measure of terminating supply of electricity. These alternative options include:

114.1 Eskom could declare a dispute to NERSA in terms of section 19 of the Electricity Regulation Act on account of the fact that a municipal licensee has contravened or failed to comply with a licence condition or any provision of this Act, including payment. Upon receipt of such a dispute, NERSA convenes a Tribunal and may compel compliance through issuing a notice.[50] If the notice is not complied with, NERSA is empowered to impose a penalty of 10 per cent of the annual turnover of the licensee or R2 000 000,00 (whichever is the higher amount) per day commencing on the day of receipt of the notice contemplated in subsection (2).[51]

114.2 Eskom could request NERSA to act as a mediator between Eskom and a municipal licensee for the purpose of resolving any dispute in terms of section 30 of the Electricity Regulation Act or (under section 30(2) of the Act) to make an application to the High Court for an order suspending or revoking a municipal distribution licence if there is any ground justifying such suspension or revocation.

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[49] Hoexter, Administrative Law 2 ed. P. 344.

[50] Electricity Regulation Act, section 19.

[51] Section 19(2) of the Electricity Regulation Act.

114.3 NERSA also has the power to revoke TCLM's distributor licence and issue it to Eskom.[52] Eskom would then supply electricity directly to the Applicants and other end-users in TCLM. Eskom already does so for other end-users throughout South Africa (and is, for this reason, licenced as a distributor). It therefore has the necessary infrastructure, skills, and expertise to do so. While the relevant electricity grid belongs to TCLM, it could be rented by Eskom.

114.4 NERSA could partly revoke TCLM's distributor licence insofar as supplying to major industrial end-users is concerned, and authorise distribution to those end-users by a newly incorporated non-profit utility company.[53] The majority of major industrial end-users in TCLM (including the Applicants) are supplied through a separate electricity supply ring.[54] They could easily be isolated and removed from the remaining grids in TCLM.

114.5 Eskom could, of course, always sue a defaulting municipality for payment and to recover its arrears through the judicial process, together with interest and costs.[55]

114.6 Finally, Eskom could seek intervention from the Province in terms of section 139 of the Constitution read with section 139 of the MFMA (dealt with below).

115 There is no indication that when it took the decision to terminate the electricity supply to TCLM, Eskom considered these options at all, and in particular did not take into account that the ability to impose significant penalties on a defaulting licensee to enforce compliance with the conditions of a licence (including payment conditions) could serve

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[52] Second Supplementary Founding Affidavit, paras 90-91, Paginated Bundle p. 619.

[53] Second Supplementary Founding Affidavit, para 92, Paginated Bundle p. 619.

[54] Second Supplementary Founding Affidavit, para 92, Paginated Bundle p. 619.

[55] Second Supplementary Founding Affidavit para 93, Paginated Bundle, p. 620.

as a powerful threat to ensure that municipalities meet their payment obligations to Eskom.

The interpretation of section 21(5) through the constitutional prism

116 Accordingly, when section 21(5) of the Electricity Regulation Act is read through the constitutional prism and in particular with the requirements of section 34 of the Constitution, it is clear that before Eskom can take a termination or interruption decision on the current facts before this Court it must first apply to a court for an order that such decision is just and equitable.

117 To the extent that this Court should find that section 21(5) is not capable of an interpretation which requires judicial oversight, it is submitted that section 21(5) is unconstitutional and invalid for failing to give effect to the Applicants' section 34 rights.

Conclusion on the Review Relief: Part B

118 The relief sought by the Applicants in Part B includes a review and setting aside the decision of Eskom dated September 2017 to reduce the electricity supply to TCLM Municipality.

119 This relief follows axiomatically from the declarations sought by the Applicants in prayer 6 of the Notice of Motion, and the unconstitutionality and irrationality of Eskom's conduct.

THE RELIEF PERTAINING TO PROVINCIAL INTERVENTION

Constitutional framework

120 Section 154(1) of the Constitution provides in broad terms that "*[t]he national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.*"

121 Section 139(1) of the Constitution provides that, when a municipality cannot or does not fulfil an executive obligation, the "relevant provincial executive *may* intervene" by issuing directives and subsequently assuming responsibility for the relevant obligations. Two aspects of s 139 bear emphasis:

121.1 First, the provision confers a discretion to intervene, and not an obligation;

121.2 Secondly, s 139 confers a power on the provincial executive itself to intervene in appropriate circumstances.

122 Section 139 provides:

> ***139. Provincial intervention in local government.—****(1) When a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation, including—*
>
> *(a) issuing a directive to the Municipal Council, describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;*
>
> *(b) assuming responsibility for the relevant obligation in that municipality to the extent necessary to—*
>
> *(i) maintain essential national standards or meet established minimum standards for the rendering of a service;*

(ii) prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or to the province as a whole; or

(iii) maintain economic unity; or

(c) dissolving the Municipal Council and appointing an administrator until a newly elected Municipal Council has been declared elected, if exceptional circumstances warrant such a step.

…

(4) If a municipality cannot or does not fulfil an obligation in terms of the Constitution or legislation to approve a budget or any revenue-raising measures necessary to give effect to the budget, the relevant provincial executive must intervene by taking any appropriate steps to ensure that the budget or those revenue-raising measures are approved, including dissolving the Municipal Council and—

(a) appointing an administrator until a newly elected Municipal Council has been declared elected; and

(b) approving a temporary budget or revenue-raising measures to provide for the continued functioning of the municipality.

(5) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must—

(a) impose a recovery plan aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, which—

(i) is to be prepared in accordance with national legislation; and

(ii) binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs; and

(b) dissolve the Municipal Council, if the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures, necessary to give effect to the recovery plan, and—

(i) appoint an administrator until a newly elected Municipal Council has been declared elected; and

(ii) approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality; or

(c) if the Municipal Council is not dissolved in terms of paragraph (b), assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

…

> *(7) If a provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in subsection (4) or (5), the national executive must intervene in terms of subsection (4) or (5) in the stead of the relevant provincial executive.*

123 When the Constitution first came into operation, section 139 simply conferred the power on provincial government to intervene when a municipality could not or did not fulfil an executive obligation in terms of the Constitution or legislation. Since then, section 139 has been extensively amended and today it envisages three different categories of intervention. These are as follows:

123.1 "Regular" interventions under section 139(1), which include measures such as issuing a directive, assuming responsibility, and dissolving a municipal council;

123.2 "budgetary" interventions under section 139(4) which include measures such as the mandatory dissolution of the municipal council, and the adoption of a temporary budget or revenue-raising measures; and

123.3 "financial crises" interventions in terms of section 139(5) which include measures such as the imposition of a financial recovery plan, dissolution of the municipal council and the assumption of responsibility.

124 Each category has its own substantive and procedural requirements.

125 Section 139(1) of the Constitution in turn contemplates 3 kinds of intervention:

125.1 Under 139(1)(a), the "softest" intervention, the Province issues a directive to the Municipal Council describing the extent of the failure to fulfil its obligations and stating any steps required to meet its obligations;

125.2 Under 139(1)(b), the "moderate" intervention, Province steps in to assume responsibility for the relevant obligation in that municipality to the extent necessary to:

125.2.1 Maintain essential national standards or meet established minimum standards for the rendering of a service;

125.2.2 Prevent that Municipal Council from taking unreasonable action that is prejudicial to the interests of another municipality or the province as a whole; or

125.2.3 Maintain economic unity; and

125.3 Under section 139(1)(b), the "*drastic*" intervention, Province dissolves the Municipal Council and appoints an administrator to administer the affairs of the municipality. This intervention may only be utilised in "*exceptional circumstances"*.

126 In the *First Certification* judgment,[56] the Constitutional Court explained that this power to intervene gives the provincial government the authority to intrude on the functional terrain of local government. In other words, it does confer on provincial government the authority to exercise municipal powers and perform municipal functions. It is a "hands-on" power. It is, accordingly, the most intrusive power. Given its intrusive nature, the circumstances under which a provincial government can exercise this power are not only restricted, but are also subject to various procedural requirements.

[56] Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the RSA, 1996 1996 10 BCLR 1253 (CC).

The MFMA

127 Section 139 of the MFMA provides for mandatory intervention by province in municipal affairs in certain defined circumstances. It provides:

> ***139. Mandatory provincial interventions arising from financial crises.***—*(1) If a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the provincial executive must promptly—*
>
> *(a) request the Municipal Financial Recovery Service—*
>
> *(i) to determine the reasons for the crisis in its financial affairs;*
>
> *(ii) to assess the municipality's financial state;*
>
> *(iii) to prepare an appropriate recovery plan for the municipality;*
>
> *(iv) to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan; and*
>
> *(v) to submit to the MEC for finance in the province—*
>
> *(aa) the determination and assessment referred to in subparagraphs (i) and (ii) as a matter of urgency; and*
>
> *(bb) the recovery plan and recommendations referred to in subparagraphs (iii) and (iv) within a period, not to exceed 90 days, determined by the MEC for finance; and*
>
> *(b) consult the mayor of the municipality to obtain the municipality's co-operation in implementing the recovery plan, including the approval of a budget and legislative measures giving effect to the recovery plan.*
>
> *(3) An intervention referred to in subsection (1) supersedes any discretionary provincial intervention referred to in section 137, provided that any financial recovery plan prepared for the discretionary intervention must continue until replaced by a recovery plan for the mandatory intervention."*

The appropriateness of an order in terms of section 139 of the Constitution read with section 139 of the MFMA

128 The circumstances before this Court are precisely those which were envisaged by the legislature as justifying provincial intervention in municipal affairs.

129 An intervention is aimed at resolving the problems the municipality is facing and restoring service delivery. The intervention is therefore remedial and not punitive. The remedial nature of a section 139(1) intervention was highlighted in ***City of Cape Town v Premier, Western Cape***[57] when the court explained that section 139 of the Constitution "*is concerned with omission or inaction by the municipality and not positive misconduct. It is also framed in the present tense, being concerned with ongoing failure and not past failure. Intervention would not be appropriate where a past omission has already ceased*".

130 While the Constitution confers the power on a provincial executive to intervene in local government, it also provides that a provincial executive may only do so in those cases where a municipality "*cannot or does not fulfil an executive obligation in terms of the Constitution or legislation*".

131 In ***Mnquma Local Municipality v Premier of the Eastern Cape***,[58] the court explained that "*this is a statutory precondition or jurisdictional fact*". "*It is not left to the discretion of the provincial executive*", the court explained further, "*but is an objective fact which is independently triable by the court*". The identification of the executive obligation is

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[57] 2008 6 SA 345 (C).

[58] 2012 JOL 28311 (ECB) at paras 49-52.

therefore an essential element of the intervention. This is because it determines whether the intervention is a constitutionally valid one or not.

132 In the present circumstances, the "executive action" concerned is the constitutional obligation on the Municipality to provide municipal services, including electricity.

Which kind of intervention is appropriate?

133 Given that all parties accept that the Municipality is unable to pay its debt to Eskom, it is clear that a section 139(1)(a) intervention in the form of a directive would not be effective.

134 The Constitution goes on to provide, however, that the provincial executive may assume responsibility to the extent that it is necessary to "*meet established minimum standards for the rendering of a service*". This would be a minimum ground for intervention in the Municipality. As would the further criterion in section 139(1)(b), namely to "*maintain economic unity*".

135 The requirements of section 139(1)(b) have consequences for both the aim and the scope of the intervention. The aim of the intervention must be to lift the municipality to a minimum standard; to prevent it from harming the interests of other municipalities or the province as a whole; or to maintain economic unity in the province. The provincial executive can only intervene to the extent necessary to achieve these goals.

136 Given the contents of the Premier's Report,[59] it appears that it is not necessary to dissolve the entire Council since, as a result of the appointment of the new Municipal Manager in May 2017 (Thoka Kgoale), the Council is functioning better, and is being better managed.[60]

137 The Premier records that there have been three previous interventions in TCLM in terms of section 139 of the Constitution (but does not record whether they were under section 139(1)(a), (b) or (c)) and states that the interventions "*allowed for temporary improvements in payments to Eskom*".[61]

138 Accordingly, it appears that there is merit to an intervention under section 139(1)(b) of the Constitution, and for the Province to take over the role of managing TCLM's electricity distribution function.

139 In addition, the Applicants rely on section 139(5) of the Constitution in terms of which, if a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or to meet its financial commitments, or admits that it is unable to meet its obligations or financial commitments, the relevant provincial executive must impose a financial recovery plan on the municipality.

140 This financial recovery plan must be aimed at securing the municipality's ability to meet its obligations to provide basic services or its financial commitments, and must be

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[59] The Report appears at Record, vol 6, p. 528.

[60] Premier's Report, para 92, Record vol 6, p. 565.

[61] Premier's Report, para 90, Record vol 6, p. 564.

prepared in accordance with national legislation. The national legislation referred to is the Local Government: Municipal Finance Management Act, and particularly section 139(5)(a) of the MFMA.

141 After the financial recovery plan has been prepared and presented to the municipality, the municipality must implement it, at least to the extent that it is necessary to solve the crisis. This is because the Constitution provides that the financial recovery plan binds the municipality in the exercise of its legislative and executive authority, but only to the extent necessary to solve the crisis in its financial affairs.

142 If the municipality cannot or does not approve legislative measures, including a budget or any revenue-raising measures necessary to give effect to the financial recovery plan, the Constitution goes on to provide that the relevant provincial executive must either dissolve the municipal council or assume responsibility for the implementation of the recovery plan itself.

143 In so far as the first option is concerned, the Constitution provides that the provincial executive must dissolve the municipal council and appoint an administrator until a newly elected municipal council has been declared elected. In addition, it must also approve a temporary budget or revenue-raising measures or any other measures giving effect to the recovery plan to provide for the continued functioning of the municipality.

144 In so far as the second option is concerned, the Constitution provides that if the municipal council is not dissolved, the provincial executive must assume responsibility for the implementation of the recovery plan to the extent that the municipality cannot or does not otherwise implement the recovery plan.

145 Moreover, of a provincial executive cannot or does not adequately exercise the powers or perform the functions referred to in section 139(4) or 139(5) of the Constitution, the Constitution provides that the national executive must intervene in terms of section 139(4) or 139(5) in the stead of the relevant provincial executive.

146 In the premises, the Applicants pray for an order directing the Premier to intervene in TCLM in terms of section 139(1)(b) of the Constitution read with section 139 of the MFMA by taking over the running of the Municipality's electricity business, and in terms of section 139(5) of the Constitution by imposing a financial plan on the Municipality.

CONCLUSION

147 In the premises, the Applicants pray for orders that:

147.1 Pending the final adjudication of Part B (including any appeals), Eskom is interdicted from terminating or interfering with the electricity supply to TCLM;

147.2 Eskom's decision of around September 2017 to terminate or interrupt the electricity supply to TCLM is declared to be inconsistent with the Constitution and unlawful;

147.3 To the extent that Eskom wishes to embark on a new electricity interruption PAJA process, it may not terminate or interrupt electricity supply to TCLM without a Court Order authorising it to do so;

147.4 The MEC:COGTA is directed to report to Parliament on the financial state of TCLM in terms of section 134 of the MFMA;[62] and

147.5 The Premier is directed to intervene in TCLM in terms of section 139(1)(b) of the Constitution read with section 139 of the MFMA by taking over the running of the Municipality's electricity business, and in terms of section 139(5) of the Constitution by imposing a financial plan on the Municipality.

148 The Applicants seek the costs of this application as well as costs of the 27 December 2017 and 31 January 2018 applicaitons, including the costs of two counsel, to be paid by Eskom.

A KATZ SC
S PUDIFIN-JONES

Chambers, Cape Town and Durban
1 March 2018

[62] Section 134 of the MFMA provides: "The Cabinet member responsible for local government must as part of the report referred to in section 38 of the Municipal Systems Act, annually report to Parliament on actions taken by MECs for local government to address issues raised by the Auditor-General in audit reports on financial statements of municipalities and municipal entities."