THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 663/2019

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**APPELLANT**
and	
RESILIENT PROPERTIES (PTY) LTD	**FIRST RESPONDENT**
CHANGING TIDES 91 (PTY) LTD	**SECOND RESPONDENT**
RETRACTION PROPS 7 (PTY) LTD	**THIRD RESPONDENT**
MOGWELE TRADING 278 (PTY) LTD	**FOURTH RESPONDENT**
EMALAHLENI MUNICIPALITY	**FIFTH RESPONDENT**
MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS MPUMALANGA	**SIXTH RESPONDENT**
MINISTER OF ENERGY	**SEVENTH RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**EIGHTH RESPONDENT**
and	
SAKELIGA NPC	**AMICUS CURIAE**

Case no: 664/2019

In the matter between:

ESKOM HOLDINGS SOC LIMITED **APPELLANT**

and

SABIE CHAMBER OF COMMERCE AND TOURISM **FIRST RESPONDENT**

LYDENBURG CHAMBER OF COMMERCE AND TOURISM **SECOND RESPONDENT**

GRASKOP CHAMBER OF COMMERCE AND TOURISM **THIRD RESPONDENT**

THABA CHWEU LOCAL MUNICIPALITY **FOURTH RESPONDENT**

MUNICIPAL MANAGER: THABA CHWEU LOCAL MUNICIPALITY **FIFTH RESPONDENT**

EXECUTIVE MAYOR: THABA CHWEU LOCAL MUNICIPALITY **SIXTH RESPONDENT**

CHIEF FINANCIAL OFFICER: THABA CHWEU LOCAL MUNICIPALITY **SEVENTH RESPONDENT**

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA **EIGHTH RESPONDENT**

MINISTER OF ENERGY **NINTH RESPONDENT**

MEC: COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **TENTH RESPONDENT**

MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS **ELEVENTH RESPONDENT**

and

SAKELIGA NPC **AMICUS CURIAE**

Case no: 583/2019

In the matter between:

THABA CHWEU LOCAL MUNICIPALITY **FIRST APPELLANT**

MUNICIPAL MANAGER: THABA CHWEU LOCAL MUNICIPALITY **SECOND APPELLANT**

EXECUTIVE MAYOR: THABA CHWEU LOCAL MUNICIPALITY **THIRD APPELLANT**

CHIEF FINANCIAL OFFICER: THABA CHWEU LOCAL MUNICIPALITY **FOURTH APPELLANT**

and

SABIE CHAMBER OF COMMERCE AND TOURISM **FIRST RESPONDENT**

LYDENBURG CHAMBER OF COMMERCE AND TOURISM **SECOND RESPONDENT**

GRASKOP CHAMBER OF COMMERCE AND TOURISM **THIRD RESPONDENT**

ESKOM HOLDINGS SOC LIMITED **FOURTH RESPONDENT**

NATIONAL ENERGY REGULATOR

OF SOUTH AFRICA **FIFTH RESPONDENT**

MINISTER OF ENERGY **SIXTH RESPONDENT**

MINISTER: COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS **SEVENTH RESPONDENT**

MEC: COOPERATIVE GOVERNANCE
AND TRADITIONAL AFFAIRS **EIGHTH RESPONDENT**

Neutral citation: *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others* (Case no 663/19); *Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism, and Others* (Case no 664/19); *Thaba Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism, and Others* (Case no 583/19) [2020] ZASCA 185 (29 December 2020)

Coram: PETSE DP, CACHALIA, VAN DER MERWE and MOCUMIE JJA and LEDWABA AJA

Heard: 27 – 28 August 2020

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives via e-mail, publication on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09H45 on 29 December 2020.

Summary: Constitutional law – section 41 of the Constitution of the Republic of South Africa, 1996 – principles of cooperative government and intergovernmental relations – all spheres of government and all organs of state obliged to make reasonable effort in good faith to settle intergovernmental

disputes – Intergovernmental Relations Framework Act 13 of 2005, ss 40 and 41.

Electricity – Electricity Regulation Act 4 of 2006, s 21(5) – interruption of electricity supply by Eskom to municipalities in financial crises and unable to pay for electricity supply – municipalities constitutionally and statutorily obliged to provide basic services, inclusive of electricity, to communities – whether Eskom entitled to interrupt electricity supply due to non-payment.

Local Government – Local Government: Municipal Structures Act 117 of 1998 – Local Government: Municipal Systems Act 32 of 2000 – Local Government: Municipal Finance Management Act 56 of 2003.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance): judgment reported *sub nom Sabie Chamber of Commerce and Tourism and Others v Thaba Chweu Local Municipality and Others; Resilient Properties (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Others* [2019] ZAGPPHC 112

Case no 663/2019: *Eskom Holdings SOC Limited v Resilient Properties (Pty) Ltd and Others:*
The appeal is dismissed with costs, including the costs of two counsel where so employed.

Case no 664/2019: *Eskom Holdings SOC Limited v Sabie Chamber of Commerce and Tourism and Others*:
The appeal is dismissed with costs, including the costs of two counsel where so employed.

Case no 583/2019: *Thaba Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others*:

1 The appeal against paragraph 2 of the order of the high court is upheld.
2 The first, second and third respondents shall pay the costs of the appeal jointly and severally, the one paying the others to be absolved.
3 Paragraph 2 of the order of the high court is set aside and in its place is substituted the following:

'The costs of this application shall be borne by Eskom Holdings SOC Limited, with the rest of the respondents being absolved.'

JUDGMENT

Petse DP (Cachalia, Van der Merwe and Mocumie JJA and Ledwaba AJA concurring):

Introduction

[1] These proceedings encompass a trilogy of appeals, two of which primarily concern the issue of whether the decisions taken by Eskom Holdings SOC Limited (Eskom) to interrupt the bulk supply of electricity to two municipalities at scheduled times are defensible on both constitutional and statutory grounds. They arise from two applications brought in the Gauteng Division of the High Court, Pretoria, sitting in Mpumalanga. Although these applications were not formally consolidated, they were nonetheless heard together over several days. The high court (Hughes J) granted an order reviewing and setting aside Eskom's decisions, together with other ancillary relief. [1] Whether the high court rightly reviewed and set aside Eskom's decisions is the primary question confronting us in this appeal. The third appeal is confined to the issue of whether the high court exercised its discretion judicially in awarding costs against Thaba Chweu Local Municipality, and three of its senior executives. The appeals come before us with the leave of the high court.

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[1] *Sabie Chamber of Commerce and Tourism and Others v Thaba Chweu Local Municipality and Others; Resilient Properties Proprietary Limited and Others v Eskom Holdings SOC Ltd and Others* [2019] ZAGPPHC 112. The review applications were heard together from 13-18 August 2018, with the order following on 7 March 2019.

[2] The facts of these appeals graphically illustrate the distressing state of municipal governance in this country, which depict a picture of the dysfunctional state of affairs bedevilling local government. The Emalahleni Local Municipality (ELM) and the Thaba Chweu Local Municipality (TCLM), the municipalities occupying centre-stage in these proceedings, have been aptly referred to by counsel as financial delinquents, dysfunctional municipalities, and municipalities plagued by poor governance and financial mismanagement.

[3] Eskom is a state-owned public company having a share capital, incorporated in accordance with the company laws of the Republic of South Africa.[2] It is the appellant in two of the three appeals. Where it is necessary to distinguish between the two appeals, I shall, for convenience, refer to the appeal under case no 663/19 as Eskom I, and the appeal under case no 664/19 as Eskom II.

[4] The first to fourth appellants in the third appeal under case no 583/10 are the Thaba Chweu Local Municipality; the Municipal Manager: Thaba Chweu Local Municipality; the Executive Mayor: Thaba Chweu Local Municipality; and the Chief Financial Officer: Thaba Chweu Local Municipality, respectively. For convenience, these appellants shall be referred to collectively as the Thaba Chweu Municipal appellants.

[5] The respondents in Eskom I are, respectively, Resilient Properties (Pty) Ltd; Changing Tides 91 (Pty) Ltd; Retraction Props 7 (Pty) Ltd; Mogwele

[2] See the long title of the Eskom Conversion Act 13 of 2001.

Trading 278 (Pty) Ltd; the Emalahleni Municipality; the MEC: Cooperative Governance and Traditional Affairs, Mpumalanga; the Minister of Energy; and the National Energy Regulator of South Africa (NERSA).[3] For convenience, the first to fourth respondents shall collectively be referred to as Resilient. The fifth to eighth respondents shall be referred to, respectively, as Emalahleni, the MEC, the Minister, and the NERSA.

[6] The first to third respondents in Eskom II are, respectively, the Sabie Chamber of Commerce and Tourism; the Lydenburg Chamber of Commerce and Tourism; and the Graskop Chamber of Commerce and Tourism. For brevity, they will collectively be referred to as the Chambers. The fourth to eleventh respondents are, respectively, the Thaba Chweu Local Municipality; the Municipal Manager: Thaba Chweu Local Municipality; the Executive Mayor: Thaba Chweu Local Municipality; the Chief Financial Officer: Thaba Chweu Local Municipality; the NERSA; the Minister of Energy; the MEC: Cooperative Governance and Traditional Affairs; and the Minister: Cooperative Governance and Traditional Affairs. The fourth to seventh respondents shall collectively be referred to as the municipal respondents. For convenience, the eighth to the eleventh respondents shall respectively be referred to as the NERSA, the MEC, and the Ministers. Where it is necessary to distinguish between the two Ministers, the ninth respondent will be referred to as the Minister of Energy and the eleventh respondent simply as the Minister of Cooperative Governance.

[3] The National Energy Regulator of South Africa (NERSA) is a regulatory authority, established as a juristic person, in terms of s 3 of the National Energy Regulator Act 40 of 2004.

[7] Resilient are all private companies who own the Highveld Mall, a 68 000m^2 retail shopping centre located within the jurisdiction of the ELM. The mall has 185 retail tenants. These companies together employ some 2 000 employees and more than 100 support staff. The mall consumes a large amount of electricity supplied by the ELM, which is a licensed distributor of electricity it bulk-purchases from Eskom for use by its residents. Resilient have dutifully paid the ELM for their consumption. The Chambers share a common interest with Resilient in these proceedings. They represent various businesses that are affiliated to them. Despite Resilient and the Chambers having fulfilled their payment obligations to the ELM and TCLM, the two municipalities have repeatedly defaulted in making their payments to Eskom. This has resulted in Eskom deciding to interrupt electricity supply to them. For Resilient and the Chambers, these electricity interruptions have had a devastating effect as they 'threaten the very fabric of society', with hospitals, schools, households and businesses severely disrupted.

[8] Mr Gwilym Rees, who deposed to the founding affidavit of the Chambers, elaborated on the effects of electricity interruptions as follows:

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

Secondly, the minute the power is shut off, the water purification and processing plants as well as those pumping water to the community to ensure adequate water pressure come to an immediate standstill. This means that taps run dry, households run out of water, and critical water based facilities will cease functioning. Even worse, when the supply is reconnected, it will take some time for an adequate reserve to be generated to enable the community and business to recommence.

Thirdly … any process (industrial, commercial or domestic) that is dependent on electricity will immediately cease.'

[9] Along similar lines, the deponent to the founding affidavit of Resilient alleged:

'50.2 The proposed interruptions will lead to the rapid collapse of the entire Emalahleni water network within 48 hours and it is likely that a human and environmental disaster will follow;

50.3 Interruptions to the electrical supply to the water purification system will lead to raw, unpurified water flowing into reservoirs and creating a serious health risk to the community;

50.4 There is a real risk that Eskom's planned interruptions will lead to a total collapse of the entire sewer system;

50.5 Interruptions to the electrical supply to the sewage works will result in a situation where raw sewage flows into the natural waterways and ultimately finds its way into the Olifants River catchment system, creating an environmental hazard way beyond the boundaries of Emalahleni.'[4]

[10] Sakeliga NPC (Sakeliga), a business interest organisation boasting a countrywide membership of some 12 000 members, is a non-profit company incorporated in terms of the Companies Act 71 of 2008. It was admitted as an *amicus curiae* in both Eskom I and Eskom II. In the high court, Sakeliga was admitted as an *amicus curiae* in Eskom I but not in Eskom II. I interpose to observe that counsel for Eskom, in Eskom II, made some play of the fact that Sakeliga was not admitted as an *amicus* in relation to the challenge of the Chambers, contending that its submissions should not have been taken into account by the high court. In my view this complaint has no substance. In this court, Sakeliga was, pursuant to its unopposed application, admitted as *amicus*

[4] These allegations were confirmed in a supporting affidavit deposed to by Resilient's expert.

and repeated the submissions it advanced before the high court. Eskom must have been aware for several months before the hearing of the appeal, when Sakeliga's application for admission as *amicus* was served on all interested parties, what its argument would entail. Thus, it was well-prepared to contest, as it in fact did, those submissions in this Court. Indeed, before us counsel was not able to point to any prejudice that Eskom had suffered as a result of Sakeliga having been allowed to present oral argument before the high court.

[11] The government is Eskom's sole shareholder. Eskom is also an organ of state as contemplated in s 239 of the Constitution of the Republic of South Africa, 1996 (the Constitution).[5] In terms of its constituent Act, the Eskom Conversion Act 13 of 2001, Eskom plays a developmental role and is charged with promoting 'universal access to, and the provision of, affordable electricity, taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom'.[6] The litigation in the high court was precipitated by decisions[7] taken by Eskom to interrupt the bulk supply of electricity to the ELM and the TCLM. Eskom asserts that it had to resort to what it accepts is a drastic measure because not only had the ELM and the TCLM persistently failed over several years to pay for the bulk electricity supplied by Eskom, in breach of their contractual obligations, they had also failed to honour their payment obligations undertaken in terms of the acknowledgment of debt arrangements that they had each respectively signed.

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[5] See para *(b)*(ii) of the definition of 'organ of state' which includes:
'*(b)* any other functionary or institution—
(i) …
(ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer…'

[6] See s 6(5)*(a)* and *(b)* of the Eskom Conversion Act.

[7] Eskom's decisions to interrupt the bulk supply of electricity to the TCLM and the ELM were taken on 15 September and 29 November 2017, respectively.

In addition, Eskom asserted that its principal objective in resorting to the drastic measure of interrupting the bulk supply of electricity to the ELM and the TCLM was to contain the spiralling of the electricity debt which, over the years, had increased exponentially. Eskom further alleged that failure to take the drastic measures it had adopted would ultimately impact negatively on its overall capacity to generate electricity. And that if it were pushed to a point where it could no longer generate electricity, so the argument continued, the whole country would be plunged into darkness, with disastrous consequences on many fronts.

[12] Eskom is licenced by the NERSA to generate, transmit and distribute electricity countrywide.[8] Currently, it is the only entity licenced to supply electricity to municipalities in the country. The municipalities are in turn licenced to sell electricity to their communities and other customers or end-users within their areas. Eskom supplies bulk electricity to the municipal grid which is then distributed by municipalities through their electricity supply networks to the end-users. It is common cause between the parties that the municipal electricity supply networks are designed in such a way that it is not technically possible for Eskom to isolate supply to selected end-users within municipal areas, the municipal water purification system and the like.

[13] In *Joseph and Others v City of Johannesburg and Others*[9] the Constitutional Court said, with reference to *Mkontwana*,[10] that: '[E]lectricity

[8] See, generally, Chapter III of the ERA.
[9] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) para 34. (Citations omitted.)
[10] *Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 38.

is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.' This statement by the Constitutional Court resonates with the facts of this case. In *Mkontwana* the Constitutional Court held that '[m]unicipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty.'[11] That electricity is a component of the basic services that municipalities are constitutionally and statutorily obliged to provide to their residents is therefore beyond question.

Factual background

[14] It is now opportune to set out a detailed background to this litigation. As the two applications were brought on essentially similar grounds, and resisted by Eskom on virtually the same basis, it is convenient to recount the facts in a consolidated narrative.

[15] The generation, transmission and distribution of electricity in this country is regulated in terms of the Electricity Regulation Act 4 of 2006 (the ERA). The NERSA, established in terms of the National Energy Regulator Act 40 of 2004,[12] has, in terms of s 3 of the ERA, been designated as the custodian and enforcer of the regulatory framework of the ERA. As Regulator it is empowered, amongst other things, to consider applications for licences and issue licences for the generation, transmission or distribution of electricity.[13] Eskom is licenced by the NERSA to generate, transmit and

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[11] Ibid. (Citations omitted.)
[12] The National Energy Regulator Act established, under s 3, the National Energy Regulator of South Africa as a juristic person to undertake, amongst other things, the functions set out in s 4 of the ERA.
[13] The powers and duties of the NERSA are set out in s 4 of the ERA:
'The Regulator—
(a) must—
(i) consider applications for licenses and may issues licenses for—

distribute electricity. The ELM and the TCLM are, for their part, licenced by the NERSA to reticulate[14] electricity supplied to them in bulk by Eskom. The ELM and the TCLM in turn on-sell or supply electricity to the customers or end-users within their respective municipal areas at a marked-up tariff in order to raise revenue for themselves. The contractual relationship between Eskom on the one hand and the ELM and the TCLM on the other is, apart from the ERA, also regulated in terms of written electricity supply agreements (ESAs) concluded between the parties. Clauses 9.1 and 9.2 of the ESAs provide:

'Electricity accounts for all charges payable under this Agreement shall be sent to the DISTRIBUTOR[15] as soon as possible after the end of each month (i.e. meter-reading month, as per the definition of "month" in the Eskom Schedule of Standard Prices), and each account shall be due and payable on the date the account is received by the DISTRIBUTOR, which date, for purposes of this Agreement, shall be as set out in subclause 25.2.

Should payment not be received within a period of 10 (ten) days from the date the account is deemed to have become due and payable in terms of subclause 9.1, ESKOM may discontinue the bulk supply to the DISTRUTOR and/or terminate the electricity supply agreement after having given the DISTRIBUTOR 14 (fourteen) days written notice. The

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(aa) the operation of generation, transmission or distribution facilities;
(bb) the import and export of electricity;
(cc) trading;

(ii) regulate prices and tariffs;

(iii) register persons who are required to register with the Regulator where they are not required to hold a licence;

(iv) issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act;

(v) establish and manage monitoring and information systems and a national information system, and co-ordinate the integration thereof with other relevant information systems;

(vi) enforce performance and compliance, and take appropriate steps in the case of non-performance;

(b) may—

(i) mediate disputes between generators, transmitters, distributors, customers or end users;

(ii) undertake investigations and inquiries into the activities of licensees;

(iii) perform any other act incidental to its functions.'

[14] For purposes of the ERA 'reticulation' is defined in s 1 to mean 'trading or distribution of electricity and includes services associated therewith'. Properly construed, reticulation appears to refer to the infrastructure necessary to connect individual end-users to a single supply point for which municipalities are responsible.

[15] 'Distributor' is a reference to the ELM and the TCLM.

amount outstanding shall bear interest compounded monthly from the due date to date of payment, at a rate per annum equal to the prevailing prime overdraft rate charged by Firs National Bank of Southern Africa Limited plus 5% (five per centum).'

[16] Clause 22.3 of the ESAs, in turn, provides:

'Should the DISTRIBUTOR fail to pay any electricity account in accordance with the provisions of Clause 9, ESKOM may discontinue the bulk supply to the DISTRIBUTOR and/or terminate this Agreement, without prejudice to any claim ESKOM may have for electricity supplied or for damages suffered by the default on the part of the DISTRIBUTOR, subject to the proviso that ESKOM shall give the DISTRIBUTOR prior notice thereof by facsimile or some other electronic medium. ESKOM shall afford the DISTRIBUTOR a period of 48 (forty-eight) hours within which to rectify the said default. The bulk supply shall be restored as soon as practicable after the DISTRIBUTOR has remedied the default and paid the requisite reconnection fee.'

[17] Eskom asserted that in breach of their respective contractual obligations, the ELM and the TCLM failed to pay for the electricity that they had purchased for distribution to their customers, the end-users. As a result, their accounts with Eskom fell into arrears. By June 2017 the collective debt owed to Eskom by various municipalities in the country had reached alarming proportions.[16] The ELM and the TCLM have been two of the notable serial defaulters[17] of their payment obligations for electricity supplied by Eskom. When the debt owed by the ELM and the TCLM had reached intolerable levels, Eskom threatened to cut off its electricity supply to the ELM and the TCLM to induce them to pay. In order to stave off Eskom's threatened action, the ELM and the TCLM signed acknowledgements of debt in favour of Eskom

[16] As at April 2020 the combined municipal debt for electricity in the country stood at approximately R 30 billion.

[17] When litigation commenced some two and a half years ago, the ELM owed Eskom over R1.2 billion and the TCLM owed approximately half a billion Rand.

in terms of which they undertook to pay off the accumulated debt in agreed monthly instalments. At the same time, they also undertook to pay for future monthly electricity consumption in full upon Eskom rendering its monthly invoices. These undertakings came to naught for both the ELM and the TCLM defaulted on their payment plans agreed with Eskom to settle the debt. In consequence, the arrears continued to mount as the ELM and the TCLM, apart from the sporadic payments that they made, failed to pay for their ongoing current consumption, the historical debt and interest accruing thereon.

[18] When Eskom's tactic of adopting 'a carrot and stick approach' to extract payment from the defaulting municipalities failed to yield the desired outcome, it published notices declaring its intention to interrupt the bulk electricity supply at scheduled times, to wit: from 06h00 to 08h00 and again from 17h00 to 19h30 during the week; and from 08h30 to 11h00 and again from 15h00 to 17h30 on weekends. These times were to be extended, incrementally, until the point of a total termination of electricity supply unless the ELM and the TCLM made substantial payments to Eskom to reduce their indebtedness. In the notices, Eskom invited members of the public and interested parties to make representations on why it should not proceed with the proposed electricity supply interruptions. Resilient made representations to Eskom to dissuade it from proceeding with the threatened action. No representations were received from the Chambers or from residents within the municipal area of the TCLM.

[19] Eskom was not moved by the representations made by Resilient. It gave notice that it would implement its decision to interrupt the bulk electricity supply to both the ELM and the TCLM as they had repeatedly failed to honour

their payment arrangements. In justifying its stance, Eskom stated that Resilient, the Chambers and any other similarly situated parties were not without a remedy. It was open to them, asserted Eskom, to apply to a court and seek a mandamus against the ELM and the TCLM directing them to pay their debts which would then obviate the need for Eskom to implement its decision to interrupt the supply of electricity. I observe in passing, that it is cold comfort to suggest that end-users of electricity could seek a mandamus directing a delinquent municipality to pay its debts in circumstances where it is known that it is unable to do so.

[20] The stance adopted by Eskom precipitated the litigation that ensued in the high court. Both Resilient and the Chambers brought separate applications on an urgent basis in which they sought interim and final relief. With respect to the interim relief, they sought orders, in essence, directing Eskom to restore the full supply of electricity pending the final determination of the relief sought in part B of their notices of motion. With respect to final relief, they, so far as is relevant for present purposes, sought orders in the following terms:

(a) declaring that the interruption decision is unconstitutional and invalid;

(b) reviewing and setting aside the interruption decision;

(c) declaring that s 21(5) of the ERA is inconsistent with the Constitution and invalid; and

(d) interdicting Eskom from disconnecting the electricity supply for the purpose of compelling the municipalities to pay their arrear debts to Eskom.

[21] The case of Resilient and the Chambers is that it is unconstitutional and unlawful for Eskom to enforce its debt against the ELM and the TCLM by interrupting the electricity supply in circumstances where they, as end-users,

have met their payment obligations to the municipalities. They assert that: (a) they have dutifully paid for their electricity but cannot compel the ELM and the TCLM to pay Eskom; (b) Eskom has been dilatory in failing to recover the escalating debt from the municipalities and allowed it to escalate to unsustainable levels, and (c) the interruption of electricity created a public health and environmental emergency because it threatened the functioning of the municipal water reticulation and sewage systems.

[22] Accordingly, the case of Resilient and the Chambers was based on the following grounds: First, Eskom was obliged to supply electricity to all end-users in terms of clauses 3.1 and 3.2 of its distribution licence. Therefore, its decision to interrupt the supply of electricity to the entire municipality was not consonant with its licence conditions. Second, Eskom's decision was tantamount to an impermissible exercise of self-help and thus inconsistent with the rule of law under s 1*(c)* of the Constitution and the right of access to courts under s 34. Third, the decision was in breach of s 6(2)*(e)*(iii) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) because in taking it, Eskom failed to have regard to all the relevant considerations, particularly the potential damage to the environment as a result of sources of water being contaminated due to damage to the municipal water and sewage systems. It thereby put the health of the local residents at risk Fourth, Eskom had not exhausted the mechanism provided for in s 41 of the Constitution and s 40 of the Intergovernmental Relations Framework Act 13 of 2005 (IRFA) to resolve its disputes with the ELM and the TCLM before taking its interruption decision.

[23] For its part, Eskom contended that: first, there was no contractual nexus between it on the one hand and Resilient and the Chambers on the other and, therefore, that it bore no constitutional obligation to supply them with electricity. Secondly, it was entitled to rely on clause 9.2 of the ESAs, which accorded it the contractual right to interrupt or even terminate altogether the supply of electricity to the ELM and the TCLM. Thirdly, its contractual right to interrupt or terminate the supply of electricity was buttressed by s 21(5)*(c)* of the ERA, which authorises it to reduce or terminate the supply of electricity to the affected municipalities, when they have contravened the payment conditions of its distribution licence. Fourthly, s 41 of the Constitution and ss 40 and 41 of the IRFA were not implicated because there existed no dispute between it on the one hand and the ELM and the TCLM on the other. On this score, Eskom asserted that the two municipalities had unequivocally admitted liability to it, undertook to settle the existing debt over an agreed period, pay for their current consumption of electricity when billed therefor by Eskom, but failed to honour their undertaking. As a further justification for its decision, Eskom asserted that it was statutorily obliged to take the action it did because s 51(1)*(b)*(i)[18] of the Public Finance Management Act 1 of 1999 (PFMA) obliges it to recover revenue owed to it.

[24] Although Eskom had consented to the grant of interim relief (albeit at different times) in terms of which it was directed to restore full supply of electricity to the ELM and the TCLM, it nevertheless made clear that it would resist the grant of final relief.

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[18] Section 51(1)*(b)*(i) reads:
'An accounting authority for a public entity—
…
(b) must take effective and appropriate steps to—
(i) collect all revenue due to the public entity concerned…'

[25] In its answering affidavit in Eskom II, Eskom emphasised that the failure of the municipalities to settle their debts threatened its financial viability. It stated:

'Between the periods March 2016 to November 2016, total municipal debt owed to Eskom had increased to R10.2 billion. As at the June 2017, the overall municipal debts for various municipalities had risen exponentially to R 11.45 billion of which R 2.536 billion was owed by various municipalities within Mpumalanga Province where the [TCLM] is located. Eskom requires the income it earns from the supply of electricity to service its debts and meet is operational expenditure. The debt owed to it adversely impact upon Eskom's financial viability and its ability to deliver services to supply electricity in the country.

In the circumstances, it [became] unsustainable for Eskom to continue to supply bulk electricity to municipalities that do not pay for it. It also [became] necessary for Eskom to take measures to reduce and manage the rate of escalation of the debts in cases where no payment is received.

Eskom needs to collect the outstanding debt to ensure its financial stability. It has become urgent to collect revenue from all offending municipalities in order to ensure that: (i) its cost of debt for capital expansion does not become unmanageable; (ii) it is not compelled to raise funds on the capital markets to meet operating expenses; and (iii) it can maintain and expand electricity generation to meet the needs of all South Africans. This has become more important in light of recent credit ratings downgrades in relation to Eskom's debt.

…

Further, if Eskom's customers such as the municipality herein, do not pay for the bulk electricity having been supplied with, that will put Eskom in a situation where it may not be able to deliver on its mandate to generate electricity. That will lead to the demise of Eskom. Should that happen, the entire economy of the country will collapse. No industry or institution will operate. There will simply be no economic activities that will take place in the country. Therefore, the action taken by Eskom is necessary in the circumstances.

Eskom is, moreover, statutorily obliged to collect all revenue owed to it in terms of s 51(1)(*b*)(i) of the PFMA and municipalities have a concomitant obligation to Eskom to pay for the electricity they distribute to end-users.'

[26] Eskom then asserted that all of its engagements with the defaulting municipalities to recover the debt and secure compliance with their obligations have been unsuccessful. Significantly, with respect to the acknowledgment of debt by the TCLM the amount of some R400 million owing was for the period from 30 September 2002 to 7 June 2016. Yet, no concerted effort was made to contain the debt before it spiralled to an unmanageable level over a 16 year period.

[27] As already mentioned, in the high court the application for final relief came before Hughes J who granted an order reviewing and setting aside Eskom's decisions to embark on scheduled interruptions of electricity to the ELM and the TCLM, together with ancillary relief.

[28] It concluded that Eskom had the power under s 21(5) of the ERA to interrupt the supply of electricity. But it nevertheless held further that Eskom had failed to comply with the requirements of cooperative governance, as prescribed in s 41 of the Constitution and read with ss 40 and 41 of the IFRA, before taking the impugned decision. It reasoned as follows:

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

In terms of s 6(2)*(e)*(iii) of the PAJA, the failure on the part of Eskom and the municipalities to exhaust alternative remedies and procedures before embarking on the procedure of supply interruptions by Eskom, warrants the grant of the review sought. This section makes provision for a court to review an administrative action if relevant considerations were not considered. I agree with the amici that in this instance, the failure to pursue the process and mechanism, as is found in IFRA, would constitute a ground for review.'[19]

Constitutional and statutory framework

[29] Following upon the detailed factual background canvassed above, it is now necessary to make reference to the constitutional and statutory obligations that municipalities in the local sphere of government bear. First, s 151(1) of the Constitution establishes the local sphere of government, which consists of municipalities throughout the territory of the Republic. Subsection (2) vests the executive and legislative authority of municipalities in their Municipal Councils. Each municipality has 'the right to govern, on its own initiative, the local government affairs of its community, subject to national and provincial legislation, as provided for in the Constitution.'[20]

[30] Section 152, in turn, deals in broad terms with the objects of local government. It provides:

'(1) The objects of local government are—

(a) to provide democratic and accountable government for local communities;

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

(c) to promote social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage the involvement of communities and community organisations in the matters of local government.

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[19] *Sabie Chamber of Commerce and Tourism* (above fn 1) paras 53-54.

[20] Section 151(3) of the Constitution.

(2) A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).'

[31] In order to fulfil its constitutional mandate as envisioned in s 152, a municipality is required, in terms of s 153*(a)*, to 'structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community'. It is also necessary to make reference to s 154 of the Constitution. The provision is headed 'Municipalities in cooperative government' and provides as follows in subsection (1):

'The 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.'

[32] Pursuant to the constitutional mandate conferred and the constitutional duty imposed, national government enacted various legislative measures in order to give effect to the dictates of the Constitution. Relevant for present purposes are: the Housing Act 107 of 1997 (the Housing Act), the Local Government: Municipal Systems Act 32 of 2000 (the Municipal Systems Act), and the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA), the latter applying to all municipalities, municipal entities, and to national and provincial organs of state to the extent of their financial dealings with municipalities.[21]

[33] Section 4 of the Municipal Systems Act, dealing with the rights and duties of municipal councils, provides, amongst others in subsection (2) that:

[21] Section 3(1) of the MFMA. Subsection (2) goes on to state that:
'In the event of any inconsistency between a provision of this Act and any other legislation in force when this Act takes effect and which regulates any aspect of the fiscal and financial affairs of municipalities or municipal entities, the provision of this Act prevails.'

'The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to-

…

(f) give members of the local community equitable access to the municipal services to which they are entitled…'

Moreover, s 73 states that:

'(1) A municipality must give effect to the provisions of the Constitution and—

(a) give priority to the basic needs of the local community;

(b) promote the development of the local community; and

(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

(2) Municipal services must—

(a) be equitable and accessible;

(b) be provided in a manner that is conducive to—

(i) the prudent, economic, efficient and effective use of available resources;

and

(ii) the improvement of standards of quality over time;

(c) be financially sustainable;

(d) be environmentally sustainable; and

(e) be regularly reviewed with a view to upgrading, extension and improvement.'

[34] Section 9 of the Housing Act, in respect of the functions of municipalities, reads as follows in subsection (1)*(a)*(iii):

'Every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to—

(a) ensure that—

…

(iii) services in respect of water, sanitation, electricity, roads, stormwater drainage and transport are provided in a manner which is economically efficient;'

[35] The object of the MFMA is 'to secure sound and sustainable management of the fiscal and financial affairs of municipalities'.[22] It seeks to do so by establishing norms and standards and other requirements for, amongst other things, 'the handling of financial problems in municipalities'.[23] Section 139, which is headed '[m]andatory provincial interventions arising from financial crises', provides in subsection (1) that:

'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;

(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.

(2) The MEC for finance in the province must submit a copy of any request in terms of subsection (l)*(a)* and of any determination and assessment received in terms of subsection (l)*(a)*(v)*(aa)* to—

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[22] Section 2 of the MFMA.

[23] Ibid para *(f)*. Chapter 13 of the Act (ss 135-162) deals with the resolution of financial problems. Provincial interventions make up part 2 of this chapter and are provided for in ss 136-150.

(a) the municipality;

(b) the Cabinet member responsible for local government: and

(c) the Minister.

(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.'

[36] Section 139(5) of the Constitution provides:

'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…'[24]

If a provincial executive cannot, or does not, or does not adequately exercise the powers or perform the functions referred to in subsections (4) and (5), the national executive must intervene in the stead of the relevant provincial executive.[25]

[37] Finally, s 1 of the Constitution decrees that the Republic of South Africa is a single, sovereign and democratic state founded on certain values 'to ensure accountability, responsiveness and openness'.[26]

The issues

[24] There are two requirements for this, as listed in s 139(5)*(a)*(i) and (ii) of the Constitution. The provincial executive must impose a recovery plan 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.'

[25] See s 139(7) of the Constitution.

[26] See s 1*(d)* of the Constitution.

[38] The principal issues for adjudication in Eskom I and Eskom II are:

(a) whether the contractual and constitutional disputes relating to the moneys owed to Eskom and, in particular, the manner in which Eskom sought to recover them constituted intergovernmental disputes as contemplated in s 41 of the Constitution and s 40 of the IRFA;

(b) whether Eskom was in law entitled to invoke s 21(5) of the ERA without a court order authorising it to do so.

The subsidiary issues are whether:

(i) Eskom's decision to interrupt the bulk supply of electricity to the ELM and the TCLM was susceptible to review, and if so, whether such decision was irrational and unconstitutional; and

(ii) if s 41 of the Constitution and s 40 of the IRFA are found to apply, whether Eskom failed first to exhaust the alternative avenues contemplated in s 41 and s 40 respectively.

[39] With respect to the appeal of the Thaba Chweu municipal appellants, the sole issue is whether they should have been ordered to bear the costs of the Chambers in Eskom II.

Discussion

[40] The relevant provisions of the MFMA must now be considered in detail. The overarching purpose of this Act is apparent from its preamble. It is to 'secure sound and sustainable management of the financial affairs of municipalities and other institutions in the local sphere of government. Section 44(1) provides that whenever a dispute of a financial nature arises between organs of state (one of which is a municipality) the parties concerned must promptly take all reasonable steps to resolve the dispute out of court.

Furthermore, subsection (2) provides that if the National Treasury is not a party to the dispute, the parties must report the matter to National Treasury and may request the latter to mediate or designate a person to mediate between them.

[41] In terms of s 135(1), the primary responsibility to identify and resolve financial problems in a municipality rests with the municipality. Section 135(2) imposes a duty on a municipality to meet its financial commitments. If a municipality encounters a serious financial problem, it must in terms of s 135(3)*(b)* 'notify the MEC for local government and the MEC for finance in the province.' Section 138 sets out criteria for determining serious financial problems. It goes further to provide a list of factors which either individually or cumulatively may indicate a serious financial problem. Two of those factors bear mentioning in the context of this case. They are: (i) failure by a municipality to make payments as and when due; and (ii) where a municipality has defaulted on financial obligations for financial reasons.

[42] Section 136 imposes an obligation on the MEC for local government in a province if he or she becomes aware that a municipality is experiencing a serious financial problem. In that event, the MEC is obliged to promptly: (a) consult the mayor to determine the facts; (b) assess the seriousness of the situation and the municipality's response to that situation; and most importantly (c) determine whether the situation justifies or requires an intervention in terms of s 139 of the Constitution. Moreover, in terms of s 136(2) the MEC must, if the financial situation has been caused by or resulted in a failure by the municipality to comply with an executive obligation in terms of legislation or the Constitution, and the conditions for

intervention in terms of s 139 of the Constitution are met, promptly decide whether or not to intervene in the municipality.

[43] Section 150 provides for the intervention of the national executive where the provincial executive 'cannot or does not or does not adequately exercise the powers or perform the functions' referred to in s 139(4) or (5) of the Constitution. It reads:

'(1) If the conditions for a provincial intervention in a municipality in terms of section 139(4) or (5) of the Constitution are met and the provincial executive cannot or does not or does not adequately exercise the powers or perform the functions referred to in that section, the national executive must—

(a) consult the relevant provincial executive; and

(b) act or intervene in terms of that section in the stead of the provincial executive.

(2) If the national executive intervenes in a municipality in terms of subsection (1)—

(a) the national executive assumes for the purposes of the intervention the functions and powers of a provincial executive in terms of this Chapter;

(b) the Minister assumes for the purposes of the intervention the functions and powers of an MEC for finance in terms of this Chapter; and

(c) a reference in this Chapter—

(i) to a provincial executive must be read as a reference to the national executive;

(ii) to an MEC for finance must be read as a reference to the Minister; and

(iii) to a provincial intervention must be read as a reference to a national intervention.'

[44] I revert briefly to the ERA. Section 2 thereof sets out its objects which, in relevant part, are to:

'*(a)* achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met…

(d) facilitate universal access to electricity;

…

(g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public.'

[45] Section 27 then deals with the duties of municipalities with respect to electricity reticulation. It reads:

'Each municipality must exercise its executive authority and perform its duty by—

(a) complying with all the technical and operational requirements for electricity networks determined by the Regulator;

(b) integrating its reticulation services with its integrated development plans;

(c) preparing, implementing and requiring relevant plans and budgets;

(d) progressively ensuring access to at least basic reticulation services through appropriate investments in its electricity infrastructure;

(e) providing basic reticulation services free of charge or at a minimum cost to certain classes of end users within its available resources;

(f) ensuring sustainable reticulation services through effective and efficient management and adherence to the national norms and standards contemplated in section 35;

(g) regularly reporting and providing information to the Department of Provincial and Local Government, the National Treasury, the Regulator and customers;

(h) executing its reticulation function in accordance with relevant national energy policies; and

(i) keeping separate financial statements, including a balance sheet of the reticulation business.'

[46] As can be seen from the provisions of s 27 quoted in the preceding paragraph, it imposes certain obligations on municipalities. Notably amongst those obligations, in the context of the facts of these appeals, is the duty to regularly report and provide information on electricity reticulation to the

Department of Provincial and Local Government, the Regulator and customers. And, significantly, to 'keep separate financial statements, including a balance sheet of the reticulation business'.

Section 21(5) of the ERA

[47] I now proceed to consider the argument advanced in relation to s 21(5) of the ERA. From the perspective of Resilient, the Chambers and Sakeliga, this issue raises the question whether Eskom in effect resorted to 'self-help' when it invoked s 21(5). In *Chief Lesapo v North West Agricultural Bank and Another*[27] the Constitutional Court held:

'No one is entitled to take the law into her or his own hands. Self help, in this sense, is inimical to a society in which the rule of law prevails, as envisioned by section 1*(c)* of our Constitution, which provides:

"The Republic of South Africa is one, sovereign, democratic State founded on the following values:

…

(c) Supremacy of the constitution and the rule of law."

Taking the law into one's own hands is thus inconsistent with the fundamental principles of our law.'[28]

[48] Section 21 of the ERA which is headed 'Power and duties of licensee' provides in relevant part of subsection (5) thereof that:

'(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

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[27] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) para 11. (Citations omitted.)

[28] See also: *Public Servants Association obo Ubogu v Head, Department of Health, Gauteng and Others* [2017] ZACC 45; 2018 (2) SA 365 (CC) paras 66-67; *Gundwana v Steko Development CC and Others* [2011] ZACC 14; 2011 (3) SA 608 (CC) para 45.

(c) the customer has contravened the payment conditions of that licensee.'

[49] In the high court, Eskom argued that it was empowered in terms of s 21(5) to interrupt or even terminate electricity supply, where a customer fails to honour the terms of the agreement for the supply of electricity or has contravened the payment conditions of the licensee. On this score Eskom strongly relied on the judgments of the Constitutional Court and this Court in *Rademan.* In *Rademan v Moqhaka Municipality and Others*[29] the question that confronted this Court was whether the respondent municipality was empowered to interrupt the supply of electricity without having to approach a court first to seek a court order authorising it to discontinue the supply of services. In answering this question in the affirmative, this Court said:

'Such a proposition is both unrealistic and untenable. Given the rate of the protests and demonstrations for delivery across the country concomitant with the refusal by ratepayers to pay their rates and taxes and fees for municipal services, I am of the view that it would not be practical for municipalities to pursue these matters in court. It cannot be gainsaid that such a step would result in the municipalities being mired in such cases, losing precious time in the process and incurring high legal bills unnecessarily.

I have no doubt these powers were given to municipalities to enable them to collect all moneys that are due and payable to them in the most cost-effective manner. Commenting on the power of a municipality to discontinue municipal service as a means of getting the ratepayers to pay their accounts, Yacoob J remarked as follows in *Mkontwana v Nelson Mandela Metropolitan Municipality, Bisset and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng and Others (Kwazulu-Natal Law Society and Msunduzi Municipality as Amici Curiae)* 2005 (1) SA 530 (CC) para 52:

"It is emphasised that municipalities are obliged to provide water and electricity and that it is therefore important for unpaid municipal debt to be reduced by all legitimate means. It bears repeating that the purpose is laudable, has the potential to encourage regular payments of consumption charges, contributes to the effective discharge by municipalities

[29] *Rademan v Moqhaka Municipality and Others* [2011] ZASCA 244; 2012 (2) SA 387 (SCA).

of their obligations and encourages owners of property to fulfil their civic responsibility.'"[30]

[50] A further appeal against this judgment to the Constitutional Court was unsuccessful.[31] Dealing with s 21(5)*(b)*, the Constitutional Court said that the provision contemplates two scenarios. The first is where there is an agreement between a resident and the municipality to supply electricity by the municipality to the customer, and the customer refuses to honour the agreement. The other is where there is no agreement for the supply of electricity and the customer refuses to enter into an agreement. The Court concluded that '[i]n either case the municipality would be entitled to cut off the supply of electricity to the resident or customer if it were already supplying electricity to the customer'.[32]

[51] Eskom submitted that here there was no dispute between it on the one hand and the ELM and the TCLM on the other. This was because the two municipalities admitted that they owed money to Eskom and signed acknowledgments of debt in terms of which they undertook to settle the debt in agreed monthly instalments. When they failed to comply with the agreement Eskom was left with no other option but to implement its decision to interrupt bulk electricity supply. In this regard Eskom, as previously stated, relied both on s 21(5) of the ERA and clauses 9.1, 9.2 and 22.4 of the ESAs.

[52] In their heads of argument Resilient, the Chambers and Sakeliga respectively contended that it was not open to Eskom to invoke s 21(5)

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[30] Ibid paras 16-17.
[31] See *Rademan v Moqhaka Local Municipality* [2013] ZACC 11; 2013 (4) SA 225 (CC).
[32] Ibid para 36.

without recourse to litigation. They argued that to construe s 21(5) to mean that Eskom could interrupt or terminate the electricity supply to an entire municipality without judicial supervision would be a violation of ss 1*(c)* and 34[33] of the Constitution. However, when it soon became clear that this contention was running into headwinds, counsel for Resilient found himself unable to press the argument. But counsel for the Chambers and Sakeliga persisted. They argued that in the context of the ERA a municipality which is a licensee in its own right, and licenced by the NERSA to reticulate or on-sell electricity distributed to it by Eskom to end-users cannot be regarded as a customer.

[53] Relying on *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*[34] and certain other decisions of the Constitutional Court,[35] counsel for the Chambers submitted that because of the egregious nature of the rights likely to be violated by the termination of electricity to a municipality, s 21(5) should be interpreted so as to require prior judicial authorisation of any decision by Eskom to interrupt or terminate the supply of electricity to a municipality. In *Jaftha* the Constitutional Court had occasion to say the following:

'Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on

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[33] Section 34 reads:
'Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.'
[34] *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC).
[35] *Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (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] ZACC 32; 2016 (6) SA 596 (CC) para 59.

ss 62 and 73 of the Act is that the former takes place invariably without prompting by the debtor. 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.'[36]

There, the applicants in the two cases had their homes sold in execution for paltry amounts after they had fallen into arrears with their payments. They applied to the high court for orders setting aside the sales in execution, and interdicting the registration of transfer of their homes to the persons who had purchased them by challenging the constitutionality of s 66(1)*(a)* of Act 32 of 1944 to the extent that it permitted the sale of a debtor's home without affording the debtor adequate protection. The applicants failed in the high court but were successful before the Constitutional Court.

[54] Counsel for the Chambers, therefore, contended that Eskom's reliance on the Constitutional Court's judgment in *Rademan* was misplaced. In developing this argument, it was submitted that *Rademan* is authority only for the proposition that 'the supply of electricity may be terminated or interrupted on the basis of s 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, further, for confirmation that the constitutional rights of residents to receive electricity from a municipality are in fact limited by the provisions of s 21(5) of the ERA'. It certainly, argued counsel, is no authority for the proposition that Eskom may interrupt or terminate the electricity supply to an entire municipality upon default of payment by the municipality and, as a result,

[36] *Jaftha* (above fn 32) para 55.

adversely affect even electricity consumers who are up to date with their payments. This must be so, proceeded the argument, because Eskom's power 'is subject to the implied requirement of prior judicial oversight' given its far-reaching implications. Counsel accepted that in order to sustain this argument it would be necessary to read in words to the effect that Eskom is required to apply to court on notice to all interested parties for an order authorising it to exercise its power under s 21(5).

[55] There is no merit in this contention. It cannot be sustained unless the plain meaning of the language used in s 21(5), read contextually and purposively, is supplemented by reading in the words suggested by counsel for the Chambers. Indeed, counsel readily and fairly accepted this to be the case. As the constitutional validity of s 21(5) is not in issue, it is not open to this Court to adopt the construction that counsel attributes to the section.[37] However, that is not to say that, in interpreting s 21(5), this Court must not promote the spirit, purport and objects of the Bill of Rights as required by s 39(2) of the Constitution.[38] It is therefore correct, as counsel for Eskom argued, that s 21(5) of the ERA empowers Eskom to reduce or terminate the supply of electricity to its customers in the circumstances spelt out in the section. And that it may exercise that power without prior authorisation by a court. All of the decisions upon which counsel for the Chambers heavily relied turned on their peculiar facts which are materially distinguishable from the facts of the Eskom appeals. To conclude, there can be no doubt that s 21(5) was adopted with the manifest purpose of obviating obstacles that distributors

[37] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* 2000 (2) SA 1 (CC) paras 23-34.
[38] Section 39(2) of the Constitution reads:
'(2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.'

of electricity would encounter if, in the circumstances spelt out in the section itself, they were required to seek prior judicial authorization before interrupting or terminating the supply of electricity to a customer who refuses or is unable to pay for it.

[56] However, this is not the end of the matter. It necessarily raises the question whether, in the context of the ERA, a municipality to which Eskom supplies electricity as a distributor and licensee is, vis-a-vis Eskom, a 'customer'. This is because Sakeliga argues that a municipality is a licensee and not a 'customer' as envisaged in s 21(5). Section 1 of the ERA provides that, unless the context indicates otherwise, 'customer' means 'a person who purchases electricity or a service relating to the supply of electricity'. It further defines 'person' to 'include any organ of state as defined in s 139 of the Constitution'. A 'distributor' is defined as 'a person who distributes electricity' and 'licensee' in turn means 'the holder of a licence granted or deemed to have been granted by the Regulator' under the ERA. There can be no doubt that for purposes of the ERA both the ELM and the TCLM are licensees and distributors of the electricity supplied to them by Eskom, which they in turn supply to their customers or end-users.[39]

[57] Sakeliga's contention does not bear scrutiny. To uphold it would result in Eskom being precluded from invoking s 21(5) not only against municipalities which are distributors in their own right but, crucially, also against any other entity that distributes bulk electricity supplied by Eskom.

[39] The word 'supply' is defined in the ERA to mean 'trading and the generation, transmission or distribution of electricity'.

Thus, on a contextual and purposeful construction of s 21(5) the contention for which Sakeliga contends is untenable.

[58] But when it comes to municipalities as distributors of electricity, further considerations would come into play. 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.

[59] There can be no doubt about the developmental role of legislative measures like the Municipal Structures Act which, in its preamble, recognises, amongst other things, the fundamental importance of local government to democracy. The Municipal Structures Act also seeks to ensure sustainable, effective and efficient municipal services, and to promote social and economic development in a safe and healthy environment. Without the supply of electricity to a municipality, all of these developmental and transformative goals would be nothing more than a dream deferred with deleterious effects

to local communities. Thus, it is manifest that these legislative measures seek to foster an integrated co-ordinated approach to the provision of municipal services to local communities.

[60] It is as well to remember that s 1 of the Constitution constitutes the Republic of South Africa as 'one, sovereign, democratic state' founded on certain fundamental values. In addition, s 154 of the Constitution decrees that the 'national government and provincial governments, by legislative and other measures, must support and strengthen the capacity of municipalities to manage their affairs, to exercise their power and to perform their duties'. There is also s 4(2) of the Municipal Systems Act that imposes a duty on municipalities together with other organs of state, like Eskom, to contribute to the progressive realisation of the fundamental rights contained in ss 24, 25, 26, 26, 27 and 29 of the Constitution. Accordingly, before Eskom decides to invoke its power under s 21(5) to interrupt the supply of electricity to an entire municipality, it must, as an organ of state, be mindful of its constitutional obligations.

Intergovernmental disputes

[61] 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. I elaborate on this below. Section 41 of the Constitution deals with principles of cooperative government and intergovernmental relations. It provides in relevant part 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;

…

(h) cooperate with one another in mutual trust and good faith by—

…

(ii) assisting and supporting one another;

(iii) informing one another of, and consulting one another on, matters of common interest;

(iv) coordinating their actions and legislation with one another;

(v) adhering to agreed procedures; and

(vi) avoiding legal proceedings against one another.'

[62] Section 41 goes on to state as follows:

'An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute.'[40]

The importance of this mandate is then bolstered by subsection (4), which empowers courts to decline entertaining disputes that have not first legitimately travelled through the extra-curial mechanisms designed and available for that purpose.

[63] The IRFA is the legislative measure contemplated in s 41(2) of the Constitution. In its preamble, the broad object of s 41 is taken further by stating, amongst other things, that 'all spheres of government must provide effective, efficient, transparent, accountable and coherent government for the Republic to secure the well-being of the people and the progressive realisation

[40] Section 41(3) of the Constitution.

of their constitutional rights'. It goes on to state that the pervasive need for government to redress the legacies of apartheid and discrimination are 'best addressed through a concerted effort by government in all spheres to work together and to integrate as far as possible their actions in the provision of services, the alleviation of poverty and the development of our people and our country'. Whilst recognising that piecemeal legislation exists to regulate this area in particular parts of the government, it deemed it necessary 'to establish a general legislative framework applicable to all spheres and in all sectors of government to ensure the conduct of intergovernmental relations in the spirit of the Constitution'.

[64] The long title of the IRFA states that the object of the Act is 'to establish a framework … to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes'. In particular, s 4 of the IRFA states that its object is:

'[T]o provide within the principle of co-operative government … a framework for the national government, provincial governments and local governments, and all organs of state … to facilitate coordination in the implementation of policy and legislation including—

…

(b) effective provision of services;

…

(d) realisation of national priorities'.

Accordingly, there can be no doubt that there are important consequences flowing from this particular relationship, meaning that disputes arising

between different spheres of government and other state organs are subject to the strictures of the IRFA.

[65] Section 40 of the IRFA, which is headed 'Duty to avoid intergovernmental disputes' provides:

'(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.

(2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute.'

[66] Section 41 of the same Act, on the declaration of 'formal intergovernmental disputes', reads:

'(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.'

It is important to note that the s 41(2) obligation, to 'make every reasonable effort to settle the dispute', is already relevant before a dispute is declared a 'formal intergovernmental dispute'. Thus, in effect, organs of state are obliged at two (separate) stages of the process to resolve their disputes with each other, by means of whatever mechanism or procedure available to them in the circumstances, outside of the courts.

[67] Both s 40 and s 41 make plain that an organ of state, as Eskom is, has a constitutional and statutory duty to avoid judicial proceedings before a genuine attempt has been made to settle the dispute. To that end, state organs must make every reasonable effort, in good faith, to settle the dispute without recourse to litigation. Moreover, where a dispute is of a financial nature, as in these proceedings, Eskom and the ELM and the TCLM were required to promptly take all reasonable steps necessary to resolve the dispute. To this end, organs of state have a statutory duty to report the matter to the National Treasury for the latter to mediate the dispute.[41]

Contentions of the parties

[68] The contentions of counsel for Eskom (in both appeals) were essentially threefold. First, it was submitted that the IRFA found no application in this litigation because the proceedings in the high court were instituted by private entities and not by one organ of state against another. Furthermore, and in any event, continued the submission, even accepting that the IRFA applied, this would not avail Resilient and the Chambers because the three organs of state, that is Eskom and the two municipalities, had, as amongst themselves, reached agreement in relation to the amounts owed by the two municipalities to Eskom and how they were to be paid off.

[69] In addition, counsel in Eskom II argued that, in any event, s 41 of the IRFA was not raised in the papers and therefore not dealt with by Eskom either in its opposing papers or in argument in the high court. Thus, counsel

[41] See para 40 above.

contended that it was not open to the Chambers and Sakeliga to raise it on appeal. Counsel emphasised that the issue of whether or not s 41 of the IRFA had been complied with was a fact-based enquiry that could not be raised at the eleventh hour on appeal. But even if it had timeously been raised, s 41 of the IRFA, being a law of general application, would still not apply when s 30 of the ERA which is the specific legislation dealing with disputes between licensees under the ERA was of direct application. Of course, the latter contention accords with the principle that where a statutory provision in a general legislative instrument regulates the same subject dealt with in a specific legislative instrument, the latter takes precedence over the former.[42]

[70] For its part, Sakeliga submitted in its heads of argument that Eskom and the municipalities concerned did 'not fully exhaust other interventions and dispute resolution mechanisms first in order to address' the failures by the ELM and the TCLM to meet their payment obligations to Eskom before the latter resorted to its decision to interrupt the electricity supply 'with potentially disastrous consequences to the local communities and the local economies', thereby adversely affecting paying customers.

[71] In opposing Eskom's appeals, counsel for Resilient, the Chambers and the ELM made common cause. Broadly stated, their contentions, so far as they are relevant to this aspect of the appeals, were:

(a) Eskom failed to comply with the constitutional requirements of cooperative governance as given effect to by the IRFA particularly having regard to the fact that: (i) the interruption decision would have 'catastrophic implications for [other] organs of state' (ie the ELM and the TCLM); (ii)

[42] See: *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC) para 103.

Eskom had for several years remained supine whilst the electricity debt soared to unsustainable levels for the two local municipalities involved;

(b) that the dispute amongst the parties related to both the quantum of the debt and the manner in which it could be liquidated;

(c) Eskom's decisions amounted to self-help which is inconsistent with the Constitution when there was no statutory power authorising Eskom to disconnect electricity to an entire municipality;

(d) that the decisions were not rationally related to the purpose for which they were taken; and

(e) the interruption decisions were unconstitutional to the extent that their implementation would render the ability of the municipalities concerned to comply with their constitutional obligations to provide basic services unattainable.

[72] Before considering the contentions of the parties, it is necessary to determine the antecedent issue of what constitutes a dispute.[43] This is necessary because Eskom argues that there was no dispute between organs of state. An analogous point to the one under consideration here was considered over seven decades ago in *Williams v Benoni Town Council*[44] in which the registered owner of an agricultural holding contested the assessment rate levied by a municipal council in respect of his property. The council argued

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[43] Section 1 of the IRFA defines 'intergovernmental disputes' as:
'a dispute between different governments or between organs of state from different governments concerning a matter—
(a) arising from—
(i) 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…'

[44] *Williams v Benoni Town Council* 1949 (1) SA 501 (W).

that there was no dispute because the parties were still engaged in discussions to resolve the impasse. In rejecting this argument, Roper J who gave the judgment in the case, said:

'I am unable to agree … that there is no "dispute" until the parties are at arm's length. A dispute exists when one party maintains one point of view and the other party the contrary or a different one. When that position has arisen the fact that one of the disputants, while disagreeing with his opponent, intimates that he is prepared to listen to further argument, does not make it any the less a dispute.'[45]

[73] Most recently, the Constitutional Court was called upon in *Competition Commission of South Africa v Hosken Consolidated Investments Ltd and Another*[46] to determine whether there was a 'live dispute' or merely 'a difference of opinion' between the parties in that matter. The Court had the following to say (para 85):

'The mere fact that parties had a difference of opinion regarding an important jurisdictional issue suggests that there was a live dispute. This is particularly so where the difference of opinion existed between an important statutory entity such as the Commission and parties who are involved in a proposed transaction that may trigger the far reaching investigative powers of the Commission.'[47]

[74] As to the question whether there is a dispute between Eskom on the one hand and the ELM and the TCLM on the other, the following bears emphasis. It is true that there is no real dispute as to the existence of the debts owed to Eskom by both the ELM and the TCLM. Nor is there a dispute as to the inability of these municipalities to make any meaningful payments themselves

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[45] Ibid at 507.
[46] *Competition Commission of South Africa v Hosken Consolidated Investments Ltd and Another* [2019] ZACC 2; 2019 (3) SA 1 (CC) para 23.
[47] Ibid para 85. See also *Frank R Thorold (Pty) Ltd v Estate Late Beit* 1996 (4) SA 705 (A) at 708J-709A, in which this court held that for a dispute to arise there must exist two or more parties, who are in controversy with one another, in the sense that they are advancing irreconcilable contentions.

due to their parlous financial state. The real disputes concerned the manner in which these two municipalities could be enabled or empowered to pay their debts to Eskom and thus whether it was appropriate in the circumstances to interrupt the supply of electricity to exact payment from them. It was in relation to these disputes that Eskom and the affected municipalities, in collaboration with the other state role players, were constitutionally obliged to make 'every reasonable effort' to avoid or settle, but failed to do so.

[75] I am therefore persuaded that there was a live dispute between Eskom on the one hand and the ELM and the TCLM on the other, in relation to the manner as to how the debt would be liquidated and the remedies available to Eskom in the event of default. That the two municipalities involved signed acknowledgments of debt detailing how the debt was to be liquidated cannot assist Eskom. This must be so because the acknowledgments of debt themselves under the heading 'Default' provided in terms that 'Eskom may *with due regard to all the relevant legislation* … take whatever legal remedies available to it including disconnection of supply of electricity …' (my emphasis). In the context of the facts of these proceedings the 'relevant legislation' is the IRFA, s 139 of the MFMA and PAJA

[76] Moreover, in signing the acknowledgments of debt the municipalities did not thereby consent to the interruption of electricity. On the contrary, all indications point to the fact that there were always sharp disagreements between the parties as to whether it was open to Eskom to interrupt electricity supply as a measure to coerce the ELM and the TCLM to pay. This is borne out by the fact that the ELM and the TCLM applied for and were granted interim relief directing Eskom to restore the electricity supply following on

the disastrous consequences of the enforced interruption a few days earlier. There can be little doubt that in signing the acknowledgments of debt, the municipalities sought to stave off the interruptions of bulk electricity supply that Eskom had all along threatened. And it was unrealistic of Eskom to expect the ELM and the TCLM to pay off a debt that had accumulated over 15 years within 12 months when it was known that they were in financial crisis.

[77] In support of the contention that there was no dispute of the kind contemplated in ss 40 and 41 of the IRFA and s 44 of the MFMA, Eskom heavily relied on an unreported judgment of the Free State Division of the high court delivered on 28 May 2015.[48] There, the court held that where a municipality: (a) admits its liability to Eskom in the amount claimed; (b) admits that it is in arrears; and (c) does not dispute that 'it is obliged to pay such arrears and any current liabilities' no dispute exists and ss 40 and 41 of the IRFA therefore find no application. In my view this judgment is not directly on point as it was decided on its peculiar facts. On a careful reading of the judgment it can hardly be understood to mean that where a dispute does indeed exist Eskom is free from the strictures of ss 40 and 41 of the IRFA and s 44 of the MFMA. In these proceedings, Eskom was, at all times, aware that the financial situation within the ELM and the TCLM was dire. This is clear from what Eskom itself alleged in its answering affidavit that: 'there is a constitutional obligation on the part of the National Department of Cooperative Governance and Traditional Affairs to intervene in the affairs of the municipality where the latter is unable to fulfil its constitutional obligations to provide services'.

[48] *Ngwathe Local Municipality v Eskom Holdings SOC Limited and Others* FB 28-05-2015 case no 4428/2014.

[78] I elaborate on why I earlier held that Eskom was required to comply with s 41(3) of the IRFA before embarking on the course it had chosen in order to extract payment from the ELM and the TCLM. Municipalities bear certain obligations to provide their communities with basic services, including electricity. The source of these obligations is the Constitution itself, buttressed by a number of statutory provisions.[49] If anyone of these obligations is breached by a municipality, the Constitution provides the necessary remedies to resolve the breach.

[79] As an organ of state, Eskom bears certain constitutional duties. The relationship between Eskom on the one hand and the ELM and the TCLM on the other is more than merely a contractual one regulated purely in terms of the ESAs that the parties concluded. Eskom supplies bulk electricity to the municipalities which, in turn, have a concomitant duty to supply it to the end-users. The unique feature of this relationship is that Eskom, as an organ of state, supplies electricity to local spheres of government to secure the economic and social well-being of the people. This then brings the relationship within the purview of the IRFA.

[80] It must therefore perforce follow that Eskom is under a constitutional duty to ensure that municipalities, which are solely dependent on it for electricity supply, are enabled to discharge their obligations under the Constitution. Thus, it goes without saying that Eskom cannot act in a way that would undermine the ability of municipalities to fulfil their constitutional and statutory obligations to the citizenry. For as Froneman J said, in *Allpay*

[49] The Housing Act, the Municipal Systems Act, the Structures Act and the MFMA.

Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others:[50]

'Organs of state have obligations that extend beyond the merely contractual. In terms of s 8 of the Constitution, the Bill of Rights binds all organs of state. Organs of state, even if not state departments or part of the administration of the national, provincial or local spheres of government, must thus "respect, protect, promote and fulfil the rights in the Bill of Rights".'

Accordingly, Eskom's decision to interrupt or terminate bulk electricity supply to the entire municipality without prior compliance with ss 40 and 41 of the IRFA, is inimical to the constitutional obligations that it bears.

[81] In paragraph 77 above, mention is made that Eskom itself realised that the parlous state in which the ELM and the TCLM are warranted intervention by the provincial government and, if need be, the national government. But this avenue was not explored because Eskom was not prepared to wait for that process to unfold. The irony about Eskom's obdurate stance was that (it had indulged the ELM and the TCLM for far too long) Eskom had inexplicably failed to make any serious attempt for more than ten years to act in terms of legislative prescripts like s 51(1) of the PFMA. As already indicated, s 41(3) requires organs of state to exhaust all other remedies to resolve disputes before they approach a court. True, in this instance, Eskom never approached a court. Instead, it took the impugned decisions to interrupt electricity supply to the municipalities, hoping that doing so would coerce the municipalities to pay for the electricity supplied over several years. This, Eskom asserts, had the desired effect in the Sabie matter that was settled between the parties. In taking this route, Eskom in effect circumvented the consequences that flow from the prohibition contained in ss 40 and 41 of the IRFA against instituting

[50] *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer, South African Social Security Agency and Others* [2014] ZACC 12; 2014 (4) SA 179 (CC) para 49. (Citations omitted.)

proceedings in a court to settle intergovernmental disputes if the dispute has not been declared a formal intergovernmental dispute, and all efforts to resolve that dispute have not been exhausted in terms of chapter 4 of the IRFA and proved unsuccessful. Nothing less than a 'reasonable effort, in good faith' to resolve the dispute will suffice.

[82] There was some suggestion that Eskom had complied with its statutory duty under the IRFA in that it held meetings with the ELM together with the Premier of Mpumalanga, the provincial MEC and at one stage including the Minister of Cooperative Governance to seek a solution to the ELM's inability to pay. At these meetings the representatives of the ELM once more undertook to settle their debt to Eskom in monthly instalments which the municipality still failed to honour. I shall not burden this judgment with the details of those meetings ostensibly held to find a lasting solution to the financial crisis facing several municipalities within Mpumalanga. Suffice it to say that these attempts came to naught and were insufficient for compliance with the precepts of s 41 of the Constitution and ss 40 and 41 of the IRFA. Importantly, no attempt was made to engage the National Treasury as required by s 44 of the MFMA.

[83] Counsel for Eskom had another string in their bow. They argued that even if it were found that there was a dispute between the parties, ss 40 and 41 of the IRFA would not be implicated. Counsel submitted that s 39 of the IRFA provides that chapter 4[51] of the Act does not apply 'to the settlement of specific intergovernmental disputes in respect of which other national legislation provides resolution mechanisms or procedures'. They contended

[51] Chapter 4 regulates resolution of intergovernmental disputes.

that as the dispute in these proceedings arose out of the supply of electricity under the ERA, it was s 30[52] of the ERA that would find application.

[84] 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 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.

Irrationality challenge

[85] The two decisions taken by Eskom in issue in these proceedings were also impugned on the basis that they were irrational. When a decision is sought to be reviewed on the basis of irrationality, the test of rationality is concerned with the evaluation of the relationship between the means employed and the

[52] Section 30 which is titled 'Resolution of disputes by Regulator' provides:
'(1) The Regulator must, in relation to any dispute arising out of this Act—
(a) if it is a dispute between licensees, act as a mediator if so requested by both parties to the dispute.'

ends to be achieved. The evaluation of the relationship seeks to determine, not whether there are means that can achieve the same purpose better than those chosen, but whether the means employed are rationally related to the purpose for which the power was conferred.[53]

[86] A rationality review also determines whether the process leading up to the decision and the decision itself are rational. The Constitutional Court cautioned that it should not be lost from sight that where there is an overlap between the reasonableness and rationality evaluations one is nevertheless dealing with discrete concepts. In *Albutt v Centre for the Study of Violence and Reconciliation and Others* the following was stated:[54]

'The executive has a wide discretion in selecting the means to achieve its constitutionally permissible objectives. Courts may not interfere with the means selected simply because they do not like them, or because there are other more appropriate means that could have been selected. But, where the decision is challenged on the grounds of rationality, courts are obliged to examine the means selected to determine whether they are rationally related to the objective sought to be achieved. What must be stressed is that the purpose of the enquiry is to determine not whether there are other means that could have been used, but whether the means selected are rationally related to the objective sought to be achieved. And if, objectively speaking, they are not, they fall short of the standard demanded by the Constitution.'

[87] Eskom's avowed purpose for the interruptions of the supply of electricity was stated in its heads of argument as 'two pronged'. Eskom asserted that 'First, it was to collect [the outstanding] debt; second … to reduce and manage the rate of escalation of the debt'. Eskom contested its

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[53] See *Democratic Alliance v President of the Republic of South Africa and Others* 2012 [ZACC] 24; 2013 (1) SA 248 (CC) para 32.
[54] *Albutt v Centre for the Study of Violence and Reconciliation, and Others* [2010] ZACC 4; 2010 (3) SA 293 (CC) para 51.

adversaries' assertions that there were less drastic means available to it to address the failure of the ELM and the TCLM to honour their financial obligations, describing these as misplaced. The less drastic means suggested by Eskom's adversaries were: (i) withdrawal of the distribution licences issued by NERSA to the ELM and the TCLM; (ii) recommending to the minister to appoint alternative licensees in their stead; (iii) Eskom itself taking over the distribution functions. But Eskom argued that the measures suggested by its adversaries fail to take account of the historical debt currently overdue and how it would be paid.

[88] There is one crucial fact that is uncontentious in relation to Eskom's appeals. It is that Eskom's decision to interrupt bulk electricity supply to the ELM and the TCLM was used as a leverage to extract payment. This drastic measure, with its catastrophic consequences as detailed above, was decided upon at a time when Eskom knew full well that it would not result in the financially strapped municipalities settling their debt, at least within the short space of time allowed by Eskom when they had all along struggled to do so for several years, and since 2002 in the case of the TCLM. And these measures were adopted by Eskom against the backdrop that Eskom itself had come to realise that without the intervention of both the national government and the provincial government it was beyond the power of the ELM and the TCLM to turn their fortunes around on their own. Eskom sought to justify its decisions by contending that the other reason why it embarked on is chosen course was to contain the spiralling of the debt. I have already explained above that Eskom, as an organ of state, cannot act in a manner that renders another organ of state unable to discharge its constitutional and statutory obligations. It must therefore follow that Eskom's impugned decisions were irrational.

[89] Finally, I deal briefly with the other basis upon which the high court found that Eskom's impugned decisions fell to be reviewed and set aside under s 6(2)(1)(iii)of PAJA. In this regard the high court said the following (para 54):

'In terms of section 6(*e*)(iii) of PAJA, the failure on the part of Eskom and the municipalities to exhaust alternative remedies and procedures before embarking on the procedure of supply interruptions by Eskom, warrants the grant of the review sought. This sections makes provision for a court to review an administrative action if relevant considerations were not considered.'

[90] There can be no doubt that Eskom's decisions constitute administrative action as contemplated in s 1 of PAJA. In *Minister of Defence and Military Veterans v Motau and Others* (2014) ZACC 18; 2014 (5) SA 69 (CC) para 33 the Constitutional Court held that administrative action, in essence, comprises the following elements: (a) a decision of an administrative nature; (b) by an organ of state or a natural or juristic person; (c) exercising a public power or performing a public function; (d) in terms of legislation or empowering provision; (e) that adversely affects rights; (f) has direct and external legal effect; (g) that does not involve the excluded categories.[55]

[91] It will be recalled that Eskom took its impugned decisions for two reasons. The first was to force the ELM and the TCLM to pay the arrear debt. This was despite the fact that Eskom well knew that this purpose could not be achieved as the two municipalities were unable to pay the arrears within the

[55]Section 1 defines administrative action to mean 'any decision taken or any failure to take a decision, by–
(a) an organ of state, when-
(i) . . .
(ii) exercising a public power or performing a public function in terms of any legislation;'.
And see further: *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1(CC) para 130.

time stipulated. In addition, the planned interruptions of bulk electricity supply also failed to address the underlying reasons for the inability to pay both the arrear and current debt. Thus, the decisions precipitately taken by Eskom failed to take into account relevant considerations that should have informed those decisions. Accordingly, the high court cannot be faulted for concluding that Eskom's impugned decisions fell to be set aside on this basis too.

Costs

[92] For the aforegoing reasons it must follow that Eskom's appeals fall to be dismissed. The dismissal of Eskom's appeals must necessarily carry with it a costs order against Eskom. But such costs order will be restricted only to Eskom's adversaries with the exclusion of the amicus curiae. This must be so for as the Constitutional Court pertinently remarked 'it is unusual and indeed it will rarely be appropriate for costs to be awarded in favour of an amicus curiae'.[56]

Conclusion

[93] There is one final issue to address in relation to the Eskom appeals. Earlier, I mentioned that although the NERSA, the Minister of Cooperative Governance and the MEC were cited as necessary parties in the high court proceedings, none of them participated in the litigation. They all elected to remain supine. But the record discloses that the Minister of Cooperative Governance and the MEC were cited for good reason. This litigation brought

[56] See: *President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd* [2005] ZACC 5; 2005 (5) SA 3 (CC) para 67.

to the fore the question whether the ELM and the TCLM had the requisite capacity to effectively manage their affairs. All concerned knew for a considerable time that they were facing a colossal crisis. To this end, s 155(6) and (7) of the Constitution provide that:

'(6) Each provincial government must establish municipalities in its province in a manner consistent with the legislation enacted in terms of subsections (2) and (3) and, by legislative or other measures, must—

(a) provide for the monitoring and support of local government in the province; and

(b) promote the development of local government capacity to enable municipalities to perform their functions and manage their own affairs.

(7) The national government, subject to s 44, and the provincial governments have the legislative and executive authority to see to the effective performance by municipalities of their functions in respect of matters listed in Schedules 4 and 5, by regulating the exercise by municipalities of their executive authority referred to in s 156 (1).'

[94] The overwhelming evidence that emerges from the record demonstrates that the ELM and the TCLM have been in financial crisis for nearly two decades. During 2016 and 2017 appeals were made to the Minister of Cooperative Governance, the Premier of Mpumalanga, and the MEC, by Eskom and the municipalities in an attempt to rescue the ELM and the TCLM from their financial quagmire. But the endeavours fell short of what is required by ss 41(1)*(h)* and 41(3) of the Constitution and ss 40 and 41 of the IRFA. When agreement was reached between Eskom and the municipalities on how their substantial debt would be liquidated, there does not appear to have been any monitoring, by the national government and provincial executive, of the implementation of the payment plan. The two municipalities, hopelessly languishing in financial distress, were still left to their own devices at a time when it must have been obvious that they lacked the capacity to turn their fortunes around on their own. And given their parlous financial state, it

is hardly surprising that they defaulted on their payment arrangements with Eskom.

[95] As already indicated above, Eskom is a business enterprise, albeit with a developmental objective. As its constituent Act decrees, it is required, in playing its developmental role, to take into account its financial sustainability and competitiveness. It is estimated that Eskom is currently owed some R 31 billion by municipalities countrywide. The question then arises: can Eskom on its own resolve the widespread failure by some of the municipalities to pay for electricity? It remains to be seen. But what emerges from the record in these proceedings is that without the constitutionally[57] and statutorily[58] mandated intervention by both the national and provincial governments, the prospect of Eskom recovering its debt seems bleak. This is an untenable situation, which is precisely what s 41 of the Constitution was designed to avert.

[96] A situation where Eskom, as an organ of state, is driven to resorting to all manner of ways to coerce municipalities which are a critical sphere of government in the constitutional scheme, to pay when they are unable to do so is plainly undesirable. This dire situation obliges the national and provincial governments to intervene, consonant with the letter and spirit of the constitutional[59] and statutory prescripts to which reference has been made in this judgment.

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[57] See s 139 of the Constitution.
[58] See ss 139 and 150 of the MFMA.
[59] See also s 154(1) of the Constitution, which commands the National Government and provincial government to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions.

[97] On this score, what the Gauteng Division of the High Court said in *Cape Gate (Pty) Ltd and Others v Eskom Holdings (SOC) Ltd and Others*,[60] with reference to s 139(7) of the Constitution, bears repeating. It said:

'[T]here are only two sources of funds on which Eskom can rely for payment in respect of on-going supply of electricity to Emfuleni. The one is Emfuleni's paying consumers, and the other is, ultimately, national treasury. And since in this country civilized society cannot exist and the economy cannot function without Eskom remaining economically viable, national treasury and ultimately National Government must inevitably step in when and where local authorities fail; that is what the Constitution expressly envisages.'[61]

What this means is that without the national and provincial governments' intervention in the financial crises experienced by the ELM and the TCLM – and many other similarly-situated municipalities – all are doomed. It is indeed a distressing feature of this litigation that those who are charged with certain responsibilities in terms of the Constitution and other statutory prescripts appear to be failing the people they are required to serve.

Case no 583/2019: Thaba Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and others

[98] As already indicated, the appeal of the TCLM appellants is just about the costs order made against them by the high court and nothing else. It is trite that an award of costs is a matter which is pre-eminently in the discretion of the court considering the issue of costs. It enjoys a wide discretion, to be exercised judicially on a proper consideration of all the relevant circumstances.

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[60] *Cape Gate (Pty) Ltd and Others v Eskom Holdings (SOC) Ltd and Others* [2018] ZAGPPHC 599; 2019 (4) SA 14 (GJ).

[61] Ibid at 148E-G. (Citations omitted.)

[99] Cognisant of the fact that the high court – which sat as a court of first instance – was vested with a discretion in the strict sense to determine the question of costs in the light of the peculiar circumstances of the case, this Court, sitting as a court of appeal, will require cogent reasons before it can interfere with the exercise of the high court's discretion. Thus, in *Giddey NO v J C Barnard and Partners*[62] the Constitutional Court, in a comparable situation, reiterated the general rule that the approach of an appellate court to an appeal against the exercise of a discretion in the strict sense will largely depend on the nature of the discretion concerned.

[100] Accordingly, where the discretion entails that the court of first instance may have regard to a wide range of considerations, an appellate court will not readily interfere with the exercise of that discretion on appeal. In *Giddey*, O'Regan J explained it thus:

'The ordinary approach on appeal to the exercise of a discretion in the strict sense is that the appellate court will not consider whether the decision reached by the court at first instance was correct, but will only interfere in limited circumstances; for example, if it is shown that the discretion has not been exercised judicially or has been exercised based on a wrong appreciation of the facts or wrong principles of law. Even where the discretion is not a discretion in the strict sense, there may still be considerations which would result in an appellate court only interfering in the exercise of such a discretion in the limited circumstances mentioned above.'[63]

[101] The Constitutional Court went on to say that the court of first instance is best placed to make the assessment, noting that:

'it would not be appropriate for an appellate court to interfere with that decision as long as it is judicially made, on the basis of the correct facts and legal principles. If the court takes

[62] *Giddey NO v J C Barnard and Partners* [2006] ZACC 13; 2007 (5) 525 (CC).
[63] Ibid para 19. (Citations omitted.)

into account irrelevant considerations, or bases the exercise of its discretion on wrong legal principles, its judgment may be overturned on appeal. Beyond that, however, the decision of the court of first instance will be unassailable.'[64]

[102] More than a century ago, in *Fripp v Gibson and Company* 1913 AD 354, Lord De Villiers CJ said (at 357-358):

'In appeals upon questions of costs two general principles should be observed. The first is that the Court of the first instance has a judicial discretion as to costs, and the second is that the successful party should, as a general rule, have his costs. The discretion of such Court, therefore, is not unlimited, and there are numerous cases in which courts of appeal have set aside judgments as to costs where such judgments have contravened the general principle that to the successful party should be awarded his costs.'

[103] In order to succeed in their appeal, the TCLM appellants must, having regard to the principles set out above, demonstrate that the high court failed to exercise its discretion judicially. This necessarily entails that there must be grounds underpinning the exercise of the discretion because a discretion exercised on no grounds at all or that was based on a misapprehension of the correct facts cannot be judicial. Where the court of first instance has exercised its discretion capriciously or upon a wrong principle, or has not brought an unbiased judgment to bear on the question or has not acted for substantial reasons, the appellate court would be justified to interfere.[65]

[104] The costs order of the high court, so far as it relates to the TCLM appellants, was assailed on several grounds. These were that the high court failed to have proper regard to the fact that: (i) the municipality was in a

[64] Ibid para 22. See also *Erf One Six Seven Orchards CC v Greater Johannesburg Metropolitan Council (Johannesburg Administration) and Another* 1999 (1) SA 104 (SCA) at 109A-B.
[65] See, in this regard, *Techmed (Pty) Ltd v Eastern Cape Provincial Tender Board and Others* 2001 (3) SA 735 (SCA) 741E-F.

parlous financial state; (ii) its financial capacity was severely constrained; (iii) the applicants before it had abandoned the relief sought against them including the prayer for costs. It was therefore contended that having regard to these factors the high court 'failed to properly consider the question of costs' thereby rendering its costs award vulnerable to interference by this Court.

[105] Against the backdrop set out above, the high court's reasons for lumping the TCLM appellants with, for example, Eskom whose action had precipitated the litigation in its costs award is dealt with in a few laconic lines[66] as follows:

'I see no need to deprive the victorious party of its costs. I am also not convinced that either Eskom or the municipalities should not be liable to pay costs. The matter is before court due to their actions or non-actions… Therefore, costs are to follow the result…'

The high court made no attempt to explain why the TCLM appellants, in particular, should still be mulcted in costs despite the fact that they had not opposed the application and, most importantly, no relief was in the end sought against them. The fact that the principal target of the relief sought was Eskom, whose decision to interrupt bulk supply of electricity to the TCLM was at the core of the dispute, was overlooked by the high court. Moreover, that the Chambers as applicants had, during the hearing, unequivocally abandoned the prayer for costs against the TCLM appellants does not appear to have received the attention that it merited from the high court.

[106] In the absence of any evidence that the TCLM appellants had directly brought about the litigation or had done something wrong connected with the conduct of the litigation, I can see no justification for mulcting them in costs.

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[66] *Sabie Chamber of Commerce and Tourism* (above fn 1) para 56.

This conclusion ineluctably drives me to find that the high court did not exercise the wide discretion it enjoyed judicially.

[107] It remains to deal with the issue of costs in relation to this appeal. The TCLM appellants were represented by two counsel at the hearing. And leading counsel asked for costs of two counsel. As indicated earlier, two counsel were employed for the limited purpose of preparing heads of argument on costs and appearance in this Court to argue the appeal. In response to a question from a member of the Bench, counsel readily accepted that the employment of two counsel for this limited purpose was not reasonably necessary. Thus, costs of one counsel will be allowed.

[108] In all the circumstances, therefore, the appeals in Eskom I and Eskom II must fail and the appeal of the TCLM appellants must succeed.

[109] The following orders are made:

Case no 663/2019: *Eskom Holdings SOC Limited v Resilient Properties (Pty) Ltd and Others*:
The appeal is dismissed with costs, including the costs of two counsel where so employed.

Case no 664/2019: *Eskom Holdings SOC Limited v Sabie Chamber of Commerce and Tourism and Others*:
The appeal is dismissed with costs, including the costs of two counsel where so employed.

Case no 583/2019: *Thaba Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others*:

1 The appeal against paragraph 2 of the order of the high court is upheld.

2 The first, second and third respondents shall pay the costs of the appeal jointly and severally, the one paying the others to be absolved.

3 Paragraph 2 of the order of the high court is set aside and in its place is substituted the following:

'The costs of this application shall be borne by Eskom Holdings SOC Limited, with the rest of the respondents being absolved.'

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X M PETSE

DEPUTY PRESIDENT

SUPREME COURT OF APPEAL

Appearances

For Appellant in case no 663/2019:	L T Sibeko SC (with him N H Moloto)
Instructed by:	Ngeno & Mteto Inc., Pretoria Kramer Weihman & Joubert Attorneys, Bloemfontein
For First, Second, Third and Fourth Respondents:	M Chaskalson SC (with him C van der Spuy)
Instructed by:	Kokinis Inc., Pretoria McIntyre van der Post Attorneys, Bloemfontein.
For Fifth Respondent:	L B van Wyk SC (with him N C Hartman)
Instructed by:	Neuhof Khoza Attorneys, Witbank Hill, McHardy & Herbst Inc., Bloemfontein
For *amicus curiae*:	A T Lamey
Instructed by:	Kriek Wassenaar & Venter Inc., Pretoria Rosendorff Reitz Barry, Bloemfontein
For Appellant in case no 664/2019:	V S Notshe SC (with him M Gwala SC)
Instructed by:	Ngeno & Mteto Inc., Pretoria

	Kramer Weihman & Joubert Attorneys, Bloemfontein
For First, Second and Third Respondents:	A Katz SC (with him S Pudifin-Jones)
Instructed by:	Van der Merwe & Ass Inc., Pretoria Honey Attorneys, Bloemfontein.
For *amicus curiae*:	A T Lamey
Instructed by:	Kriek Wassenaar & Venter Inc., Pretoria Rosendorff Reitz Barry, Bloemfontein
For Appellant in case no 583/2019:	W Mokhare SC (with him Z Gumede)
Instructed by:	Matsane Attorneys Inc., Nelspruit Matsepes Attorneys Inc., Bloemfontein
For First, Second and Third Respondents:	A Katz SC (with him S Pudifin-Jones)
Instructed by:	Van der Merwe & Ass Inc., Pretoria Honey Attorneys, Bloemfontein.