THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 870/2020

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**APPELLANT**
and	
LEKWA RATEPAYERS ASSOCIATION NPC	**FIRST RESPONDENT**
LEKWA LOCAL MUNICIPALITY	**SECOND RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**THIRD RESPONDENT**
MINISTER OF ENERGY	**FOURTH RESPONDENT**
PREMIER OF MPUMALANGA	**FIFTH RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, MPUMALANGA	**SIXTH RESPONDENT**

In the matter between:

ESKOM HOLDINGS SOC LIMITED	**APPELLANT**
and	
VAAL RIVER DEVELOPMENT ASSOCIATION (PTY) LTD	**FIRST RESPONDENT**
NGWATHE LOCAL MUNICIPALITY	**SECOND RESPONDENT**
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	**THIRD RESPONDENT**
MINISTER OF ENERGY	**FOURTH RESPONDENT**
PREMIER OF FREE STATE	**FIFTH RESPONDENT**
MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, FREE STATE	**SIXTH RESPONDENT**

Neutral citation: *Eskom Holdings Soc Ltd v Lekwa Ratepayers Association and Others; Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd and Others* (870/20) [2022] ZASCA 10 (21 January 2022)

Coram: Dambuza, Van der Merwe and Gorven JJA and Meyer and Kgoele AJJA

Heard: 23 November 2021

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 10h00 on 21 January 2022.

Summary: Constitutional Law and Administrative Law – Cooperative governance – Section 41 of the Constitution and section 40 of the Intergovernmental Relations Framework Act 13 of 2005 require Organs of State to make reasonable effort in good faith to settle intergovernmental disputes.

Interdict – Interim interdict – Appealable - although it is generally considered not in the interests of justice to permit an appeal against an interim interdict, there are limited circumstances where the interests of justice dictate that an interim interdict be appealable.

Interdict – Interim interdict - Prima facie right - whether residents of two municipalities have established the requisite prima facie right at the level required for interim relief to restrain Eskom from implementing its unilateral decisions to reduce its bulk electricity supply to municipalities to historic, outdated and inadequate contractually agreed supply levels without prior compliance with the constitutional and statutory imperatives relating to intergovernmental dispute resolution mechanisms, which rendered municipalities unable to fulfil their constitutional obligations owed to their citizenry resulting in a catastrophe unfolding with hospitals, schools, households and businesses severely disrupted and with damage to the environment as a result of water sources being contaminated due to damage to the municipal water and sewage systems.

Prima facie right on the facts established by demonstrating prospects of success in review proceedings in due course to review and set aside Eskom's decisions on the basis that they undermine constitutional and statutory imperatives.

ORDER

On appeal from: High Court, Gauteng Division, Pretoria (Millar AJ sitting as court of first instance):

1. The appeal in *Eskom Holdings Soc Ltd v Lekwa Ratepayers Association and Others* (High Court case no. 35054/2020) is dismissed with costs, including those of two counsel.
2. The appeal in *Eskom Holdings Soc Ltd v Vaal River Development Association and Others* (High Court case no. 31813/2020) is dismissed with costs, including those of two counsel.

JUDGMENT

Meyer AJA (Dambuza, Van der Merwe and Gorven JJA and Kgoele AJA concurring):

[1] This appeal arises from two applications brought in the Gauteng Division of the High Court, Pretoria: One under case number 31813/20 by the Vaal River Development Association (Pty) Ltd against Eskom Holdings SOC Limited (Eskom), Ngwathe Local Municipality (Ngwathe municipality), the National Energy Regulator of South Africa (NERSA), the Minister of Energy (the Minister), the Premier of the Free State province and the Member of the Executive Council for Cooperative Governance and Traditional Affairs for the Free State province (the Ngwathe application). The other under case number 35054/20 by the Lekwa Ratepayers Association NPC against Eskom, the Lekwa Local Municipality (Lekwa municipality), the Minister, the Premier of the Mpumalanga province and the Member of the Executive Council for Cooperative Governance and Traditional Affairs for the Mpumalanga province (the Lekwa application). The Ngwathe application concerns a reduction of Eskom's bulk electricity supply to Parys and Vredefort, and the Lekwa application a reduction of its bulk electricity supply to the towns Standerton, Sakhile, Meyerville, and surrounds.

[2] Eskom took decisions to reduce its bulk electricity supply to the Ngwathe and Lekwa municipalities to historic, outdated and inadequate contractually agreed 'Notified Maximum Demand' supply levels (NMD supply levels) as a result of those municipalities' failure to honour their payment obligations to Eskom over prolonged periods of time and the inability of Eskom and those municipalities to reach agreements on the terms of Eskom agreeing to increase the NMD supply levels to meet those municipalities' present additional demand requirements, despite the residents represented by the Vaal River Development Association (Pty) Ltd (the Ngwathe residents) and those represented by the Lekwa Ratepayers Association NPC (the Lekwa residents) being paying consumers on pre-paid electricity. An NMD supply level is the 'maximum demand notified in writing' by the consumer (municipality concerned) and accepted by the licensee (Eskom) as the maximum demand bulk electricity which the particular municipality requires Eskom to be able to supply on demand.

[3] In the Ngwathe and Lekwa applications, the residents, through their associations, sought interim interdicts against Eskom to inter alia restore the bulk supply of electricity to the Ngwathe and Lekwa municipalities to those levels supplied before the implementation of the decisions to reduce the bulk supply to within the contractually agreed NMD supply levels, pending applications to review and set aside those decisions of Eskom, either in terms of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) or legality reviews. Each application was opposed only by Eskom. Although the two applications were not formally consolidated, they were heard together.

[4] On 28 August 2020, the High Court (Millar AJ) granted an order that, pending the finalisation of the Ngwathe application and the final adjudication of the Ngwathe residents' review application, which was to be instituted on or before 30 October 2020, Eskom 'is to increase, alternatively restore the maximum electricity load supply to Parys and Vredefort to the level supplied prior to Eskom's recent implementation of the current limited 95% of 21 MVA to Parys and 4.3 MVA to Vredefort; thus interdicting and prohibiting Eskom from implementing its decision to limit electricity supply to Ngwathe per Parys and Vredefort to the Notified Maximum Demand ("NMD") of 95% of 21 MVA in Parys and 4.3 MVA in Vredefort pending an agreement acceptable to

Eskom on the settlement of arrears owed by [the Ngwathe municipality] ("the decision")'. Eskom and the Ngwathe municipality were further 'jointly and severally ordered to, within 5 days of the order, alternatively a time period set by the Court, restore the bulk electricity supply equipment to enable both transformers at Parys to be available and to render sufficient capacity at Parys, alternatively to install infrastructure to permit and allow electricity supply to Parys to the levels experienced prior to recent limitation associated with the NMD of 21 MVA for Parys following upon implementation of the decision'. Eskom was also 'directed to provide and assist the [Ngwathe municipality] to enable ringfeed of supply to Parys, to serve as back-up and to serve as a source in cases of emergency ensuring that adequate alternative capacity is available at the aforesaid towns'.

[5] In the Lekwa application, the High Court granted an order that, pending the finalisation of the Lekwa application and the final adjudication of the Lekwa residents' review application, which was also to be instituted on or before 30 October 2020, Eskom 'is to increase, alternatively restore the maximum electricity load supply to Lekwa Local Municipality ("Lekwa") per the towns of Standerton, Sakhile, Meyerville and surrounds to the level supplied prior to Eskom's recent implementation of the current limited 55 MVA, being at least 67 MVA; thus interdicting and prohibiting Eskom from continuing with implementing its decision to limit electricity supply to Lekwa to the Notified Maximum Demand ("NMD") of 55 MVA ("the decision")'. The Lekwa municipality was also interdicted 'from implementing rotational load shedding premised on a limitation linked to NMD of 55 MVA to Standerton, Sakhile, Meyerville and surrounds'. The appeal, with leave of the High Court, is against the orders made in both applications.

[6] Eskom and the Ngwathe and Lekwa residents are all ad idem that the present matter is one of those exceptional cases where the interests of justice demand that the interim interdicts granted by the High Court should be appealable. I agree. This appeal raises an issue of special public importance. It is whether the residents have established the requisite prima facie right at the level required for interim relief to restrain Eskom from implementing its unilateral decisions to reduce its bulk electricity supply to municipalities to historic, outdated and inadequate contractually agreed NMD supply levels as a result of municipalities' failure to honour their payment obligations

to Eskom over prolonged periods of time and the inability of Eskom and those municipalities to reach agreements on the terms of Eskom agreeing to increase the NMD supply levels to meet those municipalities' present additional demand requirements, pending the finalisation of review applications to set aside such decisions under PAJA or the principle of legality. Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society. Citizens have a right to receive basic services, and this includes electricity.[1]

[7] As I said in *Old Mutual Limited and Others v Moyo and Another*,[2] after a review of the authoritative judgments on this question:

'Although it is generally considered not in the interests of justice to permit an appeal against an interim interdict since it will defeat the interim nature of the order and undermine 'a necessarily imperfect procedure, which is nevertheless usually best designed to achieve justice', it is now settled that there are limited circumstances where the interests of justice dictate that an interim interdict be appealable. (See for example *Cipla* para 37 [*Cipla Agrimed (Pty) Ltd v Merck Sharp Dohme Corporation and others* 2018 (6) SA 440 (SCA)], *Department of Home Affairs and another v Islam and others* [2018] ZASCA 48 para 10 and *Velocity Trade Capital (Pty) Ltd v Quicktrade (Pty) Ltd and others* [2019] 4 All SA 986 (WCC), para 30 *et seq*. Also see the Constitutional Court judgments in cases such as *S v S* paras 46-47 [*S v S and Another* 2019 (6) SA 1 (CC)], *Tshwane City v Afriforum and Another* 2016 (6) SA 279 (CC) para 40, *Children's Institute v Presiding Officer, Children's Court, Krugersdorp, and Others* 2013 (2) SA 620 (CC) para 16 and *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC) para 25, although it should be borne in mind that the operative standard for determining whether leave to appeal should be granted by the Constitutional Court is the interests of justice.) In deciding what is in the interests of justice, each case has to be considered in the light of its own facts. (*Member of the Executive Council for Development and Planning and Local Government, Gauteng v Democratic Party and others* 1998 (4) SA 1157 (CC), para 32.) In other words, it is a fact-specific enquiry. (*S v S* para 47).'

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[1] *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) paras 34 and 40.

[2] *Old Mutual Limited and Others v Moyo and Another* [2020] ZAGPJHC 1; [2020] 4 BLLR 401 (GJ); [2020] 2 All SA 261 (GJ); (2020) 41 ILJ 1085 (GJ) para 103.

[8] I now turn to the facts relevant to the determination of this appeal; they are straightforward and essentially uncontentious. The generation, transmission and distribution of electricity is regulated by the Electricity Regulation Act 4 of 2006 (ERA). The NERSA is a regulatory authority established in terms of s 3 of the National Energy Regulator Act 40 of 2004 (NERA). In terms of s 3 of the ERA, it has been designated as the custodian and enforcer of the regulatory framework of the ERA. As the regulator, it is empowered, inter alia, in terms of s 4*(a)*(i)*(aa)* of the ERA read with its s 1 definitions, 'to issue licences for the operation of generation ["the production of electricity by any means"], transmission ["the conveyance of electricity through a transmission power system excluding trading"] and distribution facilities ["the conveyance of electricity through a distribution power system excluding trading"]'.

[9] Eskom, an organ of state, is licensed by NERSA to generate, transmit and distribute electricity countrywide. Currently, it is the only entity licensed to supply electricity to municipalities in the country. Municipalities, for their part, are licensed by NERSA to reticulate electricity supplied to them in bulk by Eskom. They, in turn, supply and on-sell the electricity to the end-users within their areas of jurisdiction. The municipalities reticulate the bulk electricity supplied by Eskom to their municipal grids through their electricity supply networks to the end-users.

[10] The contractual relationship between Eskom on the one hand and municipalities on the other is, apart from the ERA, also regulated in terms of written electricity supply agreements concluded between them. The written electricity supply agreement under which Eskom currently supplies electricity to the Lekwa municipality was concluded between the Electricity Supply Commission (Escom), established under the Electricity Act 42 of 1922, and the Standerton municipality on 26 January 1981, which is more than forty years ago. In terms thereof, the parties agreed that the notified maximum demand of the Standerton municipality at the date of signing that agreement was 55 MVA. The written electricity supply agreement under which Eskom supplies electricity to the Ngwathe municipality was concluded between Eskom and the Ngwathe municipality on 29 September 2008, which is more than thirteen years ago. In terms thereof, the parties agreed that the notified maximum demand of the Ngwathe municipality at the date of signing that agreement was 21 MVA for Parys and 4,3 MVA for Vredefort.

[11] The written electricity supply agreements concluded between Eskom and the two municipalities provide that, should a municipality at any time require any increase in the NMD supply level in force from time to time, it shall give adequate notice in writing to Eskom of the additional demand which it requires Eskom to supply and the date at which the additional demand is required. If Eskom accepts the NMD supply level in force from time to time, it will be increased by the additional demand required by the municipality.

[12] Provisions relating to the NMD supply levels form not only part of the electricity supply agreements contemplated in the ERA, but also the rules and licence conditions prescribed by NERSA – 'the Notified Maximum Demand (NMD) and maximum export capacity (MEC) rules' (the NERSA rules) – and Eskom's extensive Notified Maximum Demand Rules (Eskom's NMD rules). Paragraph 2 of the NERSA rules states:

'According to the agreement the licensee is required to provide the contracted amount of Notified Maximum Demand capacity, and the customer must never exceed this capacity. When customers exceed their monthly Notified Maximum Demand . . ., a network excess charge is imposed for the excess. This is due to the fact that a customer that exceeds the Notified Maximum Demand does so without permission. They use capacity that is not allocated to their point of delivery, put the network under strain, hamper the ability to do proper network and capacity planning. Moreover, they place the network and other customers' electricity supply and the licence at risk.'

[13] It is common cause that the NMD supply levels in force for the Lekwa and Ngwathe municipalities are hopelessly outdated. Their actual consumption of and need for electricity far exceed the agreed NMD supply levels. The Lekwa municipality requires more than 20% additional bulk electricity supply; for example, an informal settlement was electrified, and corporate users settled after the NMD supply levels were determined and agreed. The Ngwathe municipality requires approximately 5% additional bulk electricity supply. The cause for the additional demand required by the Ngwathe municipality is in dispute and Eskom maintains it is the result of illegal connections to the municipality's electricity supply network.

[14] The two municipalities can aptly be described as 'dysfunctional' and 'delinquent'. I have mentioned that the residents involved in this litigation are all paying

consumers for pre-paid electricity. However, the Ngwathe and Lekwa municipalities have failed to honour their payment obligations towards Eskom for years. As of the end of June 2020, the Ngwathe municipality's arrear indebtedness to Eskom amounted to R1 259 417 112.66, and that of the Lekwa municipality to R1 125 526 024 as of 31 July 2020. Both municipalities are indisputably in breach of their electricity supply agreements with Eskom.

[15] Nevertheless, Eskom did not previously limit electricity supply to the two municipalities to their contractually agreed NMD supply levels. Instead, it continued to raise penalties in the form of contractually agreed network excess charges for the monthly exceedance of their NMD capacities. Both municipalities applied for increases in their NMD supply levels to meet their additional electricity demands. However, Eskom refused to agree to such increases because the municipalities defaulted on their payment obligations and an agreement could not be reached on the terms upon which Eskom would agree to such NMD supply level increases.

[16] In February 2020, Eskom decided to reduce the bulk electricity supply to the recalcitrant Ngwathe and Lekwa municipalities. On 10 July 2020, Eskom implemented its decisions. The implementation thereof caused rotational load shedding in the respective municipalities in addition to the national load shedding applied by Eskom whenever the national grid faced overloading. Consequently, Parys experienced load shedding for approximately more than 11 hours a day in certain instances, and the affected towns in the Lekwa municipality experienced municipal load shedding for up to two hours at a time on average three times a day.

[17] Apart from an ensuing environmental disaster, each of the affected towns within the Ngwathe and Lekwa municipalities experienced an unfolding catastrophe with socio-economic and humanitarian consequences that adversely impacted the health and well-being of individuals within their jurisdictions. The effects of the additional municipal electricity interruptions to industries, businesses, professional practices and the like threatened them with closure or relocation with the concomitant loss of jobs. Hospitals could not function adequately, and the lives of patients requiring oxygen were placed at risk. The frequency and duration of the municipal electricity disruptions paralysed essential services, such as water supply to households and the functioning

of sewage works. Once the electricity was disrupted, the water treatment plants as well as those pumping water to ensure adequate water pressure came to a standstill with the result that taps ran dry, households ran out of water, bulk water usage facilities – industrial and commercial, such as the poultry industry and abattoirs in or close to the affected towns – ceased functioning. Sewage could then also not be pumped into the sewage processing plants but instead spilt into the streets of the affected towns, with the severe associated risk to the health of the communities, and into the Vaal River.

[18] The Vaal River is the third largest river in South Africa (1 120 km long) after the Orange River (2 200 km long) and the Limpopo River (1 750 km long) and is the main water source for the Witwatersrand area. It has its source near Breyten in Mpumalanga province, east of Johannesburg and about 30 kilometres north of Ermelo, and then flows westwards to its conjunction with the Orange River southwest of Kimberley in the Northwest Cape. The construction of the Vaal Dam was completed in 1938. The dam receives its water inter alia from the Vaal River and ensures water supply throughout the year even when the Vaal River is not full. The river for many years regularly experiences pollution of its upper reaches, which affects users downstream. The Vaal River passes through inter alia Standerton and Parys in its upper reaches. The frequent electricity disruptions caused water treatment plants in Parys and Standerton to be dysfunctional for lengthy periods of time, resulting in thousands of litres of raw sewage pouring into the Vaal River. This contributed to the gradual destruction of the Vaal River system from those points of sewage pollution and downstream inter alia to the Vaal Dam.

[19] Efforts on the part of the Ngwathe and Lekwa residents – inter alia through letters of demand; a meeting between representatives of the Lekwa residents, Eskom and the Ngwathe municipality; and calls by the Ngwathe residents for the Executive of the Free State province to intervene – in order to resolve the impasse and disputes between Eskom and the two municipalities, proved fruitless and brought no relief to the Ngwathe and Lekwa residents. Negotiations between Eskom and the two municipalities to increase their contractually agreed NMD supply levels followed but did not result in any agreement being reached. The amount owing to Eskom by each municipality is not disputed. However, issues such as the monthly prepayment for the

additional bulk electricity supply and the liability for repairs to and the upgrading of the infrastructure to accommodate the increase of the contractually agreed NMD supply levels were not resolved. Hence, the initiation by the Ngwathe and Lekwa residents, through their associations, of each application in the High Court.

[20] In finding that the residents have established a prima facie right to the interim interdictory relief they sought, the High Court (Millar AJ) concluded thus:

'37. While there is no specific reference in Grootboom [*Government of the Republic of South Africa v Grootboom and Others* 2001 (1) SA 46 (CC) para 35] to the provision of access to and the supply of electricity, it is self-evident that the supply of electricity is the cornerstone upon which all the realization of other rights is based. Homes cannot be built without electricity. Water cannot be pumped and sewerage reticulation cannot operate without electricity. Healthcare and in particular the operation of a healthcare facility which requires at a minimum running water and electricity to operate essential life-saving equipment cannot be realized without the supply of electricity. In essence, the *"inherent dignity"* and very *"right to life"* of the residents of the municipality is affected by the supply of electricity.

38. The fact that Eskom relies on the contractual relationship that it has with the respective municipalities does not detract from the fact that it is a state-owned enterprise. It is wholly owned by the state and exists with the benefit of an ostensible monopoly on the supply of electricity, not only for the purpose of generating income for the state but also for the promotion of the rights of individual citizens.

39. Accordingly, even though the applicants are themselves not parties to the contracts between Eskom and the municipalities, Eskom's enforcement of the terms of those contracts, in the present instance in regard to limitation of supply to NMD, infringes on the rights of the applicants and offer no defence to the applicants' assertion that Eskom is subject to PAJA.

40. The applicants have the right to the supply of electricity by Eskom. In the present matters however the question is not whether Eskom is supplying electricity or not but rather whether it is supplying sufficient electricity. It seems to me at the very least that enjoying a clear right to be supplied with electricity, the right to be supplied with sufficient electricity to meet the most basic threshold of the individual rights in the bill of rights must at least be a prima facie right. To find otherwise would render those rights and the obligation on the State and its organs – which include Eskom – to fulfil them, nugatory.'

(Footnotes omitted.)

[21] The real question for determination in this appeal is whether the High Court was correct in finding that the residents have established a prima facie right to grant the interim interdictory relief, which it granted. It is indisputable that the other requisites have been met. It is trite that at the level for the granting of an interim interdict, an applicant must establish a prima facie right, one that may even be open to some doubt. A prima facie right may on the facts be established - through the application of the principles set out in *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, read with the *caveat* in *Gool v Minister of Justice and Another* [1955] 3 All SA 115 (C); 1955 (2) SA 682 (C) at 688D-E, and as subsequently further qualified in *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell and Others* 1995 (2) SA 813 (W); 1995 (4) BCLR 437(W) and endorsed by the Constitutional Court in *South African Informal Traders Forum and Others v City Of Johannesburg and Others; South African National Traders Retail Association v City of Johannesburg and Others* 2014 (4) SA 371 (CC); 2014 (6) BCLR 726; [2014] ZACC 8, para 25 - by demonstrating prospects of success in the review proceedings in due course.

[22] In *Resilient Properties (Pty) Ltd v Eskom Holdings Soc Ltd and Others* (*Resilient* (GJ)),[3] Resilient applied for an interim interdict pending a review that was brought against a decision of Eskom to cut electricity supply to the Gamagara Local Authority (Gamagara) on a phased discontinuance basis for non-payment by Gamagara in breach of the electricity supply agreement between Eskom and Gamagara. Van der Linde J found that the facts showed that a humanitarian crisis would result from Gamagara's electricity supply disconnection.[4] He found that Eskom was, on a proper construction of s 21(5) of the ERA,[5] read with the electricity supply agreement between Eskom and Gamagara, entitled to interrupt the supply of electricity to Gamagara for non-payment. But, he found that 'given the nature and source of Eskom's power, its exercise is, however, administrative action for the purposes of s 33 of the Constitution and PAJA, and constrained, if not by the requirement of

[3] *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Limited and Others* [2018] ZAGPJHC 584; 2019 (2) SA 577 (GJ); [2019] 2 All SA 185 (GJ).
[4] *Resilient* (GJ), paras 44-47.
[5] Section 21(5) of the ERA reads as follows:
'A licensee may not reduce or terminate the supply of electricity to a customer, unless-
(a) the customer is insolvent;
(b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
(c) the customer has contravened the payment conditions of that licensee.'

reasonableness, then – at best for Eskom - by the baseline standard of rationality'.[6] Van der Linde J held that in the light of the catastrophic socio-economic and humanitarian consequences that were to follow, Eskom's decision was not rationally connected to the purpose for which the power to do so was given. He considered that conclusion sufficient to establish for Resilient a prima facie right, though open to some doubt, for a review down the line of Eskom's decision.[7]

[23] In *Eskom Holdings Soc Limited v Resilient Properties (Pty) Ltd and others* (*Resilient* (SCA)),[8] two municipalities, the Emahlaleni Local Municipality (ELM) and the Thaba Chuweu Municipality (TCLM) faced the threat of having their bulk electricity supply from Eskom interrupted due to decisions taken by Eskom to incrementally interrupt the supply of bulk electricity to those municipalities and ultimately to terminate the supply, as a result of their persistent failure over several years to pay for the bulk electricity supplied by Eskom in breach of their contractual obligations. The evidence presented established that those electricity disruptions and ultimate termination would have 'a devastating effect as they "threatened the very fabric of society", with hospitals, schools, households and businesses severely disrupted' and with damage to the environment as a result of water sources being contaminated due to the damage to the municipal water and sewage systems.

[24] In dismissing the appeals against the judgment of the Gauteng Division of the High Court, Pretoria (Hughes J), reviewing and setting aside those decisions of Eskom, Petse DP, who wrote the unanimous judgment of this Court, comprehensively referred to the applicable constitutional and statutory framework, which requires no repetition in this judgment. In summary, electricity is a component of the basic services that municipalities are constitutionally and statutorily obliged to provide to their residents.[9] The provincial executive, and ultimately the national executive, are constitutionally and statutorily enjoined to intervene inter alia if a municipality, as a

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[6] *Ibid* para 74.
[7] *Ibid* paras 77-80.
[8] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others* [2020] ZASCA 185; [2021] 1 All SA 668 (SCA); 2021 (3) SA 47 (SCA).
[9] *Resilient* (SCA) paras 29-34 (sections 151(1), 151(2), 151(3), 152 and 154(1) of the Constitution; ss 4(2)*(f)*, 73(1), 73(2) of the Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act); s 9(1)*(a)*(iii) of the Housing Act 107 of 1997 (Housing Act).)

result of a crisis in its financial affairs, is in serious or persistent breach of its obligations to provide basic services or to meet its financial obligations.[10] Eskom has the power under s 21(5) of the ERA to interrupt the supply of electricity to a municipality.[11] Before Eskom decides to invoke its powers under s 21(5), it must be mindful of its constitutional obligations as an Organ of State.

'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 ESA's [electricity supply agreements] 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 [Intergovernmental Relations Framework Act 31 of 2005].'[12]

Organs of State are constitutionally and statutorily required to make reasonable efforts in good faith to settle intergovernmental disputes.[13]

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[10] *Ibid* paras 35-36(sections 2, 139(1), 139(2), and 139 (3) of the Local Government: Municipal Finance Management Act 56 of 2003 (MFMA); ss 139(5) and 139(7) of the Constitution.)

[11] *Ibid* paras 47-60.

[12] *Ibid* para 79.

[13] *Ibid* paras 61-67(section 41 of the Constitution 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;
  . . .
  (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.

(2) An Act of Parliament must-
  (a) establish or provide for structures and institutions to promote and facilitate intergovernmental relations; and
  (b) provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

(3) 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.

(4) If a court is not satisfied that the requirements of subsection (3) have been met, it may refer a dispute back to the organs of state involved.'

The Intergovernmental Relations Framework Act 31 of 2005 (IRFA) is the legislative measure contemplated in s 41(2) of the Constitution. Disputes arising between different spheres of government

[25] This Court further held that there was a dispute between Eskom on the one hand and the ELM and the TCLM on the other as contemplated in s 41 of the Constitution and ss 40 and 41 of the IRFA[14] and that 'Eskom's decision to interrupt or terminate bulk electricity supply to the entire Municipality without prior compliance with Sections 40 and 41 of the IRFA, is inimical to the constitutional obligations that it bears'.[15] Petse DP inter alia said this:

'[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 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 legislation . . .* take whatever legal remedies available to it including disconnection of

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and other organs of state are subject to the strictures of IRFA. (See the preamble, long title, ss 4, 40 and 41 of the IRFA.) Section 40 of the IRFA provides as follow:

'(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.'

And s 41 of the IRFA provides as follows:

'(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 dispute 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.'

[14] *Resilient* (SCA) paras 72-77.

[15] *Ibid* para 80.

supply of electricity . . . (my emphasis). In the context of the facts of these proceedings the "relevant legislation" is the IRFA, section 139 of the MFMA and PAJA.

. . .

[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 the [m]unicipalities to fulfil their constitutional and statutory obligations to the citizenry. For as Froneman J said in *Allpay Consolidated Investment Holdings (Pty) Ltd and others v Chief Executive Officer, South African Security Agency and others* [[2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) para 49]:

"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".'

[81] . . . 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 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.'

[26] This Court concluded[16] that the High Court correctly reviewed and set aside Eskom's decisions on the basis that they were irrational and under s 6(2)*(e)*(iii) of

[16] *Ibid* paras 85-91.

PAJA.[17] This is so, Petse DP said, because Eskom's avowed purpose for the interruptions of the supply of electricity was to collect the outstanding debt and to reduce and manage the rate of escalation of the debt. Furthermore, the court held that:[18]

'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 . . . 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 its 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.'

Furthermore, Eskom's decisions constitute administrative action as contemplated in s 1 of PAJA, and they 'failed to take into account relevant considerations that should have informed those decisions'.[19]

[27] Eskom argues that it is distinguishable because *Resilient* (SCA) was concerned with phased interruptions and ultimate terminations of bulk electricity supply to municipalities, instead of a reduction of bulk electricity supply to contractually agreed NMD supply levels and finds no application in casu. It, therefore, raises similar arguments in this matter to those raised by it in *Resilient* (SCA), such as that it was merely enforcing its rights arising from the electricity supply agreements between it and the Ngwathe and Lekwa municipalities; an increase in the NMD supply levels are in terms of those electricity supply agreements, Eskom's NMD rules and the NERSA rules not merely for the asking but requires its approval; it has the power in terms of s 21(5) of the ERA to interrupt or reduce the supply of electricity to an entire municipality;

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[17] Section 6(2)*(e)*(iii) of PAJA provides that '[a] court or tribunal has the power to judicially review an administrative action if . . . the action was taken . . . because irrelevant considerations were taken into account or relevant considerations were not considered',

[18] *Resilient* (SCA) para 88.

[19] *Ibid* para 91.

it is the Ngwathe and Lekwa municipalities that are constitutionally and statutorily obliged to provide basic services to their residents and the residents, therefore, ought to have approached a court and obtained a mandamus against each municipality. Eskom's attempt at distinguishing *Resilient* (SCA) from the present matter is artificial. *Resilient* (SCA) is a case in point, and the principles enunciated therein are of equal application in this matter.

[28] The facts in *Resilient* (SCA), *Resilient* (GJ) and the instant matter are similar. I accept that the potential of a humanitarian crisis and adverse environmental consequences established in the *Resilient* cases should Eskom have implemented its decisions to incrementally interrupt and ultimately terminate the bulk electricity supply to the municipalities involved are more severe than the horrendous consequences that were prima facie established to have been unfolding in casu. However, Eskom permitted the Ngwathe and Lekwa municipalities for years to exceed their contractually agreed NMD supply levels and decided to reduce the bulk electricity supply to them to their contractually agreed NMD levels during February 2020, which decisions it implemented on 10 July 2020. Despite Eskom's protestations to the contrary, it is clear at the level of a prima facie right that is required for an interim interdict that it took and implemented those decisions to collect the outstanding debt owed to it by the Ngwathe and Lekwa municipalities and to reduce and manage the rate of escalation of the debts in the event of it agreeing to increase the NMD supply levels to meet their present additional electricity demands.

[29] Although there is no real dispute as to the existence of the debts owed to Eskom by both the Ngwathe and Lekwa municipalities or as to the inability of these recalcitrant and dysfunctional municipalities to make any meaningful payments themselves due to their parlous financial state, disputes between Eskom on the one hand and the Ngwathe and Lekwa municipalities on the other, as contemplated in s 41 of the Constitution and inter alia ss 40 and 41 of the IRFA, have prima facie arisen in relation to the manner in which the debt would be liquidated, the remedies available to Eskom in the event of default, and the terms upon which Eskom would agree to increase their historically agreed NMD levels to meet their present electricity supply demands.

[30] Those intergovernmental disputes triggered the constitutionally and statutorily required dispute resolution mechanism for Organs of State prescribed in the IRFA, and all efforts to resolve those disputes should have been exhausted in terms of chapter 4 of the IRFA. But the dispute resolution mechanism was prima facie not followed. It has been prima facie established that Eskom itself realised that the parlous state of the Ngwathe and Lekwa municipalities warranted intervention by the provincial government and, if need be, the national government. This avenue was not explored because Eskom was not prepared to wait for that process to unfold.

[31] Eskom, therefore, was not constitutionally and statutorily permitted to unilaterally reduce the bulk electricity supply to the Ngwathe and Lekwa municipalities to their historic contractually agreed NMD levels without it and the two municipalities, in collaboration with the other state role-players, first making every reasonable effort to settle the intergovernmental disputes. Had the dispute resolution mechanism been followed, it may well have resulted in the intervention of both the provincial and national levels of government, without which the Ngwathe and Lekwa municipalities are unlikely to turn their fortunes around on their own. Instead, Eskom's decisions to reduce the bulk electricity supply rendered the Ngwathe and Lekwa municipalities unable to fulfil their constitutional obligations owed to their citizenry, which resulted in a catastrophe unfolding with hospitals, schools, households and businesses severely disrupted and with damage to the environment as a result of water sources being contaminated due to the damage to the municipal water and sewage systems.

[32] The residents, therefore, have established a prima facie right at the level required for interim relief that Eskom's decisions and implementation thereof are judicially reviewable and that they have prospects of success in having them set aside on the basis that they undermine constitutional and statutory imperatives. All the requirements for granting interim interdictory relief having been established, the High court correctly granted the interim interdicts in all the circumstances of each case.

[33] In the result, the following order is made:

1. The appeal in *Eskom Holdings Soc Ltd v Lekwa Ratepayers Association and Others* (High Court case no. 35054/2020) is dismissed with costs, including those of two counsel.

2. The appeal in *Eskom Holdings Soc Ltd v Vaal River Development Association and Others* (High Court case no. 31813/2020) is dismissed with costs, including those of two counsel.

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P A MEYER

ACTING JUDGE OF APPEAL

Appearances:

Appellant's counsel:	SL Shangisa SC (assisted by L Rakgwale)
Instructed by:	Maponya Attorneys, Arcadia, Pretoria
	Maponya Attorneys, Bloemfontein
First Respondent's counsel:	H van Eeden SC (assisted by DH Wijnbeek)
Instructed by:	Lou van Wyk Inc., Parys
	Andreas Peens Attorneys, Koster
	C/o Rosendorff Reitz Barry CAJ van Rensburg, Bloemfontein