THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no:1018/2023

In the matter between:

ESKOM HOLDINGS SOC LTD **FIRST APPELLANT**

MBOMBELA MUNICIPALITY **SECOND APPELLANT**

and

SONAE ARAUCO (PTY) LTD **RESPONDENT**

Neutral citation: *Eskom Holdings Soc Ltd and Another v Sonae Arauco (Pty) Ltd* (1018/2023) [2024] ZASCA 177 (18 December 2024)

Coram: MBATHA, WEINER and SMITH JJA and MOLOPA-SETHOSA and KOEN AJJA

Heard: 19 November 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and released to SAFLII. The time and date for hand-down of the judgment is deemed to be 11h00 on 18 December 2024.

Summary: Electricity Regulation Act 4 of 2006 (the Act) – Eskom and municipalities' statutory obligations regarding loadshedding – legal nature of Codes made in terms of s 35(2) of the Act – Codes regulate equitable implementation of loadshedding when national electricity grid is at risk – whether Eskom entitled to implement loadshedding where municipalities fail to do so – Codes mandate Eskom to assume ultimate responsibility for loadshedding and to take prompt action to relieve any abnormal

condition that jeopardises reliable operation – Eskom obliged to implement loadshedding where municipalities fail to shed the required load.

ORDER

On appeal from: Mpumalanga Division of the High Court, Mbombela (Roelofse AJ, sitting as court of first instance):

1. The appeal is upheld with costs including the costs of two counsel, where so employed.
2. The order of the high court is set aside and replaced with the following order:

'The application for interim relief in terms of Part A of the notice of motion is dismissed with costs including the costs of two counsel, where so employed.'

JUDGMENT

Smith JA (Mbatha and Weiner JJA, Molopa-Sethosa and Koen AJJA concurring):

[1] The appellants, Eskom Holdings SOC Ltd (Eskom) and the Mbombela Local Municipality (the municipality), appeal against the judgment and order of the Mpumalanga Division of the High Court, Mbombela, per Roelofse AJ, (the high court), delivered on 16 August 2023. The high court, inter alia, interdicted and restrained Eskom and the municipality from implementing loadshedding in the area of the grid where the factory of the respondent, Sonae Arauco SA (Pty) Ltd (Sonae), is located. The appeal is with the leave of the high court.

[2] In addition to the appellants, Sonae also cited the Premier of Mpumalanga, the Director-General – Office of the Premier of Mpumalanga, the Minister of Mineral Resources and Energy and the Minister of Electricity. It did, however, not seek any relief against any of those parties. They consequently did not oppose the application, neither were they involved in the appeal.

[3] Sonae's application was based mainly on the assertion that in 2020, it concluded an oral electricity curtailment agreement (the curtailment agreement) with the municipality. It stated that the municipality agreed to exclude its factory from loadshedding on the condition that Sonae limits its electricity usage to 70% of its usual

consumption. It alleged that the municipality, or Eskom, implemented loadshedding at its factory during 2023 in breach of the curtailment agreement. It consequently brought the application on notice of motion in two parts. In Part A, it sought an urgent mandatory interdict compelling the municipality to comply with its obligations in terms of the curtailment agreement and to refrain from implementing loadshedding in the area of the grid where its factory is located. In the alternative, Sonae sought an order interdicting the municipality and Eskom from implementing loadshedding in the grid where the factory is located, pending the finalisation of the relief sought in Part B.

[4] In Part B Sonae sought an order, inter alia: (a) declaring that the curtailment agreement is valid and the municipality has acted in breach thereof by imposing loadshedding; (b) that the municipality is interdicted from implementing loadshedding in the grid area where Sonae's factory is located; (c) declaring that the municipality's delegation to Eskom of its obligations to provide and distribute electricity within its area of jurisdiction is ultra vires and unlawful; (d) alternatively, that the delegation is set aside in terms of the Promotion of Administrative Justice Act 3 of 2000, and substituted by a decision refusing such delegation; (e) alternatively, that the delegation is set aside and remitted to the municipality for further consideration and determination; (f) in the alternative to the relief sought in respect of the contended unlawful delegation of the municipality's constitutional obligations to Eskom, an order declaring that Eskom had unlawfully usurped the constitutional and statutory obligations of the municipality to provide electricity to the community in its area of jurisdiction; and (g) interdicting Eskom from usurping those municipal powers and obligations.

[5] The high court found that Sonae succeeded in establishing all the legal requisites for interim interdictory relief. It consequently granted the interim relief in terms of Part A of Sonae's notice of motion, pending the finalisation of the relief sought in Part B thereof.

[6] Although the material facts are relatively straightforward, they are not common cause. The disputes between the parties relate mainly to: (a) whether Sonae and the municipality concluded the curtailment agreement, and if so, whether it was lawful and valid; (b) whether Sone established a prima facie right in terms of the curtailment agreement; and (c) the circumstances which led to the implementation of

loadshedding at Sonae's factory. Because the high court's order is interim in nature, the question also arises as to whether it is appealable.

Sonae's version of events

[7] Sonae is a subsidiary of Sonae Arauco International and specialises in the manufacturing of wood based panels for the furniture and construction industries. It is one of the municipality's largest users of electricity and a major contributor to the local economy. Apart from spending about R100 million per annum on electricity, it employs 250 workers who live in the vicinity of the factory, with related spending of about R120 million in the municipality's area of jurisdiction. It also spends some R70 million on local contractors and purchases approximately R110 million worth of timber from local producers.

[8] Sonae asserted that the equipment installed at its factory located at Rockys Drift, White River, Mpumalanga, operates at exceptionally high temperatures and are sensitive to electricity supply interruptions. Such power interruptions, including those implemented during loadshedding, create 'a real and substantial fire risk' with resultant health and safety risks for employees, contractors, suppliers and the public. Sonae does not have an alternative electricity supply since a generation plant would cost at least R600 million and would take some 12 to 18 months to install. It is currently not in a financial position to install such a power plant and continued loadshedding may thus result in the closure of its factory and its withdrawal from South Africa. Such a move would have egregious consequences for its employees, their families and the local economy.

[9] It was for these reasons that Sonae approached the municipality, during 2020, to propose the conclusion of the curtailment agreement, which would entail:

(a) the municipality refraining from implementing loadshedding in the area of the grid where Sonae's factory is located;

(b) in turn, Sonae would control its electricity usage at the factory to approximately 70%, or less, of its usual electricity consumption;

(c) Sonae would achieve the reduction in its electricity supply by shutting down certain operations at the factory during periods of loadshedding; and

(d) the electricity supply to the factory would not be interrupted.

Sonae contended that this arrangement would achieve the objectives of loadshedding whilst simultaneously ensuring that it would be able to continue its operations in a safe, healthy and secure environment. This would ensure the job security of its employees and avoid the deleterious consequences for the local economy if the factory were to close.

[10] During January or February 2020, Sonae, represented by Ms Dionne Harber (Ms Harber), and the municipality, represented by Mr Jaco Landsberg (Mr Landsberg), concluded the curtailment agreement in the abovementioned terms. Sonae thereafter duly complied with its contractual obligation to limit its electricity consumption to 70% of its normal usage. However, during 2022 'for reasons unbeknown to Sonae', the municipality violated the curtailment agreement by implementing loadshedding at its factory. This, according to Sonae, was done in breach of the curtailment agreement and without any prior notice to it.

[11] On 28 December 2022, after numerous unsuccessful attempts to engage with the municipality, Sonae wrote to the municipal manager, purporting to confirm the existence and terms of the agreement. The letter stated, inter alia, that '[t]his is a formal request, after numerous failed attempts via phone and WhatsApp, to reinstate the previous agreement between ourselves, the Municipality of Mbombela and Eskom, to allow Sonae Arauco South Africa (SASA) to self-curtail its electricity consumption during loadshedding'. Sonae also proposed that if the agreement could not be reinstated, it be allowed to procure electricity directly from Eskom, alternatively that it be allowed to investigate the option of a 100% electricity wheeling agreement with a gas generation supplier. The municipality never replied to that letter.

[12] According to Sonae, the municipality 'came to its senses' in January 2023 and made a commitment that it would comply with the terms of the agreement. Sonae then wrote to the municipality on 11 January 2023, expressing its gratitude for the municipality's change of heart and requesting the municipality to give prior notice in the future of any anticipated interruptions of the electricity supply to its factory. Notwithstanding the municipality's undertaking to adhere to the terms of the curtailment agreement, on 9 June 2023, full loadshedding was implemented at the factory without any prior notification to Sonae.

[13] Sonae consequently wrote to the municipality on 12 June 2023 demanding that it complies with its obligations in terms of the curtailment agreement. It again reminded the municipality of the deleterious consequences which the interruptions to its electricity supply would have for its employees and the local economy. Once again, there was no reply from the municipality.

[14] According to Sonae, Mr Landsberg subsequently informed Ms Harber that the municipality could not comply with the curtailment agreement because Eskom had taken over the implementation of loadshedding in the municipality's area of jurisdiction. Since it was unclear whether the municipality had delegated its loadshedding function to Eskom or whether Eskom had unilaterally usurped it, Sonae attempted to obtain clarity in this regard from Mr Landsberg and the Eskom representative for the Mbombela region. However, neither of them could enlighten it as to who had implemented the loadshedding. Despite further communications to the municipality and Eskom demanding compliance with the curtailment agreement, neither had responded. Sonae was thus compelled to launch the application.

[15] Sonae asserted that it had a prima facie right in terms of the curtailment agreement not to be subjected to loadshedding. It also asserted its constitutional and statutory right to constant and uninterrupted supply of electricity. Although Sonae also contended that it had a legitimate expectation arising 'from the express promise and terms of the contract that the municipality will not interrupt its electricity supply', in argument before us it abandoned any reliance on the doctrine of legitimate expectation. Sonae has also claimed that it was entitled to notice prior to the implementation of loadshedding. However, this contention was raised for the first time in its replying affidavit.

[16] Sonae contended furthermore that it would not be afforded substantial redress at a hearing in due course and that any delay would result in its inevitable demise. It would suffer irreparable harm in the form of 'the real and substantial fire risk' at the factory; the adverse effects on its sustainability; the impact on the job security of its employees; and the deleterious consequences for the local economy if the factory were to close. It had no other remedy available but to interdict the municipality and Eskom from implementing loadshedding since it would take 12 to 18 months for it to

install an alternative power source. By then, the fire risk and the other deleterious consequences would have materialised.

[17] According to Sonae those far-reaching consequences also tipped the balance of convenience firmly in its favour. The municipality and Eskom, on the other hand, would suffer no prejudice. The municipality had been honouring its obligations in terms of the curtailment agreement since 2020 and if an interim order should be granted, the *status quo ante* would simply be restored, or so Sonae argued.

Eskom and the municipality's version of events

[18] In its answering affidavit, Eskom proffered a different version of events. It explained that the municipality is serviced by five substations, including Rockysdrift, where Sonae's factory is located. Until 1 August 2022, Eskom had been implementing loadshedding in the municipality's area of jurisdiction when necessary, including at Rockysdrift.

[19] In July 2022, Eskom agreed to allow the municipality to implement loadshedding in the areas serviced by the Barberton substation. Eskom, however, made the agreement subject to the NRS048-9: 2019 Code of Practice (the 2019 Code) published by the National Energy Regulator (NERSA) in terms of the Electricity Regulation Act 4 of 2006 (the Act). Eskom stipulated that any non-adherence to the agreement would result in it revoking the approval on 24 hours' notice. I deal in greater detail with the relevant provisions of the 2019 Code later in the judgment.

[20] In December 2022, Eskom became aware that the Rockysdrift substation had been erroneously omitted from loadshedding schedules. It thereafter immediately commenced loadshedding in the areas serviced by that substation as it was obliged to do in terms of the 2019 Code. Although it was not clear how it came about that Rockysdrift was initially excluded from the loadshedding schedule, Eskom was adamant that it could not have been because of the purported curtailment agreement between Sonae and the municipality, since the latter had only been allowed to assume responsibility for loadshedding in the area serviced by the Barberton substation. It was only in the latter half of December 2022 that Eskom agreed that the municipality could

also implement loadshedding in the areas serviced by Rockysdrift. This was on the same conditions which attached to the approval in respect of the Barberton substation.

[21] Despite the municipality's assurances to Eskom that it was equipped to implement loadshedding, Eskom's reports indicated that the municipality was not complying with loadshedding instructions and was not reducing its load to the required amounts. Consequently, during May 2023, Eskom wrote to the municipality requesting it to deliver reports detailing, inter alia, its load consumed between January and May 2023. When the municipality eventually responded, after numerous further requests from Eskom, it provided only its loadshedding schedules instead of the requested reports detailing its load consumption.

[22] The municipality thereafter wrote to Eskom explaining that it was unable to furnish the requested information because it lacked the necessary metering points to assess consumption properly. According to Eskom, this was an 'alarming revelation' since licensees are required by law to deliver reports regarding their implementation of load reduction. This can only be done if the requisite metering equipment had been installed.

[23] On 8 June 2023, Eskom's Network Optimisation Department delivered a draft audit report which revealed that for the period January 2023 to May 2023: (a) the municipality had not demonstrated that it participated in loadshedding; (b) instead the municipality had, in certain circumstances, increased consumption, thereby putting the grid at risk; (c) the municipality did not even comply with the lowest stages of loadshedding; and (d) the municipality lacked the required instruments to estimate reduced loads and was consequently unable to implement loadshedding properly.

[24] On 9 June 2023, when it had become clear that the municipality could not properly implement loadshedding itself, Eskom assumed responsibility for loadshedding in the entire area of the municipality's jurisdiction. Because Eskom can only implement loadshedding at substation level, it therefore had to shed all the end-users serviced by, among others, the Rockysdrift substation, including Sonae's factory.

[25] Eskom asserted that Sonae's constitutional right to uninterrupted supply of electricity is not absolute but is subject to the law. In this regard the 2019 Code places an obligation on it to protect the national grid by implementing loadshedding in a municipality when that municipality fails to do so or lacks the capacity to implement loadshedding properly.

[26] In addition, the curtailment agreement is unlawful because it did not comply with the prescripts of the 2019 Code. Sonae was not eligible for load curtailment since it did not utilise 80% of the load provided by the Rockysdrift sub-station. In any event, Eskom was not party to the curtailment agreement and is consequently not bound by it.

[27] The municipality made common cause with Eskom's version and asserted that it is statutorily obligated to cooperate with Eskom in the implementation of loadshedding. In terms of the agreement it concluded with Eskom, the municipality is obliged to implement the stages and schedules of loadshedding as determined by Eskom. Sonae does not provide an essential service and is therefore not entitled to a special dispensation exempting it from loadshedding.

[28] The municipality denied that it concluded a lawful curtailment agreement with Sonae, as alleged by Sonae. It contended that only the municipal manager, in his or her capacity as accounting officer, has authority to enter into binding agreements with service providers or customers on behalf of the municipality. The purported curtailment agreement on which Sonae relies was not concluded with the municipal manager or any other duly delegated municipal functionary. While denying that such an agreement existed at all, the municipality asserted that it would in any event be invalid and unenforceable because it was not in writing and did not comply with the prescripts of the 2019 Code.

The high court's findings

[29] The high court found that Sonae had proved the existence of the curtailment agreement. It rejected the municipality's contention that the curtailment agreement was unlawful and invalid because it was not concluded by the municipal manager and

was not in writing. The high court held that the 2019 Code 'specifically provides for load curtailment agreements and no formal requirements are set for validity.'

[30] The high court also found that Eskom did not implement loadshedding at the Rockysdrift substation because the substation was excluded in error, 'but rather because the municipality did not comply with its obligations to shed the required load at that substation'. In any event, so the high court found, if the power supply to the Rockysdrift substation had indeed been interrupted for that reason, 'the municipality must have other ways to reduce its load for it was apparently able to do so in terms of its agreement with Eskom at least some time prior to 29 May 2023'.

[31] The high court further found that Sonae had established that: it had a prima facie right by virtue of the curtailment agreement; it had shown irreparable harm not only to itself but also to the 'wider community' if Eskom and the municipality were not compelled to comply with the curtailment agreement; it had no other effective remedy; and the balance of convenience favoured Sonae since the municipality had been able to comply with the provisions of the curtailment agreement for more than three years. It appears, however, that the high court did not give any consideration to the prospects of success of Part B of Sonae's notice of motion. It is trite that an applicant seeking interim interdictory relief must, in addition to the other legal requisites, show that there are reasonable prospects that he or she will obtain final relief in due course.

Is the high court's order appealable?

[32] Even though none of the parties contested the appealability of the high court's order, this Court is nevertheless bound to pronounce on that issue since it raises the related question of this Court's jurisdiction. It is thus not an issue which the parties can settle by agreement but one that must be decided by this Court.

[33] This Court in *Zweni v Minister of Law and Order* (*Zweni*), formulated the following requirements for appealability of an order: (a) the decision must be final in effect and not open to alteration by the court of first instance; (b) it must be definitive

of the rights of the parties; and (c) it must have the effect of disposing of at least a substantial portion of the relief claimed in the main proceedings.[1]

[34] However, even if an order does not meet the *Zweni* threshold, it may nevertheless be appealable if the interests of justice require it. In *United Democratic Movement v Lebashe Investment Group (Pty) Ltd,* the Constitutional Court made it clear that the 'interests of justice approach' is not limited to the Constitutional Court but applies equally to this Court.[2]

[35] In *Government of the Republic of South Africa and Others v Von Abo*, this Court commented that:

'It is fair to say that there is no checklist of requirements. Several considerations need to be weighed up, including whether the relief granted was final in its effect, definitive of the rights of the parties, disposed of a substantial portion of the relief claimed, aspects of convenience, the time at which the issue is considered, delay, expedience, prejudice, the avoidance of piecemeal appeals and the attainment of justice.'[3]

[36] In *International Trade Administration Commission v SCAW South Africa Ltd* at paragraph 56 the Constitutional Court, in holding that the requirements for appealability must be considered disjunctively rather than conjunctively, explained that:

'It is sufficient if the order disposes of "at least a substantial portion of the relief claimed in the main proceedings". Also, it is adequate if the interim order is intended to and does have an immediate effect and is not susceptible to be reconsidered on the same facts in the main proceedings.'*4*

[37] Considered in the light of the abovementioned legal principles, there can, in my view, be little doubt that the order is indeed appealable. The high court's order has the effect of restraining Eskom and the municipality from discharging their statutory

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[1] *Zweni v Minister of Law and Order* [1992] ZASCA 197; [1993] 1 All SA 365 (A); 1993 (1) SA 523 (A) at 532J–533A.
[2] *United Democratic Movement and Another v Lebashe Investment Group (Pty) Ltd and Others* [2022] ZACC 34; 2023 (1) SA 353 (CC); 2022 (12) BCLR 1521 (CC) para 45.
[3] *Government of the Republic of South Africa v Von Abo* [2011] ZASCA 65; 2011 (5) SA 262 (SCA); [2011] 3 All SA 261 (SCA), para 17.
[4] *International Trade Administration Commission v SCAW South Africa Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC); 2010 (5) BCLR 457 (CC); 72 SATC 135 para 56.

obligations regarding loadshedding. The prohibition against the implementation of loadshedding at Sonae's factory and the concomitant risk to the stability of the national grid it may entail, in my view, renders the order final in effect. And as I said earlier, the order was granted without any consideration of Sonae's prospects of success in respect of the relief sought in Part B of its notice of motion. It is therefore in the interests of justice that the order should be regarded as appealable.

The statutory framework

[38] The much maligned practice of loadshedding is an inconvenient but necessary tool to prevent the national electricity grid from collapsing and resulting in the dreaded national blackout, that is, a total loss of electricity supply. The essence of loadshedding is the balancing of insufficient generation capacity and excessive customer demand, by rapidly reducing power supply, in other words, by implementing scheduled and planned power interruptions to avoid the collapse of the national grid.

[39] The consequences of a national blackout would self-evidently be catastrophic. Without electricity, essential services, including water supply, health, travel, internet and banking services, among others, will be interrupted. While one can only speculate about how long it would take to restore electricity supply after a national blackout, there is no reason to doubt Eskom's estimate that it could take up to two weeks. This is undoubtedly a serious risk that the country can ill afford. It is for this reason that the Act and the Codes published in terms thereof provide a regulatory framework to enable Eskom to protect the national grid through scheduled, fair and responsible load reduction.

[40] Section 21(1) of the Act 'empowers and obliges a licensee to exercise the powers and perform the duties set out in such licence…'. In terms of s 35(2) of the Act, NERSA may make guidelines and publish codes of conduct and practice regulating 'the relationship between licensees and customers and end users' and 'relating to the operation, use and maintenance of transmission and distribution power systems'.

[41] NERSA has published two codes to regulate the implementation of loadshedding, namely, the 2019 Code and the South African Grid Code System Operation Code (the Grid Code) (collectively referred to as the Codes). These Codes

form part of license conditions and oblige licensees, including Eskom, to adhere to their prescripts.

[42] In terms of the Grid Code, Eskom, as the 'Systems Operator', is mandated to take prompt remedial action 'to relieve any abnormal condition that may jeopardise reliable operation' and to 'shed customer load to maintain system integrity'. The Grid Code requires Eskom to instruct municipalities regarding the extent of their load reduction to ensure the safety of the grid, and to monitor their capacities to do so. Where a municipality fails to reduce its load sufficiently, Eskom must intervene to ensure the stability of the grid.

[43] The Codes provide for fair and equitable distribution of the loadshedding burden and stipulate that all customers are subject to loadshedding. Only a few critical entities are automatically excluded. These include, among others, water service power stations, bulk potable water supply systems, refineries, the Union Buildings and National Parliament.

[44] In terms of the 2019 Code, a customer may elect to enter into a load curtailment agreement in which it undertakes to reduce load on demand, rather than being subjected to loadshedding. Load curtailment agreements are subject to, inter alia, the following conditions: (a) the agreement must be in writing; (b) it can only be implemented during stages 1 to 4 of loadshedding; (c) it 'shall not result in the need to exclude significant other loads from loadshedding due to network limitations'; and (d) the load reduction must be measurable and verifiable. Sonae did not assail the validity of the Codes.

Analysis and discussion

[45] Sonae's assertion that it has a constitutional right to electricity supply is indisputable. The Constitutional Court said in *Joseph and Others v City of Johannesburg and Others* that, '[e]lectricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban

society'.[5] Eskom and municipalities are the main functionaries tasked with the statutory and constitutional obligation to realise this constitutional right. Eskom has been licensed by NERSA to generate and distribute electricity throughout the country and municipalities are licenced to distribute and sell electricity to end users in their respective areas of jurisdiction.[6]

[46] However, Sonae's right to electricity supply is not absolute. The Codes published by NERSA in terms of s 35 of the Act provide a regulatory framework for the equitable implementation of loadshedding. They specifically mandate Eskom to assume 'ultimate' responsibility for loadshedding and to take prompt action 'to relieve any abnormal condition that jeopardise reliable operation'. Where a municipality implements loadshedding itself, Eskom must instruct the municipality regarding the amount of load that must be reduced and must monitor the municipality's capacity to reduce load. Where the municipality fails to reduce its load sufficiently, Eskom is required to shed the bulk supply points to the municipality and must include that municipality in its future loadshedding schedules.

[47] The Codes self-evidently bind Eskom, municipalities and customers alike. In terms of clause 3.1 of the 2019 Code, a 'licensee' is defined as a 'body, licensed by NERSA, that generates, transmits or distributes electricity'. As mentioned earlier, municipalities are licensed to distribute and sell electricity to end users in their respective areas of jurisdiction. A 'customer' is defined as a 'person or legal entity that has entered into an electricity supply agreement with a licensee'.

[48] Sonae contends that the Codes are mere policy documents that only have internal force and thus only regulate the affairs of Eskom. The Act overrides the Codes and Sonae's electricity supply may therefore only be interrupted in terms of s 21(5) of the Act,[7] so Sonae argued.

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

[6] *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) para 12.

[7] Section 21(5) provides that:
'A licensee may not reduce or terminate the supply of electricity to a customer, unless-
(a) the customer is insolvent;

[49] This submission is fundamentally at odds with the express language of the Codes. The Codes unambiguously impose upon Eskom the primary responsibility for the implementation of loadshedding. They also define the role of municipalities and clarify customers' obligations. Clause 1 of the 2019 Code provides that it 'is intended to provide for the implementation of a nationally consistent response to a variety of system emergencies' and, inter alia, to define 'the roles, responsibilities and limitations of licensees and customers in addressing various aspects of loadshedding'. In terms of clause 4.4.2, 'all customers should by default be shed', in terms of predetermined loadshedding schedules. Sonae did not impugn the validity of the Codes.

[50] The high court correctly accepted – albeit without providing reasons – that the Codes have external force. With reference to clause 4.5.3 of the 2019 Code,[8] the high court stated that, '[t]he NRS Code specifically provides for load curtailment agreements.' It, however, then erroneously concluded that, 'no formal requirements are set [by the Code] for its validity'. As I have stated above, the Codes, while allowing for a licensee to conclude a load curtailment agreement with a customer, prescribe various requirements to which such an agreement must adhere. These are, inter alia: the agreement must be in writing; it only applies during stages 1 to 4 of loadshedding; the customer must use at least 80% of its feeder's supply; the load reduction must be measurable and verifiable; and the agreement is subject to the provisions of the Codes relating to 'critical loads,[9] demand response participation,[10] load curtailment, or independent power producers'. It is common cause that the curtailment agreement on which Sonae relies was not in writing, neither has Sonae been able to show that its factory uses 80% of the supply from the Rockysdrift substation. The purported curtailment agreement consequently does not comply with the prescripts of the Codes and is therefore unenforceable as against the municipality.

(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.'

[8] Clause 4.5.3 reads as follows:
'**Notified mandatory load curtailment (Stages 1 to 4)**
4.5.3.1 A licensee may identify specific customers who, instead of being shed, can provide a pre-defined amount of load to be curtailed within a maximum of 2h on instruction from the licensee.'

[9] Load that 'is managed to minimise the impact of load shedding or loss of supply in order to either maintain the operational integrity of the power system, or' to avoid a cascading impact on public infrastructure.'

[10] Where a customer has signed a contract with his supplier or Eskom to offer a portion of his load at a price, for the purposes of load reduction.

[51] Sonae also criticised Eskom for unilaterally assuming the municipality's loadshedding responsibility. It submitted that loadshedding may only be implemented in terms of s 21(5) of the Act, and as a 'last resort'. It argued, furthermore, that Sonae is entitled to uninterrupted electricity supply and Eskom has not shown that the grid was at risk because its factory was excluded from loadshedding.

[52] The short answer to this argument is that the Codes do not only mandate Eskom to monitor the implementation of loadshedding by municipalities but they indeed obligate Eskom to: (a) instruct municipalities regarding the amount of load that must be reduced after a decision to implement loadshedding had been taken; (b) monitor the municipalities' capacity to reduce load; (c) shed the bulk supply points to a municipality where that municipality has failed to reduce load in accordance with Eskom's instructions; and (d) include the municipality in its future loadshedding schedules.

[53] Sonae was unable to dispute Eskom's assertion that it was obliged to implement loadshedding at the Rockysdrift substation in terms of clause 4.1 of the 2019 Code because: (a) it had an agreement with the municipality that the latter would implement loadshedding at that substation subject to the condition that if it failed to do so properly, Eskom would reassume control of loadshedding within 24 hours; (b) the municipality had failed to implement loadshedding at the substation properly for an extended period; (c) the municipality had failed to provide Eskom with the information to show that it implemented loadshedding in accordance with Eskom's instructions; and (d) the municipality informed Eskom that it lacked the required metering points necessary to asses electricity consumption.[11]

[54] Eskom was not a party to the curtailment agreement and was accordingly not bound by any arrangements between the municipality and Sonae. In these

[11] Clause 4.1 reads as follows:
'Where municipal licensees are unable to demonstrate the ability to reduce demand by at least 80% of the required amount within 15 min on advance notification (provided at least 1 hour before possible load shedding), and the ability to restore 80% of this load in under 30 minutes:
(a) Eskom shall shed the bulk supply points to these municipalities;
(b) Eskom shall include these municipalities on its schedules going forward; and
(c) the municipal licensees shall revise their schedules to reflect the relevant shedding times.

circumstances, the Codes obligated Eskom to assume responsibility for the implementation of loadshedding at the Rockysdrift substation.

[55] Moreover, the high court accepted that Eskom implemented loadshedding at the Rockysdrift substation 'because the municipality did not comply with its obligations to shed the required load at that substation'. The high court, however, incongruously commented that '[i]t is therefore impossible to determine exactly what Eskom's defence is'. The finding that Eskom assumed responsibility for the loadshedding because the municipality failed to shed the required load should have been dispositive of the matter. This is because Eskom was obliged in terms of the Codes to assume responsibility for loadshedding at the Rockysdrift substation.

[56] There is another reason why Sonae's application for interdictory relief against the municipality should have failed, and it is this. In applying for the interdictory relief, Sonae relied primarily on the assertion that in interrupting the power supply to its factory, the municipality acted in breach of the curtailment agreement. The finding that it was Eskom, and not the municipality, who implemented the loadshedding is also dispositive of that contention.

[57] Moreover, the high court accepted that Eskom implemented loadshedding at the Rockysdrift substation 'because the municipality did not comply with its obligations to shed the required load at that substation.' The high court, however, incongruously commented that '[i]t is therefore impossible to determine exactly what Eskom's defence is.'

[58] Insofar as the high court's order has the effect of prohibiting Eskom from implementing loadshedding in circumstances where the municipality has failed to shed load in the amounts stipulated by Eskom, it impermissibly sanctions an unlawful situation. The order, in effect, restrains Eskom, as the 'ultimate authority', from discharging its obligations under the Grid Code to protect the integrity of the grid when it is at risk.

[59] Additionally, as I said earlier, the high court did not consider whether there were reasonable prospects that Sonae would obtain final relief in terms of Part B of its notice

of motion. In this regard, Sonae, inter alia, seeks an order declaring the curtailment agreement effective as between it and the municipality, and that the municipality be interdicted from implementing loadshedding in the area of the grid where its factory is located. It was common cause – and was also found by the high court – that it was Eskom and not the municipality who implemented the loadshedding. Sonae failed to show reasonable prospects that it will obtain final interdictory relief against the municipality.

[60] Sonae has also not shown that there were reasonable prospects that it would succeed with the declaratory relief sought in respect of the municipality's contended unlawful delegation of its constitutional obligation to Eskom, alternatively Eskom's unlawful usurpation of those functions. It was not disputed that Eskom unilaterally implemented loadshedding at the Rockysdrift substation without the municipality's acquiescence. Eskom therefore did not act in terms of a delegation by the municipality, but rather in terms of its obligations under the Codes. Furthermore, Eskom derives its authority from s 21(1) of the Act and the provisions of the Codes. As I have explained earlier, Eskom is obliged to implement loadshedding where a municipality has failed to shed load to the extent stipulated by it.

[61] The high court's extensive reference to and reliance on the minority judgment in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* (*Vaal River*)[12] was, in my view, misplaced. The facts of that case are clearly distinguishable. That matter did not concern loadshedding but rather Eskom's decision to terminate the power supply to the municipality in terms of s 21(5) of the Act because the customer defaulted in its payment. Since the supply to a customer who is in default of payment does not put the entire grid at risk, there cannot be any reason why notice of termination of the power supply should not be given in those circumstances. And this was indeed the basis on which the applicants in *Vaal River* challenged Eskom's decision to reduce the power supply to the municipality.

[12] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*. [(CCT 44/22) [2022] ZACC 44; 2023 (5) BCLR 527 (CC); 2023 (4) SA 325 (CC).

[62] The Codes, however, regulate an entirely different eventuality, namely when the demand for electricity exceeds the available generation capacity, thereby putting the entire grid at risk. The only way in which the calamitous consequences of a grid collapse can be averted in this circumstance is through the planned reduction of electricty supply. The Codes provide the protocol for the scheduled and equitable interruption of power supply to prevent such a catastrophe from happening. Eskom is obligated to play a central role in that process and must instruct municipalities regarding the quantities of the load that must be shed, monitor the municipalities' compliance with those instructions and implement loadshedding itself where a municipality has failed to shed the required load.

[63] Furthermore, in my view the facts put up by Sonae in support of its assertion that it would have suffered irreparable harm if loadshedding were not interdicted, were insubstantial and tenuous. In this regard, Sonae has placed heavy reliance on a fire risk at its factory if the electricity supply were interrupted. The fire risk would presumably have been precipitated by the high temperatures at which equipment installed at its factory operate. However, nowhere does Sonae explain why a fire risk would arise if the electricty supply were to be cut. It was also common cause that loadshedding had been implemented at its factory in December 2022. Sonae did not explain how it was able to avert the contended disatrous consequences during that period. The calamitous consequences that would flow from a collapse of the grid, if Eskom does not implement loadshedding, on the other hand, are manifest and undeniable. The balance of convenience was therefore firmly in Eskom and the municipality's favour.

[64] In *National Treasury and Others v Opposition to Urban Tolling Alliance and Others*,[13] the Constitutional Court held that in deciding whether to interdict the exercise of executive or legislative powers, a court must carefully consider how the interdict will disrupt those functions and thus 'whether its restraining order will implicate the tenet of division of powers'.[14] The Constitutional Court further cautioned that, [w]hile a court has the power to grant a restraining order of that kind, it does not readily do so, except

[13] *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) (*Urban Trolling Alliance*).
[14] *Urban Trolling Alliance* para 65.

when a proper and strong case has been made out for the relief and, even so, only in the clearest of cases'.[15] For the abovementiond reasons, I am of the view that this is not one of those clear cases and that the high court consequently erred in granting the interdictory relief. The appeal must accordingly succeed.

[65] In the result I make the following order:

1. The appeal is upheld with costs including the costs of two counsel, where so employed.
2. The order of the high court is set aside and is replaced with the following order:

'The application for interim relief in terms of Part A of the notice of motion is dismissed with costs including the costs of two counsel, where so employed.'

_____

J E SMITH

JUDGE OF APPEAL

[15] Ibid.

Appearances

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For the second appellant:	Z Matebese SC with L Zwane
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For the respondent:	J de Beer
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