CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 44/22

In the matter between:

ESKOM HOLDINGS SOC LIMITED	Applicant
and	
VAAL RIVER DEVELOPMENT ASSOCIATION (PTY) LIMITED	First Respondent
NGWATHE LOCAL MUNICIPALITY	Second Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Third Respondent
MINISTER OF ENERGY	Fourth Respondent
PREMIER, FREE STATE	Fifth Respondent
MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, FREE STATE	Sixth Respondent

Case CCT 44/22

ESKOM HOLDINGS SOC LIMITED	Applicant
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, MPUMALANGA Fifth Respondent

MEMBER OF THE EXECUTIVE COUNCIL FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, MPUMALANGA Sixth Respondent

Neutral citation: *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44

Coram: Kollapen J, Madlanga J, Majiedt J, Mathopo J, Mhlantla J, Mlambo AJ, Theron J, Tshiqi J and Unterhalter AJ

Judgments: Unterhalter J (minority): [1] to [188]
Madlanga J (majority): [189] to [310]

Heard on: 23 May 2022

Decided on: 23 December 2022

Summary: Interim interdicts — nature of prima facie right — rights in Bill of Rights — content of rights — whether rights established — role of final relief in interim orders

Bulk electricity supply — reduction of electricity supply — section 21(5) of the Electricity Regulation Act

Pleadings — interpretation and purpose of pleadings — sufficiency of pleaded case

Section 7(2) of the Constitution — duty to respect rights — duties of different organs of state — role and functions of local government — section 152 and 153 of the Constitution

Section 7(2) of the Promotion of Administrative Act — exhaustion of internal remedies — section 30 of the Electricity Regulation Act

Subsidiarity — direct invocation of the Constitution or not — electricity regulatory framework

Grounds of review — procedural fairness — rationality — ulterior motive

Balance of convenience — separation of powers — polycentricty — rights violations — stability of national grid

---

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, such costs to include the costs of two counsel.

JUDGMENT

UNTERHALTER AJ (Kollapen J, Majiedt J and Mlambo AJ concurring):

Introduction

[1] This is an application for leave to appeal against a judgment and order of the Supreme Court of Appeal dismissing the applicant's appeal against the judgment and order of the High Court of South Africa, Gauteng Division, Pretoria (High Court).[1] The High Court granted an interim interdict in terms of which it prohibited the applicant

[1] *Eskom Holdings SOC Ltd v Lekwa Ratepayers Association* [2022] ZASCA 10; 2022 (4) SA 78 (SCA) (Supreme Court of Appeal judgment).

from implementing its decision to reduce bulk electricity supply to two municipalities, pending finalisation of an application to review that decision.[2]

Parties

[2] The matter originates from two urgent applications that were joined before the High Court. Before this Court, although there is but one application, the parties are cited as they were in the original applications.

[3] Eskom Holdings SOC Limited (Eskom) is the applicant in both applications. The National Energy Regulator of South Africa (NERSA) and the Minister of Energy (Minister) are the third and fourth respondents in both applications.

[4] In the first application, the first respondent is the Vaal River Development Association (Pty) Limited, a non-profit organisation representing the residents of Ngwathe Local Municipality (Ngwathe Municipality). Ngwathe Municipality is the second respondent. The fifth and sixth respondents are the Premier of the Free State and the Member of the Executive Council for Cooperative Governance and Traditional Affairs, Free State.

[5] In the second application, the first respondent is the Lekwa Ratepayers Association, a non-profit organisation representing the residents of Lekwa Local Municipality (Lekwa Municipality). Lekwa Municipality is the second respondent. The fifth and sixth respondents are the Premier of Mpumalanga and the Member of the Executive Council for Cooperative Governance and Traditional Affairs, Mpumalanga. The first respondents in both applications are referred to jointly as "the Associations" or "the residents".

[2] *Vaal River Development Association (Pty) Ltd v Eskom Holdings SOC Ltd; Lekwa Rate Payers Association NPC v Eskom Holdings SOC Ltd* 2020 JOL 48273 (GP) (High Court judgment) at para 51.4.2.

[6] In both applications, only Eskom and the Associations filed papers before this Court.

The origins of the case

[7] Eskom supplies bulk electricity, under contract, to the Lekwa and Ngwathe Municipalities (municipalities). The contracts concluded between Eskom and the municipalities for the supply of electricity obliged Eskom to supply electricity up to each municipality's Notified Maximum Demand (NMD). The NMD for the Ngwathe Municipality was agreed in 2008. For the Lekwa Municipality, an increased NMD was agreed to in 2010. For extended periods since these agreements were struck, Eskom supplied electricity to the municipalities in excess of their NMD.

[8] In July 2020, Eskom applied what it styled "rotational load reduction" to the supply of bulk electricity to the municipalities. In effect, Eskom restricted the supply of electricity to the municipalities to accord with the NMD of each municipality. There was some dispute as to the reasons for Eskom's actions. Certainly it is that the municipalities had failed to pay Eskom for all the electricity supplied to them. Indeed, the municipalities are severely dysfunctional and in serial default of their constitutional and statutory obligations towards both Eskom and the residents. Despite owing a constitutional duty to the residents to supply municipal services as provided in sections 152[3] and 153(a)[4] of the Constitution; and owing statutory duties to Eskom in

[3] Section 152 states:

> "(1) The objects of local government are—
>
> (a) to *provide democratic and accountable government for local communities*;
> (b) to *ensure the provision of services to communities in a sustainable manner*;
> (c) to promote social and economic development;
> (d) to *promote a safe and healthy environment*; and
> (e) to encourage the involvement of communities and community organisations in the matters of local government.
>
> (2) *A municipality must strive, within its financial and administrative capacity, to achieve the objects set out in subsection (1).*" (Emphasis added.)

[4] In terms of section 153(a), "[a] municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community".

terms of the Electricity Regulation Act[5] (ERA), the municipalities have failed dismally and have shown gross incompetence in the execution of their duties. Eskom announced that its restrictions of supply were necessitated by the failure of the municipalities to eliminate illegal connections; their inability to recover payment for electricity supplied; and their failure to provide the infrastructure required to support the supply of electricity above the NMD, and thus secure the integrity of the national grid.

[9] The restriction of supply to the municipalities required the municipalities, in turn, to reduce the supply of electricity to their customers. Residents of the municipalities, who conducted their businesses in the towns administered by the municipalities, were moved to bring legal proceedings in the High Court. Their complaint was this. They were paying the municipalities for the electricity they received and required to run their businesses. If the municipalities had failed to honour their contractual obligations to Eskom, that did not permit Eskom to restrict the supply of electricity, as it had done. The consequences of Eskom's actions were dire. In addition to the harm caused to businesses from rotational disruptions, the effect upon essential services in the two towns was described as "an unfolding human and environmental catastrophe". It compromised drinking water supply and sewage disposal; adversely affected hospitals and old age homes; and caused the pollution of the Vaal River from untreated waste.

[10] The residents, acting through the Associations, brought urgent applications before the High Court. The Associations sought, in essence, interim relief to secure the restoration of the supply of electricity that Eskom had provided to the municipalities prior to the restrictions it had imposed. This interim relief was to operate pending the final adjudication of a judicial review to set aside Eskom's decision to limit the bulk supply of electricity to the municipalities to the level of their NMD.

[5] 4 of 2006.

The salient facts

[11] On 29 September 2008, Eskom and the Ngwathe Municipality concluded a bulk electricity supply agreement. In terms of the agreement, Eskom would supply 24 300 kVA to the municipality. Clause 11.3 of the agreement stated that if an increase of the NMD is required, the municipality must give adequate notice to Eskom. An increase shall be subject to the terms and conditions agreed upon by the parties in writing and, in the absence of such an agreement, no increase in the NMD shall be implemented. The terms and conditions of the increase must take into account the additional capital expenditure to be incurred by Eskom and the additional capacity required by Eskom to meet the demand.

[12] In January 1981, Escom (the Electricity Supply Commission, Eskom's predecessor, established under the Electricity Act)[6] and Lekwa Municipality entered into a bulk electricity supply agreement. In terms of the agreement, Eskom would supply 22 260 kVA to the municipality. In 2010, the bulk electricity supply was increased to 55 000 kVA. Similar to the agreement concluded between Eskom and Ngwathe Municipality, any increase of the NMD required adequate notice to Eskom. Additionally, no increase could be implemented without an agreement between the parties.

[13] Since 2008 and 2010, no increase in the NMD was agreed between Eskom and the municipalities. However, the consumption of and need for electricity by the residents of the municipalities exceeded the agreed NMD. Eskom supplied electricity in excess of the contracted NMD to both municipalities for an extended period of time. Eskom charged monthly penalties to the municipalities each time they exceeded their agreed NMD. This was done in terms of the NMD and Maximum Export Capacity (MEC) Rules (NERSA Rules), which state:

[6] 42 of 1922.

> "When customers exceed their monthly NMDs and/or MEC, a network access charge (NCC) is imposed for the excess. This is due to the fact [that] a customer that exceeds the NMD/MEC 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 licensee at risk."[7]

[14] The municipalities applied to increase their NMD supply levels to meet the additional electricity demand, but Eskom refused to agree to these increases. Seemingly, because the municipalities had defaulted on their payment obligations.

[15] In February 2020, Eskom decided to reduce bulk electricity supply to the municipalities to the NMD levels set out in the supply agreements (the reduction decision). This meant that it would no longer supply electricity to the municipalities in excess of the agreed NMD levels. Eskom informed the municipalities of the reduction decision but did not inform the residents. The decision was implemented in 2020 and resulted in rotational load shedding in the municipalities. This had a significant impact on essential services such as water supply and the functioning of sewage works. Once the electricity supply was disrupted, the water treatment plants came to a standstill. As a result, taps ran dry and industrial and commercial activities, such as the poultry industry and abattoirs in or close to the affected towns, ceased functioning. Sewage also started spilling into the streets of the affected towns and into the Vaal River.

[16] Efforts on the part of the Ngwathe and Lekwa residents to engage with Eskom, the municipalities and Members of the Executive in their respective provinces were unsuccessful. Furthermore, negotiations between Eskom and the two municipalities to increase their contractually agreed NMD supply levels yielded no results. Thus, the Ngwathe and Lekwa residents, through the Vaal River Development Association on behalf of the Ngwathe residents, and the Lekwa Ratepayers Association on behalf of the Lekwa residents, approached the High Court for urgent relief.

[7] See rule 2 of the NERSA Rules.

Litigation history

High Court

[17] Before the High Court, the Associations sought interim orders, pending the determination of review proceedings. The interim relief sought was, inter alia, to compel Eskom, as the sole supplier of electricity to the municipalities, to restore the supply of electricity to the levels enjoyed before the implementation of the reduction decision.[8]

[18] Eskom contended that it had no obligation to the residents of the municipalities;[9] that it was entitled to enforce the contracts concluded with the municipalities; and, if the residents were adversely affected, they should seek relief from the municipalities.[10] Eskom further submitted that this case differed from previous matters in which the supply of electricity had been terminated; here it was reduced in conformity with the supply agreements.[11]

[19] On behalf of the residents, it was argued that the reduction decision constituted administrative action and that Eskom had a constitutional obligation to the residents of the municipalities.[12] It was also submitted that Eskom's decision resulted in catastrophic humanitarian and environmental consequences. The residents sought an interim interdict prohibiting Eskom from implementing its decision to reduce the bulk electricity supply to the municipalities.[13]

[20] The High Court held the view that the applications were urgent and granted the interim interdicts.

---

[8] High Court judgment above n 2 at para 2.

[9] Id at para 28.

[10] Id at para 29.

[11] Id at para 49.

[12] Id at para 28.

[13] Id at para 30.

[21] First, it determined whether the residents had a *prima facie* right, though open to some doubt, notwithstanding that there was no contractual relationship between the residents of the municipalities and Eskom.[14]

[22] The High Court held that, although the right to electricity is not specifically provided for in the Bill of Rights, the supply of electricity is inextricably intertwined with the rights to dignity, life, housing, healthcare, food, water and social security.[15] With reference to *Grootboom*,[16] the Court held:

> "While there is no specific reference in *Grootboom* to the provision of access to and supply of electricity, it is self-evident that the supply of electricity is the cornerstone upon which all the realisation of other rights is based."[17]

[23] The High Court found that although the residents were not parties to the agreements concluded between Eskom and the municipalities, Eskom's enforcement of those agreements infringed the rights of the residents.[18] It found that Eskom's reliance on its contractual relationships with the municipalities did not detract from the fact that it is a state-owned enterprise that—

> "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."[19]

[14] Id at para 32.

[15] Id at para 35.

[16] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).

[17] High Court judgment above n 2 at para 37, citing id at para 34.

[18] High Court judgment above n 2 at para 39.

[19] Id at para 38.

[24] Thus, it held, the residents have a right to the supply of electricity and therefore a *prima facie* right had been established.[20]

[25] The High Court went on to hold that enjoying a clear right to be supplied with electricity requires the supply of sufficient electricity "to meet the basic threshold of the individual rights in the Bill of Rights". To find otherwise would render those rights and the obligation of state organs, such as Eskom, to fulfil those rights nugatory.[21]

[26] Second, the High Court found that the limited electrical supply had an adverse effect on all basic municipal services, most notably in respect of sewerage reticulation and the provision of clean water. The harm suffered by the residents was not contested by Eskom.[22]

[27] Third, the High Court considered that for an extended period of time before the implementation of the NMD limitations, Eskom provided both municipalities with electricity in excess of the NMD.[23] It held that the municipalities' debt levels and the extent of the time during which Eskom permitted them to exceed the NMD while imposing penalties for doing so, militated against any prejudice that Eskom may suffer. The residents, however, were faced with prejudice that could not be measured in monetary terms or even mitigated. The balance of convenience thus favoured the residents.[24] Fourth, the Court held that Eskom enjoys a monopoly over the supply of bulk electricity.

[20] Id at para 40.

[21] Id.

[22] Id at para 41.

[23] Id at para 42.

[24] Id at para 45.

[28] The residents thus had no alternative other than to approach the High Court for relief.[25] The Court accordingly granted the order as set out in paragraphs 51[26] and 52 of the judgment.[27] In summary, Eskom was ordered to increase or, alternatively, restore

[25] Id at para 47.

[26] Para 51 of the High Court judgment above n 2 states the following:

> "In the circumstances it is ordered:
>
> In Case number 31813/20
>
> 51.1 The First Respondent, 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 Second Respondent ("the decision");
>
> 51.2 The First and Second Respondents jointly and severally are ordered to, within [five] 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;
>
> 51.3 The First Respondent is directed to provide and assist the Second Respondent 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.
>
> 51.4 The order in paragraphs 51.1 to 51.3 above will operate as an interim interdict pending:
>
> 51.4.1 the finalization of this application; and
>
> 51.4.2 the final adjudication of the Applicant's application for a review of the First Respondent's decision(s), in terms of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA") and/or legality review to set aside the First Respondent's decision(s) to implement the limit to the bulk electricity supply to the Second Respondent per Parys and Vredefort;
>
> 51.4.3 the relief in paragraphs 51.1 to 51.3 above will lapse if the Applicant fails to institute the aforesaid review application on or before 30 October 2020.
>
> 51.5 The First and Second Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this application which include the reserved costs of 6 August 2020 on the scale as between attorney and client, such costs to also include the costs consequent upon the employment of two counsel."

[27] Para 52 of the High Court judgment above n 2 states the following:

> "In Case number 35054/20
>
> 52.1 The First Respondent, 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 implementation of the current limited 55 MVA, being at least 67 MVA; thus interdicting and prohibiting Eskom from continuing with implementation of its decision to limit electricity supply to Lekwa to the Notified Maximum Demand ("NMD") of 55 MVA ("the decision");

the maximum electricity load supply to the level supplied prior to the reduction decision; thus interdicting and prohibiting Eskom from implementing its decision to limit electricity supply. The order of the High Court was to operate as an interim interdict pending final adjudication of the residents' application for a review of Eskom's reduction decision in terms of the Promotion of Administrative Justice Act[28] (PAJA) and/or legality.

[29] The High Court also noted that—

> "[f]or so long as the NMD penalties and interest charges which Eskom levies on the municipalities exceed the cost of actual consumption, paying consumers will be saddled with hopelessly insolvent municipalities that have no prospect whatsoever, without outside intervention or assistance, of paying their outstanding debt to Eskom. The result is a catch 22 situation for the applicants and consumers in the municipalities and *Eskom has become the proverbial cholesterol in the municipal service delivery breakdown in Ngwathe and Lekwa*. They simply have no other recourse than to approach the court."[29] (Emphasis added.)

[30] A punitive costs order was granted against Eskom.[30]

52.2 Interdicting the Second Respondent from implementing rotational load shedding permitted on a limitation linked to NMD of 55 MVA to Standerton, Sakhile, Meyerville and surrounds;

52.3 The order in paragraphs 52.1 to 52.2 above will operate as an interim interdict pending:

52.3.1 the finalization of this application; and

52.3.2 the final adjudication of the Applicant's application for a review of the First Respondent's decision(s), in terms of the Promotion of Administrative Justice Act No 3 of 2000 ("PAJA") and/or legality review to set aside the First Respondent's decision(s) to implement the limit to the bulk electricity supply to the Second Respondent to the level of the NMD set or agreed to as 55 MVA.

52.3.3 the relief in paragraphs 52.1 to 52.2 above will lapse if the Applicant fails to institute the aforesaid review application on or before 30 October 2020.

52.4 The First and Second Respondents, jointly and severally, the one paying the other to be absolved, are ordered to pay the costs of this application which include the reserved costs of 21 August 2020 on the scale as between attorney and client, such costs to also include the costs consequent upon the employment of two counsel."

[28] 3 of 2000.

[29] High Court judgment above n 2 at para 47.

[30] Id at para 49.

Supreme Court of Appeal

[31] The question for determination on appeal was whether the High Court was correct in its finding that the residents had established a *prima facie* right to interim interdictory relief.[31] It was common ground that the matter was one in which the interests of justice demanded that the interim interdicts granted by the High Court were appealable. The Supreme Court of Appeal held that the appeal raised an issue of special public importance.[32]

[32] The Supreme Court of Appeal referred (with approval) to *Resilient High Court*[33] where the High Court found that although Eskom has the power to interrupt the supply of electricity for non-payment in terms of section 21(5) of ERA, given the nature and source of this power, its exercise amounted to administrative action for the purposes of section 33 of the Constitution and PAJA. The exercise of the power is constrained, if not by the requirement of reasonableness, then certainly under the standard of rationality.[34] In *Resilient High Court,* in light of the catastrophic socio-economic and humanitarian consequences that were to follow, the High Court found that Eskom's decision to incrementally reduce electricity supply with the ultimate goal of terminating supply altogether, was not rationally connected to the purpose for which the power to do so was given.[35]

[33] The Supreme Court of Appeal also referred, with approval, to its decision in *Resilient SCA.*[36] In *Resilient SCA,* the Supreme Court of Appeal held that electricity is a component of the basic services that municipalities are constitutionally obliged to

[31] Supreme Court of Appeal judgment above n 1 at para 21.

[32] Id at para 6.

[33] *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 (2) SA 577 (GJ).

[34] Id at para 74.

[35] Id at paras 77-80.

[36] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd;* [2020] ZASCA 185; 2021 (3) SA 47 (SCA).

provide to their residents.[37] Thus, before Eskom decided to invoke its powers under section 21(5), it was required to take into account its constitutional obligations as an organ of state. The Supreme Court of Appeal held further 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 brought the relationship within the purview of the Intergovernmental Relations Framework Act[38] (IRFA). In terms of IRFA,[39] organs of state are constitutionally and statutorily required to make reasonable efforts in good faith to settle intergovernmental disputes.[40]

[34] The Supreme Court of Appeal, in the present matter, held that the attempt by Eskom to distinguish the findings in *Resilient SCA* was artificial. The Supreme Court of Appeal, adopting the reasoning in *Resilient SCA*, held that Eskom was not constitutionally and statutorily permitted to unilaterally reduce the bulk electricity supply to the municipalities without first making every reasonable effort to settle its intergovernmental disputes with the municipalities and other spheres of government.

[35] The Supreme Court of Appeal found that all the requirements for granting interim interdictory relief had been established and that the High Court had correctly granted the interim interdicts.[41]

---

[37] Id at paras 29-34.

[38] 13 of 2005.

[39] See section 41 of IRFA which states the following:

> "(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."

[40] Supreme Court of Appeal judgment above n 1 at para 24.

[41] Id at para 32.

Submissions before this Court

Applicant's submissions

[36] Eskom submits that the key issues requiring determination by this Court are—

(a) whether the residents are entitled to an order compelling Eskom to supply them with sufficient electricity;

(b) whether the residents are entitled to sufficient electricity and, if so, who determines the appropriate NMD to be supplied; and

(c) whether a dispute concerning NMD ought to be resolved in terms of ERA or IRFA.

Urgency and jurisdiction

[37] Eskom contends that the interlocutory order compels it to supply electricity that it cannot generate. According to Eskom, it must consider the national grid and its lack of capacity to comply with such a broad and drastic order. Furthermore, Eskom submits that the order will result in its financial ruin, which would ultimately be to the detriment of the whole country and will not be in the interests of justice.

[38] Eskom argues that the question whether IRFA takes precedence over ERA engages a constitutional issue. It argues that the issue pertaining to the NMD raises a novel point of law and refers to the Supreme Court of Appeal's finding that the issues in this matter are of "special public importance".

Grounds of appeal

[39] Eskom submits that an order to compel it to supply sufficient electricity to the municipalities is at odds with this Court's decision in *Mazibuko*[42] where it was held that section 26(2) of the Constitution stipulates that the state must take reasonable legislative

[42] *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC) at paras 48-9.

and other measures progressively to realise the right of access to adequate housing within its available resources. Eskom also relies on *Treatment Action Campaign*.[43] It says the reasoning in these decisions does not support the conclusion that Eskom is compelled to supply a particular amount of electricity. Additionally, so Eskom submits, a dispute regarding the amount of electricity to be supplied must be decided by NERSA as the specialist regulator under ERA.

[40] Eskom submits that in some instances the NMD was exceeded as a result of illegal connections, and it has no obligation to supply electricity to meet illegal demand. Eskom relies on *Sidoyi*[44] to contend that if there is no underlying lawful basis to supply, such as an electricity supply agreement, Eskom cannot be compelled to supply electricity to that customer.

[41] Eskom contends that the High Court and Supreme Court of Appeal failed to consider that it does not have excess electricity and that supplying electricity above the contracted NMD levels puts a strain on the infrastructure and Eskom's network. Eskom further submits that the lower courts also failed to distinguish between the different roles that Eskom and municipalities play in supplying electricity. The municipalities have been absolved from their constitutional obligations. Relying upon *New National Party*,[45] Eskom contends that fault must lie with the municipalities for failing to carry out their duties. Eskom further submits that the lower courts failed to take into account that any increase to NMD levels must be in accordance with the NMD Rules and a dispute pertaining to NMD must be decided in accordance with ERA, not IRFA.

[42] In respect of ERA, Eskom submits that section 30 of ERA provides an internal remedy to resolve such disputes.[46] Thus, the internal remedies provided by ERA should

[43] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC) at paras 49-50.

[44] *Eskom Holdings SOC Ltd v Sidoyi* [2019] ZASCA 65; 2019 JDR 0963 (SCA).

[45] *New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC) at paras 22-3.

[46] Section 30, headed "Resolution of disputes by Regulator", states the following:

have been utilised before invoking PAJA and approaching the courts. Eskom submits that in terms of section 7(2)(a) of PAJA,[47] the High Court had no jurisdiction to hear the matter prior to the internal remedies of ERA having been exhausted. According to Eskom, NERSA, as the specialist regulator, has the necessary expertise and exclusive jurisdiction to resolve a dispute pertaining to a complex issue such as NMD supply. Eskom relies on *Bato Star*,[48] where this Court enunciated the import of judicial deference to administrative agencies such as NERSA.[49] Eskom also referred to *Koyabe*,[50] where the failure to exhaust internal remedies proved fatal to a party's review under PAJA.

[43] Finally, Eskom submits that interruptions resulting from a municipality's poor planning differ from interruptions in terms of section 21(5); because in the former, Eskom is still supplying electricity, albeit strictly in accordance with the contracted NMD. According to Eskom, these are legitimate interruptions that fall outside the purview of *Resilient SCA*, where the interruptions occurred with the aim of terminating

---

"(1) The Regulator must, in relation to any dispute arising out of this Act—

(a) if it is a dispute between licensees, act as mediator if so requested by both parties to the dispute;

(b) if it is a dispute between a customer or end user on the one hand and a licensee, registered person, a person who trades, generates, transmits, or distributes electricity on the other hand, settle that dispute by such means and on such terms as the Regulator thinks fit.

(2) The Regulator may appoint a suitable person to act as mediator on its behalf and any action or decision of a person so appointed is deemed to be an action by or decision of the Regulator.

(3) The Minister must prescribe the procedure to be followed in the mediation and the fees to be paid.

(4) The mediation or arbitration in terms of this section is done at the request of the parties to the dispute and no decision of the Regulator or the person contemplated in subsection (2), taken in the course of the mediation process, must be regarded as a decision contemplated in section 10(3) or (4) of the National Energy Regulator Act." (Emphasis added.)

[47] Section 7(2)(a) states that "[s]ubject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted".

[48] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC).

[49] Id at para 48.

[50] *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC).

electricity supply. In the present matter, Eskom continues to supply electricity to the municipalities.

The Associations' joint submissions

Jurisdiction

[44] The Associations submit that Eskom has not raised a constitutional issue or an arguable point of law of general public importance outside of the law settled in *Resilient SCA*. They also submit that Eskom does not raise a dispute between organs of state requiring a decision by this Court. Thus, this Court's jurisdiction is not engaged. As to Eskom's submission that the High Court and the Supreme Court of Appeal failed to consider the municipalities' payment obligations, this cannot be entertained absent a counter-application by Eskom against the municipalities.

Leave to appeal

[45] The Associations contend that before the Supreme Court of Appeal, the interests of justice demanded that the interim interdict was appealable due to the issue of special public interest, namely whether the residents had established a *prima facie* right to be supplied with a specified amount of electricity. The Associations submit that it is not in the interests of justice to grant leave to appeal to this Court, because there are no conflicting judgments in respect of the issues raised by Eskom and all relevant principles that have already been established in *Resilient SCA*.

[46] The Associations submit that there are no material differences between the present case and *Resilient SCA*. There, Eskom reduced electricity supply to the municipalities to obtain payment. That is the case in this instance as well. In *Resilient SCA,* Eskom relied on a contractual right to interrupt electricity supply in the event of non-payment. Here, Eskom relies on the contractual right relating to the NMD to reduce supply. The Associations contend that the same legal framework is applicable and the effect of both decisions (to interrupt or reduce electricity supply) is the same, namely catastrophic consequences for the residents.

[47] The Associations contend that Eskom cannot reduce or interrupt the supply of electricity by relying on a contractual right it has against a municipality, without engaging with the affected residents. They rely on this Court's decision in *Joseph*,[51] where this Court held that a municipal service cannot be denied to a citizen because of a municipality's outstanding debts.[52]

[48] The Associations contest Eskom's reliance on its contracts to justify the reduction decision because, while the supply agreements subsist between state organs, the agreements impact the residents. The residents do not seek to enforce contractual rights, but instead seek to enforce their public law rights because Eskom is an organ of state. Therefore, its decisions constitute administrative action and are reviewable under PAJA.

[49] The Associations also submit that Eskom has created an impossible situation where it knows that the municipalities' electricity demands are much higher than the contracted NMD. It has been supplying electricity to the municipalities in excess of the contracted NMD over an extended period of time; yet it refuses to revise the supply agreements to make provision for the increased demand.

[50] In respect of Eskom's submission that this matter must be resolved by NERSA, the Associations submit that it was incumbent on Eskom to refer the dispute to NERSA but it failed to do so.

[51] Finally, the Associations submit that the question of whether they have the right to sufficient electricity, as posited by Eskom before this Court, was never an issue before the courts below. The only issue was Eskom's reduction of supply to outdated

[51] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[52] Id at para 53.

NMD levels without following due process. Any dispute regarding payment and increasing the NMD levels must be resolved by the relevant intergovernmental players.

Assessment

[52] The following issues require our consideration. First, does this Court enjoy jurisdiction to entertain this application? Second, if so, should we grant leave to appeal? Third, if we grant leave to appeal, was the Supreme Court of Appeal correct to dismiss Eskom's appeal and affirm the interim relief ordered by the High Court?

Jurisdiction and leave to appeal

[53] There can be no doubt that this appeal raises a constitutional issue. The interim relief granted to the residents is predicated upon their *prima facie* right to seek judicial review of Eskom's power to restrict the supply of electricity to the municipalities. A review brought under section 6 of PAJA gives effect to the right to just administrative action in the Constitution. Central to the review are two issues. First, does Eskom owe constitutional or statutory duties to the residents of the municipalities to maintain the supply of electricity that it made available in the past? Second, may Eskom reduce the supply of electricity to the NMD agreed with the municipalities without taking reasonable measures to settle the intergovernmental disputes affecting that supply, pursuant to the Constitution[53] and IRFA?

[54] Eskom provides the great majority of the country's electricity. It is a near monopoly. Electricity is essential to the social and economic well-being of the country and its people. What constitutional and statutory duties Eskom owes and to whom are plainly constitutional matters of importance. Our jurisdiction is thus engaged in terms of section 167(3)(b) of the Constitution.

[53] Section 41 of the Constitution sets out the principles of co-operative government and intergovernmental relations.

[55] Whether we should grant leave to appeal on an urgent basis is a question of what the capacious considerations of the interests of justice require. It will be a rare case in which an application for leave to appeal to this Court will be granted where it concerns an order for interim relief that has already enjoyed the attention of the Supreme Court of Appeal. In *OUTA*[54] and *Afriforum*,[55] this Court set out what the interests of justice entail when an application for leave to appeal is brought to appeal an interim order. That an interim order is not usually of final effect and does not dispose of a substantial portion of the relief claimed are relevant matters to weigh, but they are not decisive. What is salient is the intrusion of the interim order upon the exercise of public powers that takes place until the final adjudication of the review.

[56] In the present matter, we are faced with the following problem. The municipalities have failed to discharge their constitutional and statutory duties. Their failure causes serious harm to the residents of the towns they are required to serve. Residents who pay for their electricity suffer shortages of electricity. This damages their businesses and causes widespread civic degradation. The municipalities are in serial default of their obligations to pay Eskom for the electricity supplied to them. Furthermore, Eskom complains that the municipalities have failed to terminate illegal connections; nor have they invested in the infrastructure required to maintain the grid and support the supply of electricity that the residents require. Hence Eskom has reduced the supply of electricity to the municipalities.

[57] Faced with permutations of this problem, courts have provided an answer that holds Eskom to the maintenance of the supply of electricity. Both in *Resilient SCA* and in the present case, the Supreme Court of Appeal held that Eskom cannot terminate or reduce its supply of electricity to defaulting municipalities, unless it makes reasonable efforts first to settle its intergovernmental disputes under the Constitution and IRFA. The duties of Eskom that have been found to support this decision require careful

[54] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at paras 22-30.

[55] *Tshwane City v Afriforum* [2016] ZACC 19; 2016 (6) SA 279 (CC); 2016 (9) BCLR 1133 (CC) at paras 40-3.

consideration. The Supreme Court of Appeal considered *Resilient SCA* to be dispositive. Whether that is so requires the consideration of this Court. Furthermore, given the widespread disarray that has assailed a great many municipalities throughout the country, there is every likelihood that residents in these municipalities will secure interim relief to hold Eskom to supply electricity, as they have in the past, should Eskom attempt to terminate or reduce supply to municipalities in default. This is a systemic issue of great importance that requires an authoritative determination by this Court. Such a determination will have significant consequences for residents, municipalities, other spheres of government, and of course Eskom itself.

[58] I find that it is in the interests of justice that leave to appeal should be granted and that the appeal was warrantably brought on an urgent basis.

On interim relief

[59] To obtain the interim relief secured from the High Court, the residents, who had paid for electricity and would continue to do so, were required to show that they enjoyed a *prima facie* right, though open to some doubt. The residents contended in their founding affidavits that they, or at least those that pay the municipalities for electricity, have a right to the supply of electricity from Eskom. According to the residents, the supply of electricity is the means by which other fundamental rights are realised, such as the right to water, education and a healthy environment. The reduction of electricity supply by Eskom interferes with the enjoyment of these rights, and it prevents the municipalities from discharging their constitutional obligations to the residents.

[60] In both applications brought by the Associations, the notices of motion sought interim relief pending "the final adjudication of the applicants' application for a review of the first respondent's (Eskom's) decision(s) in terms of the Promotion of Administrative Justice Act No 3 of 2000". The founding affidavits referenced a number of cases in which interim orders were granted against Eskom in like circumstances, and then reproduced and relied upon passages in *Sabie Chamber of Commerce* and

Resilient.[56] There, the North Gauteng High Court (per Hughes J) reviewed and set aside the decisions of Eskom to interrupt the supply of electricity. It did so on the basis of the failure by Eskom and the municipalities to resolve their disputes by recourse to section 41(3) of the Constitution.

[61] I draw attention to the pleaded case of the Associations for the following reasons. First, the interim relief that was sought was an order pending the final determination of the Associations' judicial review of Eskom's reduction decisions. Second, the Associations referenced no rights, save those invoked to bring under review Eskom's reduction decision. Third, I have identified the rights relied upon by the residents as the basis upon which the Associations contend that the reduction decision is unlawful and hence reviewable. The more expansive account of the rights of the residents that are said to have been compromised by the reduction decision, taken up in the reasoning of the High Court, and by way of submission before this Court, is not borne out by the pleaded case. This is of no small significance. Eskom was entitled to know the case it had to meet and, in particular, the rights claimed by the residents to give rise to a duty owed by Eskom to supply them with electricity.

[62] Some clarity is also required as to the showing that the Associations were required to make in order to secure the interim relief that they sought. I engage upon this matter because the judgment of Madlanga J appears to understand an application for interim relief, pending a judicial review, to engage an enquiry distinct from the prospects of success of the proposed judicial review. That is not so. When a person contends that their rights have been adversely affected by unlawful administrative action, they may bring that action under judicial review to have it set aside. That is what the Associations say they will seek by way of final relief.

[63] What *prima facie* right then, must the Associations establish to secure interim relief pending the determination of their review? It is a *prima facie* right to

[56] *Sabie Chamber of Commerce and Tourism v Thaba Chweu Local Municipality; Resilient Properties Proprietary Limited v Eskom Holdings SOC Ltd* [2019] ZAGPPHC 112.

review and set aside the reduction decisions made by Eskom. The grounds upon which that review will be brought are two-fold. First, that the residents have a right to the supply of electricity from Eskom and hence the reduction decisions are unlawful. Second, that Eskom has breached its constitutional and statutory duties to resolve its disputes with the municipalities.

[64] A very long line of cases, stretching back to the authoritative pronouncement of our modern law in *Setlogelo*,[57] has made it plain that a *prima facie* right, though open to some doubt, is the standard used to assess the applicant's prospects of success in obtaining final relief. The enquiry is of necessity provisional because the available evidence is usually incomplete, untested under cross-examination (where there are disputes of fact), and the case may yet be more fully developed.

[65] What the standard requires has given rise to no small measure of difference. According to *Webster v Mitchell*,[58] as qualified in *Gool*,[59] the test is whether the applicant has furnished proof which, if uncontradicted at trial (here in the review), would entitle the applicant to final relief. The Court will then consider the case of the respondent to decide whether it casts serious doubt on the case of the applicant. If it does, the standard is not met. In *Ferreira*,[60] a majority of a Full Court considered this test to be too exacting. It held that the prospects of success of the claim for the principal relief, albeit weak, may nevertheless suffice. This is so because other requirements for the grant of an interim interdict may be strongly grounded and hence compensate for the weakness as to prospects. This, it was thought better chimed with the holding in *Eriksen Motors*.[61] More recently, this Court, in *Economic Freedom Fighters*[62] held that—

[57] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[58] *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189.

[59] *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688E-F.

[60] *Ferreira v Levin* 1995 (2) SA 813 (W) at 830-34.

[61] *Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton* 1973 (3) SA 686 (A) at 691C-G.

[62] *Economic Freedom Fighters v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC).

> "*before a court may grant an interim interdict, it must be satisfied that the applicant for an interdict has good prospects of success in the main review*. The claim for review must be based on *strong grounds* which are likely to succeed. This requires the court adjudicating the interdict application to *peek into the grounds of review raised in the main review application and assess their strength*. It is *only if a court is convinced that the review is likely to succeed that it may appropriately grant the interdict*."[63] (Emphasis added.)

[66] What all of these cases make clear is that to secure interim relief, an applicant must establish their prospects of success of obtaining final relief to the required standard. Without that showing, there is no basis upon which a respondent can be required to endure the strictures of an interim order, pending the final determination of the case for final relief. And even if the standard is satisfied and the applicant is granted an interim order, the order is generally subject to the following condition. If the applicant ultimately fails in the main action, they will be liable for the damages that the respondent may have suffered as a result of the imposition of the interim order.[64] This is a further demonstration of the manifest connection between the grant of interim relief and the likely outcome of the proceedings that will finally determine the matter.

[67] In sum, the following may be said of this account of our law. First, an application for interim relief is decided upon a consideration of the applicant's prospects of success in obtaining final relief. The *prima facie* right, though open to some doubt, that must be established to obtain interim relief is the right that is the subject of the main action (or proceedings). In the present case that is the Associations' right to the judicial review of Eskom's reduction decisions. Hence, an application for interim relief is never decided on some separate consideration of rights unrelated to the claim for final relief. As I shall show, the second judgment proceeds without sufficient regard to this fundamental precept. For this reason, I am in respectful disagreement with its approach.

---

[63] Id at para 42.

[64] *Hix Networking Technologies CC v System Publishers (Pty) Ltd* 1997 (1) SA 391 (SCA) at 403.

[68] Second, it is axiomatic that if an applicant cannot prove that they have a clear right, the very nature of satisfying a court that they have a *prima facie* right, though open to some doubt, is a provisional judgment. The court that finally determines the matter will decide whether the right, that the applicant relied upon to secure interim relief, has been proven on a balance of probabilities so as to secure final relief. The second judgment cites a passage from the decision of this Court in *National Gambling Board*[65] to support the proposition that what is before us at this stage is about what must happen in the interim, what is to be decided by the reviewing court is left open for that court.

[69] *National Gambling Board* held that the High Court enjoyed jurisdiction to grant interim relief, even though the High Court lacked jurisdiction to determine the final relief because that matter fell into this Court's exclusive jurisdiction. That holding followed the position at common law that a court may grant interim relief even though it lacks jurisdiction to decide the main dispute. *National Gambling Board* casts no doubt on the proposition, dealt with above, that the grant of interim relief requires the consideration of the prospects of success in the main proceedings. That is so even if the High Court lacks jurisdiction over those proceedings. In *Airoadexpress,* the Court held that it was precisely because the appellant was bound to succeed in its administrative appeal that the High Court was empowered to grant interim relief. [66]

[70] Nor does *National Gambling Board* hold to the position that the outcome of an application for interim relief always entails that no final determination of the rights of the parties can occur. There is an important distinction between what an application for interim relief seeks and what the court that considers that application may decide. *National Gambling Board* references this matter.[67] If, in an application for interim relief, there are no disputes of fact or law, there is no reason why a court should

[65] *National Gambling Board v Premier, KwaZulu-Natal* [2001] ZACC 8; 2002 (2) SA 715 (CC); 2002 (2) BCLR 156 (CC) at para 49.

[66] *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban* [1986] ZASCA 6; 1986 (2) SA 663 (A).

[67] *National Gambling Board* above n 65 at para 52.

not grant final relief. So too, if the court should find that the application is premised upon a proposition of law that cannot be sustained, there is no reason why the court should not decide the question of law and dismiss the application. Of course, where the court grants the interim relief on the basis that the applicant has shown a *prima facie* right, though open to some doubt, the court that decides whether final relief should be granted will not be bound by the prior interim decision.

[71] In the case before us, there are important questions of law that need to be considered as to whether the residents have a right to the supply of electricity from Eskom, and hence whether the Associations have prospects of success in the review. It is for this very reason that the matter falls within our jurisdiction, and it is in the interests of justice to decide the appeal. If those questions of law are decided against the residents, then that is dispositive of the matter and the High Court would have erred in granting the relief that it did. Just as the High Court must dismiss an application for interim relief if it finds, as a matter of law, that the applicants do not enjoy the rights they claim, so too this Court may so find on appeal. That the second judgment holds otherwise, and does so relying upon *National Gambling Board*, is an error.

Eskom's duties and the residents' rights

[72] The starting point is therefore to determine what duties Eskom has, and to whom these duties are owed. The Eskom Conversion Act[68] (Conversion Act) converted Eskom into a public company, incorporated in terms of the Companies Act.[69] The Conversion Act did not privatise Eskom. Upon conversion, the state was Eskom's sole shareholder. Its conversion required Eskom and the Minister of Public Enterprises to enter a Shareholder compact. The Shareholder compact is defined in section 1 of the Conversion Act to mean "the performance agreement to be entered into between Eskom and the government of the Republic of South Africa". In doing so, the Minister was required to take account of the "developmental role of Eskom" and "the promotion of

[68] 13 of 2001.

[69] 71 of 2008.

universal access to, and the provision of, affordable electricity, taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom".[70]

[73] The Conversion Act is not a charter for the singular pursuit of profit by Eskom for the benefit of its shareholder. Rather, the point of the Shareholder compact is to give statutory force to the role of Eskom as a provider of public goods, taking account of cost, financial sustainability and competitiveness. Eskom is a state-owned enterprise. Whilst so constituted, the Conversion Act requires the Minister of Public Enterprises to take account of the developmental role of Eskom, under the commercial disciplines listed in section 6(5)(b). The Shareholder compact is enforceable as between Eskom and its shareholder, the state.

[74] The provision of electricity is an essential resource. Eskom has historically enjoyed a near monopoly over the generation, transmission and distribution of electricity in the country. Unsurprisingly, therefore, the electricity industry has been made subject to extensive regulation. The regulatory framework is to be found in ERA. ERA empowers NERSA as the independent regulator of this framework.

[75] The essential features of the framework are as follows:

(a) No person may, without a licence, operate any generation, transmission or distribution facility.[71]

(b) A person may apply to NERSA for a licence.[72] NERSA must decide upon an application for a licence and may make any licence subject to conditions relating to defined but broadly framed areas of regulation.[73] Among these are prices and tariffs, performance targets and service quality; the regulation of a licensee's revenue; the obligations of a licensee to generate, transmit or distribute electricity; the termination of

[70] Section 6(5)(b) of the Conversion Act.

[71] Section 7(1) of ERA.

[72] Section 10 of ERA.

[73] Sections 13 and 14 of ERA.

> electricity supply to customers and end users; and the classes of customers and end users to whom electricity may or must be supplied.[74]

[76] NERSA may also vary, suspend or remove any licence condition, and include any additional licence conditions.[75] This may be done on application by a licensee but also, if necessary, for the purposes of ERA, upon application by an affected party. Thus, for example, an end user may not only hold Eskom to the conditions of its licence, but if Eskom's licence conditions fail to give effect to some aspect of supply that affects an end user, they may seek an amendment to Eskom's licence.

[77] The scope of NERSA's regulatory competence is wide. NERSA may regulate much of what a firm would otherwise be free to decide if it operated in an unregulated market. What may be produced, how much may be produced, at what price, to whom and under what conditions, all fall within the scope of NERSA's regulatory powers.

[78] NERSA's powers go further still. It adjudicates contraventions of licences.[76] NERSA must settle disputes between a customer or end user and a licensee.[77] NERSA's decisions are, in turn, governed by the National Energy Regulator Act,[78] which specifies how NERSA is to take decisions and provides for rights of appeal and review.[79]

[79] Furthermore, ERA outlines a number of objects it was created to fulfill. In terms of section 2 of ERA, the objects of the Act are to—

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

[74] Id.

[75] Section 16 of ERA.

[76] Section 18 of ERA.

[77] Section 30 of ERA.

[78] 40 of 2004.

[79] Section 10 of the National Energy Regulator Act.

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;

. . .

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

[80] The sustainability and efficiency model contemplated in ERA is further amplified in section 15 which regulates tariffs. In terms of section 15—

"(1) [a] licence condition determined under section 14[80] relating to the setting or approval of prices, charges and tariffs and the regulation of revenues—

(a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;

. . .

(c) must give end users proper information regarding the costs that their consumption imposes on the licensee's business;

. . .

(2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions."

[81] It is thus evident that any duty imposed on Eskom to provide electricity, cannot be separated from its fiscal responsibilities. These fiscal duties are not only aimed at protecting Eskom as a licensee, but also serve the purpose of protecting it as the nation's electricity provider. Of significance is NERSA's Multi-Year Price Determination Methodology[81] (MYPDM). The MYPDM is developed for the regulation of Eskom's required revenues. It forms the basis upon which NERSA evaluates the price

[80] Section 14 of the ERA regulates the conditions of a licence.

[81] Section 14(1)(e) of ERA describes the MYPDM as "the methodology to be used in the determination of rates and tariffs which must be imposed by licensees".

adjustment applications received from Eskom. It is a cost-of-service based methodology, with incentives for cost savings and efficient and prudent procurement by the licensee (Eskom).[82] Thus, Eskom is meant to function as a viable licensee.

[82] That, in summary, is the regulatory landscape governing the generation, transmission and distribution of electricity.

[83] Municipalities have a central role to play in the distribution of electricity. In *Joseph*, this Court set out the constitutional and statutory basis of the public duty of a municipality to provide electricity to its residents.[83] Under the provisions of the Local Government: Municipal Structures Act[84] (Structures Act), municipalities are empowered to manage the bulk supply of electricity to end consumers. Municipalities procure bulk supplies of electricity from Eskom and must then discharge their duties to supply end consumers.[85]

[84] ERA recognises the importance of municipalities. It contains provisions that give effect to the constitutional duty of municipalities to supply electricity to their residents. In terms of section 27, each municipality is required to exercise its executive authority to perform a list of stated duties. These duties include: ensuring sustainable reticulation; progressively ensuring access to at least basic reticulation services through appropriate investment in electricity infrastructure; providing reticulation services at no cost or at minimum cost to certain classes of end users within its available resources; and preparing and implementing relevant plans and budgets.

[85] Under the provisions of ERA, municipalities are the customers of Eskom when they purchase bulk electricity. Those to whom the municipalities, in turn, supply electricity are end users, under the definition in ERA. The Local Government

[82] Id.

[83] *Joseph* above n 51 at paras 34–40.

[84] 117 of 1998.

[85] Section 84(1)(c) of the Structures Act.

Municipal Finance Act[86] (Municipal Finance Act) provides for the budgetary control of municipalities, including revenue collection in accordance with the municipal budget;[87] treasury oversight of the pricing of bulk electricity and the payments made by municipalities for bulk electricity;[88] and the regulation of proposed price increases by an organ of state for the supply of bulk electricity to a municipality.[89]

[86] The following may be said of the regulatory scheme that I have sketched. First, Eskom is constituted to supply electricity for the country. The state, as its sole shareholder, may require Eskom to secure public goods, consonant with the Conversion Act. Eskom is regulated by NERSA under ERA. Among the extensive powers conferred upon NERSA, it enjoys the power to regulate licensees which would otherwise enjoy monopoly power. But NERSA also has the competence to implement national government's electricity policy framework. That is a further indication that a licensee such as Eskom may be used to secure public goods. Eskom is also a major public entity listed in schedule 2 of the Public Finance Management Act[90] (PFMA). Eskom is thus made subject to the application of chapter 6 of the PFMA, which regulates the duties of accounting authorities responsible for public monies. It follows that Eskom does perform public functions in terms of legislation and thus qualifies as an organ of state under the definition in section 239 of the Constitution.[91]

---

[86] 56 of 2003.

[87] Section 54(1)(d)(ii) of the Municipal Finance Act.

[88] Section 41(1) of the Municipal Finance Act.

[89] Section 42 of the Municipal Finance Act.

[90] 1 of 1999.

[91] In terms of section 239, an "organ of state" means—

> "(a) any department of state or administration in the national, provincial or local sphere of government; or
>
> (b) any other functionary or institution—
>
> (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation,
>
> but does not include a court or a judicial officer."

[87] Second, municipalities, as this Court found in *Joseph*, have constitutional and statutory duties to procure and pay for bulk electricity and then to supply electricity to residents. That must be done by the provision of a system of reticulation that serves the residents, makes provision for the poor, within the resources available to a municipality, and implements a budget to collect revenue so that the municipality can procure electricity to supply to its residents.

[88] In fact, so far do a municipality's powers to collect revenue extend that this Court, in *Rademan*,[92] confirmed that a municipality may disconnect a resident's electricity supply where that resident failed to pay for other municipal services, but still paid for electricity supply.[93] There, this Court held that where a resident, as a customer of the municipality, contravened the municipality's conditions of payment, as set out in the municipal by-laws read with the Local Government: Municipal Systems Act[94] (Systems Act) and the agreement between the parties, then section 21(5)(c) of ERA was met. Accordingly, a municipality is then entitled to cut off the resident's electricity supply. On what basis then can Eskom, an organ of state that does not bear the responsibility of providing municipal services directly to the residents, be held liable for the supply of electricity if the conditions of its electricity supply agreements have been breached?

[89] Third, the relationships between Eskom, as supplier; the municipalities as customers; and the residents as end users of electricity, are regulated under ERA. ERA, as I have observed, gives NERSA extensive powers to do so. Those powers include the resolution of disputes that end users may have against Eskom.

[90] I reiterate, where do the residents locate the duties that Eskom has to them that they may enforce against Eskom? It is not in the contracts for the supply of electricity that subsist between the municipalities and Eskom. The residents are not parties to

[92] *Rademan v Moqhaka Local Municipality* [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC).

[93] Id at para 39.

[94] 32 of 2000.

those contracts. Nor do the residents rely upon any contravention by Eskom of its licence. They do not seek to enforce any provision of Eskom's licence against Eskom. The residents also do not seek an amendment to Eskom's licence to place an obligation upon Eskom to supply them.

[91] Furthermore, the residents do not contend that Eskom was prohibited by section 21(5) of ERA from reducing the supply of electricity to the municipalities. That provision 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."

[92] It is clear that the municipalities, as customers, are in arrears and do not pay for all of the electricity they procure from Eskom. Therefore, the condition for the reduction of supply in terms of section 21(5)(c) was met. Section 21(5) authorised Eskom to take the reduction decision.

[93] The residents do not rely upon the Conversion Act. They do not say that the Minister of Public Enterprises has failed to discharge his mandate to agree to a Shareholder compact that would protect the interests of the residents.

[94] What rights then do the residents contend they may invoke to impugn the reduction decision? That is the threshold issue of importance for two reasons. First, even in the extended sense explained in *Grey's Marine*,[95] the proposed review under PAJA requires that the administrative action adversely affect the rights of the residents.

[95] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 23.

Second, the grounds of review relied upon by the residents are based upon the proposition that Eskom's duty of supply to the residents rendered the reduction decision unlawful.

The pleadings

[95] In their founding affidavits, the residents invoke what they style a basic public right to the supply of electricity. The specific rights they mention are the rights to life, dignity, water, education and a healthy environment. The founding affidavits do not contend that these rights include the right to the supply of electricity. Indeed, they say nothing as to the contents of these rights. Rather, they aver that electricity is a means by which these rights are realised. They also reference decisions of the High Court that have interdicted Eskom's termination or restrictions of supply, and rely upon the holding in *Resilient SCA.*

[96] In the High Court, Millar AJ reasoned that the residents' right to the supply of electricity was inextricably bound up with their constitutional rights to dignity, life, housing, healthcare, food, water and social security. The second judgment agrees. It also adds, to the list of rights infringed by Eskom's reduction decision, the right to a basic education.

[97] The first difficulty with these wide-ranging findings is to source their origin in the pleaded case. Beyond the bare averment that the supply of sufficient electricity to the citizens of municipalities is a basic public law right; and, that "the continuous supply of electricity serves as a means to realise other fundamental rights such as rights to water, education and a healthy environment", nothing more is said in the founding affidavits as to the contents of the rights invoked by the residents. Neither the High Court, nor the second judgment, explain how the long list of rights they rely upon have a content that gives rise to the infringement they find to have been established. Rather, as I shall explain, the second judgment proceeds from the premise that the calamitous social and economic effects of the reduction decision self-evidently establish

the infringement of the rights referenced in the founding affidavits and those inferred in the second judgment.

[98] The second judgment says that it suffices for a court to examine the facts that have been pleaded and derive the infringement of rights from those facts. The second judgment frames the matter as thus: "[t]he residents make a simple case. Eskom's decision of substantially reducing the electricity supply has resulted in a breach of several rights protected by the Bill of Rights".[96] The reasoning of the second judgment is this. Eskom substantially reduced the supply of electricity to the municipalities. This has caused deplorable conditions in the municipalities. Therefore, the identified constitutional rights of the residents have been infringed.

[99] There is a missing step in the reasoning, which is fundamental. Does Eskom owe a duty to the residents to supply them with the electricity that supports their well-being? And do the residents enjoy a correlative right to claim that electricity from Eskom? If Eskom has no such duty and the residents have no such right, the reduction of supply by Eskom cannot infringe a right, the contents of which does not include a claim by the residents to the supply of electricity from Eskom. Put differently, how, in law, can Eskom be required to supply electricity to the residents that it has no duty to supply because its failure to do so causes substantial suffering to the residents? The answer is that Eskom cannot be required to do what it has no duty to do. The duty to act lies elsewhere. That is, with the municipalities. The Associations do not plead that Eskom has a duty of supply to the residents. The second judgment insists that no such pleading is required.

[100] This is a surprising position to adopt. While a court will often wish to interpret pleadings with generosity, as this Court made plain in *Bato Star*,[97] "it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon

[96] See [261] of the second judgment.

[97] *Bato Star* above n 48 at para 27.

which they base their cause of action, and the legal basis of their cause of action". Since the Associations base their proposed review on what they style a basic public law right, it is not fetishistic formalism to require the Associations to specify the rights of the residents upon which they rely, the *contents* of those rights, and the facts that support their infringement. The residents list the rights they rely upon, but fail to plead the contents of these rights that impose a duty upon Eskom to supply them with electricity. Hence, they make no showing as to how Eskom has breached a duty that the residents have never pleaded or established.

[101] This is an issue of some importance. The rights advanced by an applicant have a specific content. First, a respondent is entitled to know what rights are claimed so as to understand its correlative duties; whether it has complied with those duties; and, if not, whether its breach may be justified by way of limitation. Second, a court must decide the dispute before it, and not author a result on equitable grounds when no case in law has been pleaded or made out.

[102] The approach adopted in the second judgment allows a court to read into the facts the rights and their contents that it considers worthy of vindication. That is an invocation of divination at the instance of the court. It is not the role of the courts to do so, nor is it our law.

[103] Do residents who procure electricity from the municipalities in which they reside enjoy constitutional rights to the supply of electricity from Eskom? This Court's decision in *Joseph* identified the obligations of local government to provide basic municipal services, including electricity. Those obligations derive from the objects of local government in section 152 of the Constitution and the developmental duties of municipalities set out in section 153 of the Constitution, read with the relevant provisions of the Municipal Systems Act.

[104] Our holding in *Joseph* has been held by certain High Courts as being capable of extension so as to impute onto Eskom the obligations of a municipality to supply

electricity. An exposition of this reasoning is to be found in *Cape Gate*.[98] That Court reasoned as follows. The municipality is a conduit between the supplier of electricity, Eskom, and the consumers who pay for the electricity supplied, that is the residents. If the residents have a public law right as against the municipality to procure a supply of electricity, "it would be incongruous if the ultimate beneficiary of and payer of the electricity stream downwards did not have the right to enforce due performance by the initiating supplier of the electricity of a public-law duty owed by it to the conduit of the electricity".[99]

[105] This reasoning is mistaken. The Constitution imposes obligations upon municipalities. Municipalities constitute the autonomous local sphere of government under the Constitution. They enjoy specified powers, discharge crucial functions, bear defined duties and form part of the democratic government of the country. Municipalities can in no measure be characterised as a conduit. That is to transpose the commercial interposition of a middleman upon a constitutionally ordained autonomous sphere of government. Municipalities are required to discharge their constitutional mandate, including their duty to provide basic services. They cannot abdicate that duty, nor delegate it. A municipality is responsible for the functions it performs. It is ultimately answerable to its local electorate. The municipality is not a conduit of obligations.

[106] True enough, municipalities must often procure goods and services to discharge their functions. Providers of those goods and services may, in certain instances, be organs of state, such as Eskom, that may bear their own constitutional and statutory duties. But the mere fact that Eskom supplies almost all of the electricity that municipalities require does not make the duties of the municipalities those of Eskom. Eskom has duties of its own. But they do not come about simply because Eskom is a monopoly supplier of electricity.

[98] *Cape Gate (Pty) Ltd v Eskom Holdings (SOC) Ltd* 2019 (4) SA 14 (GJ) at paras 129-130.

[99] Id at para 135.

[107] If Eskom does not bear the duty to supply residents by reason of the transposition of the municipalities' duties upon Eskom, what is the independent basis in the Constitution that imposes such a duty?

[108] The Supreme Court of Appeal, in the appeal now before us, considered the reasoning of Petse DP in *Resilient SCA* to answer this question. In *Resilient SCA*, Eskom was found to have two constitutional duties. First, Eskom is an organ of state. Municipalities are solely dependent on Eskom for electricity supply. Eskom has a constitutional duty to ensure that municipalities "are enabled to discharge their obligations under the Constitution".[100] Adopting a passage in *Allpay*,[101] this duty was found to derive from section 8(1) read with section 7(2) of the Constitution.[102] Since Eskom is an organ of state, the Bill of Rights is binding upon it. Furthermore, since the state must respect, protect, promote and fulfil the rights in the Bill of Rights, Eskom is required to enable the municipalities to discharge their duties. To do so, Eskom bears a duty of supply. I shall refer to this as the enablement argument.

[109] The second basis for imposing a constitutional duty upon Eskom is this. As an organ of state, Eskom is bound, in terms of section 41(3) of the Constitution,[103] and the provisions of IRFA, to make every reasonable effort to settle an intergovernmental dispute in which it is involved. Until Eskom has done so, it may not implement a decision to interrupt supply, as was the case in *Resilient SCA*, or to reduce supply, as occurred in the matter before us. I shall refer to this as the settlement argument.[104]

---

[100] *Resilient SCA* above n 36 at para 80.

[101] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).

[102] *Resilient SCA* above n 36 at para 80, citing id at para 49.

[103] Section 41(3) states the following:

> "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."

[104] *Resilient SCA* above n 36 at paras 61, 64 and 79.

The right to the supply of electricity: the enablement argument

[110] I consider first the enablement argument. I have set out above why it is that Eskom qualifies as an organ of state. It forms part of the state.[105] It is thus bound under section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights. But what rights in the Bill of Rights do the residents contend provide for the supply of electricity? None were advanced on the pleadings or in the submissions before us. The residents go no further than to contend that the supply of electricity is a means by which certain rights may be realised. This is unsurprising. The Bill of Rights does not provide that all persons shall have a right to electricity. In *Joseph*, the constitutional duty resting upon a municipality to provide basic services does not derive from the Bill of Rights.[106] Section 7(2) of the Constitution is not of application to rights that derive from duties sourced elsewhere in the Constitution. The enablement argument cannot prevail relying as it does on section 7(2) of the Constitution, unless a case is made out that residents have a right, sourced in the Bill of Rights, to be supplied with electricity. No such right has been claimed on the pleaded case before us.

[111] I should not be understood to hold that such a case could not be made out. It may be that the right in section 27(1)(c) to social security is wide enough to include access to basic services, including electricity. I make no finding whatever on this score. If, for the sake of argument, the provision of electricity forms some part of the right to social security, Eskom may be required in its decision-making to promote and fulfil that right. However, that is not the case before us. The residents have not relied upon section 27(1)(c). This right, as this Court has held in *Grootboom*,[107] does not require the state to do more than its available resources permit. Accordingly, section 27 is judged by what measures are reasonable within the state's available resources to achieve the progressive realisation of the right. Section 27 does not impose a minimum level of

[105] See [274] of the second judgment.

[106] *Joseph* above n 51 at paras 34 and 37.

[107] *Grootboom* above n 16 at para 46.

assistance. In the present matter, we thus have no idea whether the supply of electricity to the NMD levels in the supply agreements concluded between Eskom and the municipalities conforms to what would be required of Eskom to promote and fulfil a right to electricity as a basic service, if such a right should exist.

[112] The second difficulty is just as problematic. A right must have a defined content. No right in the Bill of Rights gives express recognition to a right of every person to electricity. As I have noted, section 27(1)(c) may have that implicit content. But, as I have observed, that is not the case before us. The Associations plead that the supply of electricity is a means to realise other fundamental rights.

[113] This reasoning cannot be sustained. A particular means by which a right may be secured does not make that means the subject matter of the right. In the case of the right to housing (section 26) or rights to health care, food, water and social security (section 27), it is for the state to take reasonable measures within its available resources to achieve the progressive realisation of these rights. The state must determine the means by which these rights are progressively realised. But the means to realise the rights do not define the contents of the rights. Not least because there may be entirely different, but equally permissible means used to realise the same right. These rights must be progressively realised. How that is to be done is for the state to determine, provided the measures taken are reasonable. Thus, how the state may use the supply of electricity; through what agency; and, under what conditions to realise the rights in sections 26 and 27 of the Constitution, is for the state to determine.

[114] It follows that the residents cannot claim a right to the supply of a certain quantity of electricity from Eskom on the basis that the electricity has utility in securing their rights under sections 26 and 27 of the Constitution. That would be to disintermediate the state and the decisions the state must make as to how to realise these rights, and how to do so on an aggregative basis that permits of their progressive realisation. The residents may complain that the state is not taking the measures required of it. But that is not the case before us. What the residents cannot do, within the scheme of

the Constitution, is to fasten upon a particular organ of state and select it to provide them with a resource (here, electricity) that would secure for them better access to housing, health care, food, water and social security.

The content of the other rights in the Bill of Rights

[115] What of the rights in the Bill of Rights that are not so qualified? The Associations and the High Court refer to the right to life and dignity. The second judgment adds the right to a basic education. The Associations, in their founding affidavits, make mention of the right to an environment that is not harmful to their health or well-being. Of these rights, the High Court said that the right to the supply of electricity is inexorably bound up with the rights it referenced in the Bill of Rights. The Associations contended that the supply of electricity was a means to the enjoyment of the rights they rely upon, including the right to water, education and a healthy environment. The second judgment finds that Eskom's reduction decisions constitute clear infringements of the rights identified in the judgment.

[116] None of these approaches commences with the correct starting point: what is the content of the right invoked? In particular, does the content of these rights include a right enjoyed by the residents to be supplied with a given quantity of electricity by Eskom?

[117] Before I consider this question, I must address its relevance because the second judgment says that this is the wrong question. The second judgment holds the position that the constitutional rights it identifies should be the focus of the Court's concern and not the constitutional right of the residents to be supplied with electricity. The second judgment variously describes my preoccupation with the right of supply to electricity to be mistaken and that I am focusing on "the wrong right".[108] It considers that the facts set out in the founding affidavit self-evidently show an infringement of the residents' right to dignity, life, an environment that is not harmful to health or

[108] See [195] and [200] of the second judgment.

well-being, basic education, and clean water. Whether the contents of these rights provide for a right to a specific quality of electricity from Eskom is a demonstration that need not be made. It is, in the words of the second judgment, "to straitjacket" the second judgment. Without this constraint, the second judgment says that the implications of its holding upon the state's budget do not arise.[109]

[118] This reasoning is mistaken, and profoundly so. Rights, conceptually, are held *by* some person and *against* another person (or entity). So too, duties are owed *by* a person (or entity) to another. Rights always have a content. We do not have a right in the air. We have a right to something. And the right enjoyed by a person gives rise to a duty owed by another to the rights-holder. Rights standardly fall into two principal categories: first, a right that others do some action with respect to the rights-holder (a claim right); and second, a right that a rights-holder may do some action (an active right). The content of the right determines which type of right is enjoyed by the rights-holder. Drawing this together, in the case of a claim right, the rights-holder (X) has a claim against another (Y) that Y performs an action (A). Y has a correlative duty to X of the same content, that is, to do A. In the case of an active right, the rights-holder (X) may take some action (A). Y must forebear and permit X to do so because Y has no right, as against X, to prevent X from doing the action, A.[110]

[119] I have set out this foundational understanding of rights because the second judgment fails to adhere to it. The residents do not have a right to life or dignity in the air. The rights that they claim must have a content. That content determines whether the rights relied upon are claim rights or active rights. The rights can only exist if they give rise to co-extensive duties of a specific content borne by identified persons (or entities). What then is the contents of the residents' right to life, to dignity, to an environment that is not harmful to their health or well-being? The second judgment does not tell us. It holds to the proposition that it suffices to read the founding affidavit,

[109] See [289] of the second judgment.

[110] This analysis of rights follows the scheme of Hohfeld expounded in Hohfeld "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 *Yale Law Journal* 16.

observe the deplorable conditions brought about by the reduction decisions, and hence recognise that these rights are being infringed.

[120] That is an error of some gravity. We can only decide whether a right has been infringed if we know the content of the right to which the rights-holder has a claim; upon whom the duty rests to secure the content of the right; and, hence whether the duty has been carried out. The residents complain that the reduction decisions of Eskom have caused them to suffer the deplorable conditions set out in the founding affidavit. Those decisions are to be challenged on review because they infringe the residents' rights. To what do the residents claim a right? To the restoration of the supply of electricity that Eskom provided prior to the reduction decisions. It is an unavoidable step in the analysis of the case before us that the *content* of the rights claimed is to the supply of a determined amount of electricity. The residents contend that they have claim rights upon Eskom to restore the electricity it supplied to the municipalities prior to the reduction decisions, and that Eskom has a correlative duty to do so. We can thus identify the right-holders, what is claimed, and against whom.

[121] The second judgment identifies the rights-holders as the residents. It enumerates constitutional rights enjoyed by the residents, without identifying their contents, which the second judgment considers to be an unnecessary step in the reasoning. The second judgment holds that because the deplorable conditions suffered by the residents have come about because of the reduction decisions, Eskom must be ordered to restore the status quo. Why Eskom, as opposed to the municipalities, has the legal duty to do so is unexplained. And that is so because Eskom cannot have a legal duty to restore supply to the residents if the residents have no right to claim that supply. The second judgment impermissibly avoids the central question upon which the case of the Associations rests: do the contents of the constitutional rights enumerated in the second judgment include a claim right by the residents upon Eskom to the restoration of the supply of electricity?

[122] The reasoning of the second judgment comes down to this. Eskom was supplying electricity at a particular level. Its reduction decisions have caused deplorable conditions for the residents of the municipalities. These effects self-evidently amount to an infringement of the enumerated constitutional rights of the residents. Hence, a *prima facie* case has been made out for the interim restoration of supply by Eskom, pending the determination of the review.

[123] This reasoning begs the central question: what do the residents claim? They claim the restoration of the supply of electricity that Eskom's reduction decisions have deprived them of. Do the residents have a right to claim this from Eskom by virtue of the rights they have enumerated? The second judgment erroneously answers this question in the affirmative. It says, if Eskom once supplied the electricity and the consequences of not doing so are harmful, the residents have a right to claim restoration of the supply of electricity. This reasoning avoids the unavoidable issue: did the residents ever enjoy the right to the supply of electricity from Eskom by virtue of their constitutional rights? If not, how did the residents acquire this right? To this question, neither the pleaded case before us, nor the High Court judgment, nor the second judgment provides an answer. And for understandable reasons, because the residents have no such right. Their rights lie against the municipalities, as *Joseph* has held. Alternatively, they could seek recourse under the regulatory scheme of ERA. To avoid this issue, as the second judgment assiduously does, does not diminish its salience. Put simply, the residents cannot claim something as of right which forms no part of the *contents* of the rights they invoke. And no invocation of deplorable social and economic effects can cure this juridical lacuna. Nor can section 7(2) of the Constitution fill this gap. This is so because if the residents have not established a right under the Bill of Rights to the restoration of supply by Eskom, there is no duty, deriving from section 7(2), for Eskom to respect, protect, promote or fulfil rights that do not exist.

[124] The second judgment considers there to be no lacuna. It holds that the residents need not show that they have a right to claim from Eskom the supply of electricity that

it has reduced. The residents' rights lie elsewhere. They are to be found in the rights set out in the founding affidavits; by recourse to the obligations of the state to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) of the Constitution requires; and, by reference to the residents' case that Eskom has acted without procedural fairness, contrary to the requirements of PAJA.

[125] This reasoning is mistaken. First, the right of the residents to claim electricity from Eskom is not a claim that stands apart from the rights in the Bill of Rights that the residents rely upon. It is the claim that the residents make and would impose upon Eskom. If that claim forms no part of the contents of the rights that the residents invoke, then they have no claim in law deriving from these rights. It is hard to understand how the residents need make no case that they have a right to the supply of electricity from Eskom, but they can nevertheless compel the restoration of supply from Eskom, as a matter of legal right, the contents of which entails no claim to such supply. The right to the supply of electricity from Eskom is not a right the residents may choose to ignore and still prevail. It is the necessary contents of the rights that they must show or fail to show in their application.

[126] Second, section 7(2) of the Constitution cannot do the work required of the residents to make out a case if the residents do not have a right in the Bill of Rights that supports their claim. The second judgment places some emphasis upon the duty of the state to respect the rights in the Bill of Rights. That duty is plainly set out in section 7(2). However, if the residents have established no right in the Bill of Rights, as I hold, then there is nothing for the state to respect. The duty only arises in section 7(2) if the residents have a right. Put simply, if there is no right, there is no duty.

[127] Third, in what follows, I will explain why the residents have made out no case for a want of procedural fairness. It suffices here to identify the same threshold problem that affects the residents' case. However generously we interpret the meaning of administrative action, the relevant power must adversely affect the rights of the

residents. However, if the residents have no rights of the kind claimed by them, it is difficult to comprehend what it would mean for their rights to be adversely affected by Eskom's reduction decision. If the residents have no legal right to the supply of electricity from Eskom, the reduction of supply has no capacity to affect their legal rights. This is so even in the expanded sense recognised in *Grey's Marine*.[111] The second judgment cites, with approval, academic commentary that understands the class of rights that may be affected to be broad. I agree, although I have some difficulty understanding what it means to say that there is no "natural limit" to rights that fall into the class.[112] Here, however, the residents rely upon rights they contend for in the Bill of Rights. Without those rights, for reasons I shall explain, the residents have no right to procedural fairness.

[128] I draw attention to what I consider to be the fundamental error in the second judgment because it holds the seeds of much constitutional danger. Many people in this country suffer dire conditions that gravely compromise their life chances. The breakdown and incapacity of the state, in many aspects of its operations, exacerbates this suffering. The second judgment proceeds from the following premise. Constitutional rights, such as the right to life and dignity, coupled with the obligations cast upon the state in section 7(2) of the Constitution, give rise to claim rights upon the state in every one of its constituent elements where resources might be applied to redress conditions of immiseration. The moral sentiment is worthy. But, as I will explain, that is not what our Constitution provides. Nor should it because it would lead to the courts allocating the greater part of our public resources and deciding how the state should do so. That would be an impermissible usurpation of democratic government.

[129] I proceed, then, to the central issue: what is the content of the rights that the second judgment enumerates? The content of the right to life, or dignity, or an environment not harmful to health or well-being is not a claim by the rights-holder to a

[111] *Grey's Marine* above n 95.

[112] De Ville *Judicial Review of Administrative Action in South Africa* rev ed (LexisNexis Butterworths, Durban (2005) at 53 referred to the second judgment.

specific quantity of a specific resource that the state is bound to provide; so as to sustain the enjoyment of these rights at a particular level. I shall refer to such a claim as the resources claim. That is so for a number of reasons. First, it is inconsistent with the structure of the Bill of Rights. The Constitution has given express recognition in sections 26 and 27 to rights that place an obligation upon the state to use its resources for the progressive realisation of these rights. This Court has also held that in cases concerning the rights in sections 26 and 27, other rights, such as the right to life, dignity and equality, should be taken into account when deciding whether the state has complied with the constitutional standard of reasonableness.[113] If the rights to dignity or life required that the state be placed under an obligation (absent limitation) to secure a particular standard of living or level of economic opportunity by way of the resources claim, this would not only eclipse, indeed it would render redundant, the more limited and rigorous requirements of sections 26 and 27. Additionally, it would amount to a substantial subordination of the power of the Executive and the Legislature to decide upon fundamental questions of policy and legislation that accord with the democratic mandate of the government of the day. No coherent interpretation of the Constitution allows for this understanding of the rights in the Bill of Rights as posited in the second judgment.

[130] Second, the contents of these rights do not include the resources claim because it is contrary to the precedent of this Court. In *Soobramoney*,[114] the applicant sought dialysis treatment from the state so as to be kept alive since he lacked the private means to secure such treatment. He invoked the constitutional guarantee of the right to life, as also section 27 of the Constitution. Of the right to life claimed by Mr Soobramoney, this Court had the following to say:

> "The state has to manage its limited resources in order to address all these claims. There will be times when this requires it to adopt a holistic approach to the larger needs

[113] *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) at para 44.

[114] *Soobramoney v Minister of Health, KwaZulu-Natal* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 (CC).

> of society rather than to focus on the specific needs of particular individuals within society."[115]

[131] The claim for treatment was dismissed for failing to make out a case in terms of section 27(1) and (2). *Soobramoney* makes plain the proposition that direct claims upon the resources of the state should not be sought in the right to life, but rather in the socio-economic rights in the Bill of Rights that give express treatment to such claims. A failure to observe this distinction undermines the duties of the state to make decisions over limited resources. That is its preserve to secure the welfare of the country and its people.

[132] Third, if, as the second judgment proposes, the right to life or to dignity not only found a claim to specific state resources but also to such resources as might be required to maintain a certain level of welfare, this Court will soon become the arbiter of the entire state budget. As I have explained, this is a country where poverty greatly curtails the life chances of a very large number of people and, as a result, gravely limits their dignity. The right to life or to dignity may be enhanced for particular classes of persons by claims upon state resources. Every poor person would lead a more dignified life if the state gave them a minimum income every month. That may be a good policy for the state to adopt. It is a matter of considerable public debate. Such a policy may or may not be affordable. But these are not measures that may be claimed as an incident of the right to life or the right to dignity. They should not be decided by the courts. They are matters to be decided by other institutions of a democratic state: the Legislature and the Executive.

[133] I should not be understood to hold that ending an infringement of a right to dignity or life, or the other rights referenced above, apart from the socio-economic rights in the Bill of Rights, may never have consequences for state expenditure. Plainly that is not so. The remedy imposed to cure the infringement of rights very often requires

[115] Id at para 31.

the use of state resources. What I do hold is that the rights claimed by the Associations, expanded upon by the High Court and in the second judgment, are not rights, the contents of which lay claim to a specific state resource, to be maintained at a specific level.

[134] This is so, even in respect of rights, the contents of which may give rise to a claim upon state resources. The rights in sections 26 and 27 are expressly predicated upon reasonable measures, within the state's available resources, to achieve the progressive realisation of these rights. The right to basic education, referenced in the second judgment, may require the expenditure of state resources to provide such an education. However, the state will retain the power to decide how to do so and with what resources. That will always remain within the state's margin of appreciation. As the Associations acknowledge, electricity is a means to secure the enjoyment of a right. However, a rights-holder cannot require the state to use this means to secure the enjoyment of a right. Hence, the right to a basic education is not a right to a specific state resource. The same is true of the right to an environment that is not harmful, under section 24(a) of the Constitution, as raised by the Associations. What the state may be required to do, rather than cease doing, so as not to infringe the right, does not translate into a claim to a specific state resource.

[135] In sum, by failing to analyse the contents of the rights advanced by the High Court and in the second judgment, their reasoning cannot support the conclusions they reach. The High Court considered that because the supply of electricity is bound up with the right to dignity and to life, there is a right to the supply of electricity. But that is to confuse what may make the enjoyment of a right more fulsome with the content of the right itself. The second judgment assumes that curtailing the supply of electricity is an infringement of various rights. This puts the matter the wrong way round. It is only once the content of the right is determined, as I have explained, that the question of infringement may be decided. The second judgment does not demonstrate that the content of the rights it references includes the right of the residents to a particular level of supply of electricity.

[136] The second judgment places emphasis on the rights of the residents to procedural fairness. The treatment of this issue in the founding affidavits is so sparse that it is difficult to discern that a case was made out. In the case advanced by the Vaal River Association, reference is made to a meeting between representatives of the municipality, Eskom and the Association during which the Association made representations to Eskom. This meeting occurred after the announcement of the reduction decision, but the engagement was undertaken to find a solution. It came to naught because the municipality and Eskom could not resolve the question of the municipality's indebtedness to Eskom. The Association, in its account of the residents' *prima facie* rights, makes no mention of procedurally fair administrative action.

[137] In the Lekwa Association case, the founding affidavit recounts that Eskom served notice of the reduction decision on the municipality, but the notice was not served at the council meeting, nor was it distributed to political parties or the business community. Here too, no *prima facie* right to procedurally fair administrative action is invoked.

[138] The absence of a properly pleaded case notwithstanding, the second judgment holds that the reduction decision constitutes administrative action and, this Court's decision in *Joseph* establishes that the residents have a right to procedurally fair administrative action in terms of section 3 of PAJA. The passage from *Joseph* referenced in the second judgment does no such thing.[116] It reads as follows:

> "Indeed, a finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had 'direct, external legal effect' on the applicants. Conversely, a finding that the rights of the applicants were not materially and adversely affected would have the

[116] See [274] of the second judgment.

> result that section 3 of PAJA would not apply – barring, of course, a claim based on legitimate expectations which was not raised in this case."[117]

[139] The holding in *Joseph* requires a determination of the very issue with which I remain in disagreement with the second judgment. That is, do the residents have rights to assert against Eskom to restore the supply of electricity that the reduction decisions have reduced? In *Joseph,* the rights of the residents derived from the constitutional and statutory duties resting upon local government to provide basic municipal services, including electricity. I hold that the residents in the present matter have no such rights as against Eskom, and hence, following *Joseph*, there was no duty resting upon Eskom to extend procedural fairness to the residents in taking the reduction decisions. The second judgment holds that because the residents have a number of constitutional rights as against Eskom, though not a right to the supply of electricity, Eskom was required to accord the residents procedural fairness in deciding to reduce the amount of electricity that Eskom supplied to the municipalities. The question of procedural fairness, even if a case had been properly pleaded, is derivative of what constitutional rights the residents enjoy against Eskom. For the reasons given, I hold that no such rights have been established.

[140] There is one last issue on this aspect of the matter that warrants consideration. The second judgment emphasises that this appeal concerns the grant of interim relief, and hence the Associations need only show a *prima facie* right, though open to some doubt. This, the second judgment holds, has been done. It is important, however, to distinguish a question of law from the evidence marshalled as to the facts upon which an application for interim relief rests. A question of law may be difficult to decide, but it has a right answer. And hence, where the rights relied upon by an applicant turn on a question of law, the law either recognises the rights claimed or it does not. It is not a matter that is decided by reference to weight (weak or strong). That is the case we have before us. The Constitution and the relevant statutory scheme either confer a right upon

[117] *Joseph* above n 51 at para 27.

the residents to the supply of electricity from Eskom or they do not. I hold that they do not. The second judgment takes comfort in the notion that it suffices for the purposes of interim relief that the residents have a *prima facie* right to the supply of electricity from Eskom. I am very doubtful that a question of law can yield such a conclusion. But if it could, I find no basis to find that the residents have any such right, *prima facie* or otherwise.

[141] The enablement argument thus cannot hold sway because neither in the appeals before us, nor in *Resilient SCA*, was a right in the Bill of Rights advanced, much less established, that burdens Eskom with the duty to supply the residents of the municipalities with electricity.

Section 7(2) of the Constitution

[142] Emphasis is placed in the second judgment upon section 7(2) of the Constitution. But, absent a finding that the residents have a right to the supply of electricity located in the Bill of Rights, section 7(2) has no application. I cannot, for the reasons given, find that the Associations have established such a right.

[143] The second judgment references the duty cast upon the state by section 7(2) to respect the rights in the Bill of Rights. How can it be, the second judgment asks, that Eskom does not have a duty to restore the supply of electricity that it has decided to reduce when the reduction bears so harshly upon the residents? The second judgment takes it to be axiomatic that Eskom has a duty of restoration because that is the respect that is due to the constitutional rights of the residents. There are, however, two separate issues which should not be confused. First, what rights, located in the Bill of Rights, do the residents have to electricity? Second, if the residents have the right to electricity, arising from the Bill of Rights, against whom may these rights be claimed? The second judgment avoids both questions.

[144] If the residents have no constitutional right to the supply of electricity, then no duty is cast upon Eskom to restore electricity out of respect for rights that have not been

established. But even if a right to the supply of electricity had been established, it does not follow that section 7(2) would cast an obligation upon Eskom to supply that electricity to the residents. This, the second judgment assumes to be the case; but wrongly so. The second judgment has recourse to section 7(2) so as to find a basis upon which Eskom may be held liable to make good the infringement of the residents' rights. Section 7(2) does not do so.

[145] Section 7(2) requires the state to respect, protect, promote and fulfil the rights in the Bill of Rights. The state is made up of many parts, of which Eskom is an organ. The obligations of section 7(2) are not cast upon every constituent part of the state. Regard must be had to the division of responsibility under which the state is organised. This is in part dictated by the Constitution itself. By way of example, the Reserve Bank may not be called upon to cure the failure by officials of the Department of Home Affairs to issue a passport to a citizen.

[146] The present case bears out this principle. It is the municipalities, under the Constitution and by reason of the regulatory scheme that governs the supply of electricity, which are required to supply electricity to the residents. That duty has not been allocated to Eskom. The municipalities constitute the sphere of government to which the duty has been given. They must carry out their duties and, by so doing, fulfil the obligations of the state in section 7(2). Section 7(2) cannot be understood to require an organ of state to which the duty to supply electricity to residents has not been given, to do what the municipalities have failed to do, so as thereby to honour the state's obligations under section 7(2). Yet this is what the second judgment would require of Eskom, and without explanation as to why, if the resident's rights have been infringed, the municipalities should not be that part of the state that must make good the state's obligations under section 7(2).

Subsidiarity

[147] Even if the residents had been able to identify a constitutional right that they could invoke, they would be met by a further difficulty.

[148] The ERA is a comprehensive piece of legislation that regulates the generation, transmission and distribution of electricity. In particular, ERA regulates the relationships of supply with which this appeal is concerned. That is, the relationship between Eskom, as the supplier of bulk electricity to municipalities; the municipalities as customers of Eskom; and the residents of the municipalities, who procure electricity from the municipalities as end users. The rights of end users, such as the residents of the municipalities, to the supply of electricity and Eskom's obligations to do so are regulated under ERA. Once Parliament has legislated in this way, may the residents look outside ERA to assert rights against Eskom?

[149] The principle of subsidiarity, repeatedly recognised by this Court, has a number of applications.[118] One application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case.

[150] The residents do not impugn the reduction decision by recourse to ERA. This creates an obstacle that stands in the way of the proposed review of the reduction decision, and hence the interim relief that is predicated upon the review. Even if the residents had been able to identify a constitutional right that they could assert against Eskom, they would have had to show that they were not bound to seek recourse under ERA as the legislation enacted to give effect to that right. This they did not do. The principle of subsidiarity excludes the relief that the residents have sought in their review, and hence precludes the grant of the interim relief that they have obtained.

[151] The second judgment considers that the principle of subsidiarity poses no obstacle to the residents' claim to the restoration of supply from Eskom because ERA does not give effect to the constitutional rights that the second judgment finds the

[118] *Mazibuko* above n 42.

residents to enjoy. The second judgment says that the constitutional rights of the residents are manifold, and that ERA is a single legislative instrument that could not have been enacted to give effect to all of these rights. The second judgment fails to recognise that it is not the number of the rights that it references, but the content of these rights. That content, as I have explained, concerns a claim by the residents to the supply of electricity. That is precisely what ERA and the regulatory scheme that I have described regulate. And hence the principle of subsidiary holds good.

[152] The second judgment also fails to have regard to the scope of the regulatory scheme under which powers, rights and duties are allocated for the supply of electricity to residents. I have set this out in detail. Suffice to say that it is the Constitution that places the municipalities at the centre of the supply of electricity to the residents. There is an interlocking scheme of legislation and subordinate legislation that constitutes NERSA; confers wide powers upon it; regulates Eskom and the municipalities; and grants rights to end users. It is hard to imagine a more comprehensive regulatory scheme. This scheme is clearly ordered to secure the public interest, of which the rights of end users, and hence residents, forms part. It is difficult to understand how this scheme can be understood, given its reach, not to give effect to such constitutional rights as the residents may enjoy. How the residents can apparently by-pass this entire edifice by directly invoking their constitutional rights is a conclusion I find preposterous.

[153] The second judgment provides a lengthy disquisition on the concept of subsidiarity in our constitutional jurisprudence. That analysis shows that the principle of subsidiarity is generally, but not exclusively, of application in cases where a statute gives effect to a constitutional right. The second judgment cannot find anything in ERA that can be said to give effect to a constitutional right. The second judgment declines to decide whether subsidiarity can apply to legislation that does not give effect to a constitutional right. But it goes on to say that absent a definitive pronouncement on this point, the question of subsidiarity can do no more than cast some doubt on the residents' *prima facie* rights.

[154] The second judgment is in error for two reasons. First, it is not simply ERA, but the entire regulatory scheme that must be considered to determine whether the principle of subsidiarity is of application. That scheme is predicated upon the constitutional centrality of the municipality as the sphere of government responsible for the supply of electricity to its residents. The powers of NERSA and the rights and duties of Eskom are designed to cohere with the constitutional duties borne by municipalities. The rights of residents to the supply of electricity form part of this regulatory scheme. ERA provides the statutory means by which residents may enforce their rights. But there can be little doubt that it is a regulatory scheme that gives effect to the constitutional design by which electricity is to be made available to residents. The residents' recourse under ERA forms part of that design, and hence triggers the application of the principle of subsidiarity. In so far as the second judgment considers the residents' case not to depend on a constitutional right to the supply of electricity, that is a disagreement elsewhere explored in this judgment.

[155] Second, the second judgment further falls into error because it adheres to an incorrect understanding of what it means for an applicant for interim relief to establish a *prima facie* right, though open to some doubt. This requirement concerns the standard of proof that rests upon the applicant. The standard of proof is a standard that determines what is required of a litigant to prove facts, not law. A proposition of law which recognises a right is either correct or it is not. The evidence marshalled to establish that right must meet a particular standard. In the case of interim relief, the standard is a *prima facie* right, though open to some doubt. An arguable proposition of law has no bearing upon whether a right is *prima facie* established. Whether a right exists in law is one thing. Whether an applicant has marshalled evidence sufficient to establish that right is quite another. The second judgment makes a category error. The principle of subsidiarity either excludes the claims of the Associations for interim relief or it does not: that is a question of law. Whether the residents have established a *prima facie* case is a question of evidence. The disinclination of the second judgment to decide the question of subsidiarity does not mean that at best that question can only cast some doubt on the *prima facie* case of the Associations. Correctly understood, a

question of law simply has no bearing on whether an applicant has met the standard of proof required for the grant of an interim order. If subsidiarity applies, the residents have no claim. If subsidiarity does not apply, or if a court is uncertain whether it applies, the evidence marshalled by the applicant is unaffected – it is neither enhanced nor diminished. Therefore, the principle of subsidiarity excludes the claims of the Associations. The second judgment declines to provide a definitive answer to the point.

[156] The second judgment takes the position that my approach is too rigid. It expresses the view that there may be circumstances in which a court, faced with an application for interim relief (sometimes on an urgent basis), cannot be expected to reach a definitive decision on a question of law. If that be so, a judge may say that *prima facie* there is enough pointing to the determination of the legal question in the applicant's favour. I have some sympathy for this position. However, an arguable question of law, upon which the case of the applicant turns is not what it means for an applicant to have a *prima facie* right. That is to muddle an evidential standard as to facts with a legal standard. The correct approach is to recognise, as the majority of the Court did in the Full Court decision in *Ferreira*, that an applicant should meet the standard of a serious question of law to be tried. That is the standard in English law, and I see no impediment to its adoption.[119]

[157] However, I can see no justification for the second judgment declining on appeal to decide the question of subsidiarity, and rather leaving this matter for the High Court. There is no good reason to do so. The facts and the law have been placed before us. The issue has been fully considered. The novelty and complexity of the matter does not warrant deferring a decision on the point. It is precisely cases of novelty and complexity that this Court is charged to decide. The matter should be decided. I hold that the principle of subsidiarity is of application and non-suits the Associations.

[119] *Ferreira* above n 60 at 836.

Section 7(2) of PAJA

[158] The residents face a further obstacle. ERA provides a comprehensive regulatory framework. Section 30 requires NERSA to settle disputes between an end user, defined to mean a user of electricity, and a licensee, such as Eskom. The residents have not had recourse to section 30. They do not traverse this matter in their papers, nor in their submissions before this Court. Yet their claim for interim relief is predicated upon a review under PAJA. Section 7(2) of PAJA requires the exhaustion of all internal remedies, save in exceptional circumstances. The residents have not explained why relief under section 30 of ERA is neither possible, adequate or timeous. Instead, they contend that it was incumbent on Eskom to refer the dispute to NERSA. They have failed to provide a reason why they, as the aggrieved parties, did not refer the dispute to NERSA before bringing the reduction decision for review under PAJA. This omission means that the promised review of the reduction decision was stillborn, and hence the interim relief for this reason also cannot hold good.

[159] The second judgment holds that section 7(2) of PAJA poses no obstacle to the residents in their application for interim relief because that application is not a review of the reduction decisions, and hence section 7(2) cannot be of application. The second judgment goes further still. It holds that section 7(2) of PAJA plays no role in the determination of applications for interim relief pending a PAJA review. It reasons that this would impose too great a burden on an applicant for interim relief, in that the grant of interim relief already requires a showing that there is no other satisfactory remedy. To add a requirement that an applicant must also show that it will comply with PAJA is to unduly curtail access to the courts. Furthermore, an applicant may yet persuade the review court of exceptional circumstances that, in terms of section 7(2)(c), excuse compliance with the obligation to exhaust any internal remedy.

[160] I recall what I have set out as to the relationship between an application for interim relief and the prospects of the applicants in securing final relief. The position taken in the second judgment fails to have proper regard to this. The issue before the High Court was this: what prospects do the Associations have of succeeding in their

review of Eskom's reduction decisions? A relevant consideration in answering that question is whether the residents will be able to show that the review court can grant final relief in the face of section 7(2) of PAJA. If the Associations have an internal remedy and they do as section 30 of ERA provides a specific remedy to the residents of direct application to the reduction decision of which they complain a failure to exhaust this remedy means the court hearing the review will have no power to review the reduction decisions; save for exemption upon a showing of exceptional circumstances. The issue is not answered by saying that the application for interim relief is not the review. A failure to provide any explanation as to why an available internal remedy has not, will not or cannot be used gives rise to the difficulty that the court deciding upon interim relief must apprehend that the court adjudicating upon the case for final relief may not be competent to rule at all. If that is so, how does a court order interim relief pending such a review?

[161] Nor is it answered by saying that the residents may yet seek to exhaust their internal remedies under section 30 of ERA or show exceptional circumstances to exclude compliance. That they have not, and have indicated no intention of doing so, is relevant in deciding whether the Associations have prospects of prevailing in the review. That an application for interim relief is not a review, as the second judgment observes, is not salient.[120] The application for interim relief necessarily casts forward to consider the applicants' prospects of success. The Associations have an internal remedy available to them. They say nothing as to why they have not used it or could not use it to obviate the need for a review altogether. That is plainly relevant to the question as to whether the court deciding the review could come to the assistance of the Associations.

[162] The second judgment holds that traversing internal remedies at the stage of interim relief is unduly burdensome to an applicant because it adds to the requirement of showing the absence of another satisfactory remedy. The second judgment also

[120] See [216] of the second judgment.

considers that this would infringe an applicant's constitutional right of access to the courts. In this, too, the second judgment is mistaken. As I have shown, whether an applicant for interim relief will be able to comply with the requirements of section 7(2)(a) of PAJA in the review is plainly relevant to the question whether the applicant can secure relief from the courts in due course. If the applicant cannot, there is no warrant to impose injunctive burdens on the respondent in the interim. Some remedies available to an applicant may fall within the class of internal remedies provided for in any other law as section 7(2)(a) stipulates. If the applicant has recourse to such a remedy then, at the stage of interim relief, the question as to why the applicant has not or will not make use of this remedy cannot be avoided. It bears directly upon the applicant's likely prospects of success in the review. If some other species of alternative remedy is available to an applicant, then it will also be necessary to determine whether it is satisfactory or whether the applicant can show that it is not so.

[163] These are assuredly burdens that an applicant must shoulder to enjoy interim relief. But they are neither gratuitous nor an infringement of the right of access to courts. They are relevant and necessary considerations that go to the justification for making an interim order. Courts will not incline to render a respondent subject to interim compulsory constraint by its order if there is no need to do so, or there are vanishingly modest prospects that the applicant can prevail in the review. Nor does an applicant, so burdened, suffer any restriction of their right to have the question of interim relief resolved by the application of law. The difference I have with the approach taken by the second judgment concerns the legal considerations that are relevant to the grant of interim relief. A difference as to the substantive law of application to the grant of interim relief cannot be characterised as an issue of access to courts, as the second judgment unwarrantably seeks to do. The right to have a dispute resolved by the application of law cannot determine what substantive law is used to decide the dispute.

[164] When a court decides upon an application for interim relief, the question is whether the respondent must endure such an order if there are other satisfactory

remedies available to the applicant. Thus, the issue is whether the applicant may secure adequate redress, at least in the interim, by recourse to another satisfactory remedy. The Associations have had nothing to say on this score to show why the internal remedies provided in section 30 of ERA, and available to the residents, would not suffice. The availability of an internal remedy, in this case, is an issue pertinent to two factually interconnected, but separate, legal issues. First, whether there is any prospect that the court that hears the review will enjoy the competence to grant final relief. Second, whether the internal remedy suffices to provide a satisfactory remedy. Both issues are relevant to the enquiry as to whether interim relief should be granted to an applicant who would bring an administrative action under judicial review.

[165] Whether examined from the vantage point of prospects of success in the review or the availability of a satisfactory alternative remedy, the Associations have failed to deal with these matters. The second judgment says this matters not because the residents averred that they had no other satisfactory remedy, the High Court agreed, and this Court is in no position to hold otherwise. This is not so. The founding affidavits of the Associations contended that it was Eskom's duty to resolve its dispute with the municipalities and that "the municipality and for that matter, the applicant, have no other remedy". By law it may not purchase its electricity from any supplier other than Eskom. That Eskom is a monopoly supplier to the municipalities, and they, in turn, are monopoly suppliers to the residents answers the question as to whether the residents have an alternative source of supply. It says nothing at all as to whether the residents have an alternative satisfactory remedy. They do. It is an internal remedy provided for in ERA, and the residents have nothing at all to say on this score. It is an obvious omission and impediment to the grant of the relief that they sought. Eskom averred that the residents did have alternative recourse. The High Court's only finding on this aspect of the matter was that the residents would not obtain relief by enforcing the obligations of the municipalities because the municipalities were hopelessly insolvent. Neither the High Court nor the Supreme Court of Appeal traverse the recourse of the residents under section 30 of ERA. I do not see how a finding by the High Court as to one remedy

precludes the consideration by an appellate court of the availability of another remedy that is relevant to whether the interim order was correctly granted.

The residual PAJA ground

[166] The second judgment considers the residents to have made a supportable case that Eskom has acted for ulterior purposes because it took the reduction decisions to pressure the municipalities to settle their outstanding debts. While the second judgment acknowledges that this ground of review has not been pleaded, it holds that it can nevertheless be entertained on a discretionary basis.[121]

[167] That is not so. An appeal court might entertain an appeal where an issue that strayed from the pleadings was fully ventilated before the Court below.[122] But an appellate court cannot raise a ground of review that was not pleaded nor fully considered by the parties on their papers and in argument. In any event, the factual basis of the case for Eskom's ulterior purpose is much contested on the facts. Eskom's affidavit sets out the reasons for its reduction decisions which provide reasons for acting that are reasonable, given what it says as to the risks to the grid and the danger of illegal connections. On an application of *Gool*,[123] or even the tests more favourable to the Associations, much doubt is cast on the ulterior purpose ground of review; whether cast as such, or under the more general case that was pleaded of rationality. There seems little to gainsay the point that Eskom was acting within its rights under the regulatory scheme of application to it. Such lawful action is not transformed into a reviewable irregularity by labelling it an ulterior purpose or irrational.

---

[121] See [276] of the second judgment.

[122] See *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198 where the Court held the following:

> "The object of pleadings is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleadings of the opponent has not been as explicit as it might have been."

[123] *Gool* above n 59.

A variant of the enablement argument

[168] A variant of the enablement argument was this. Since the municipalities bear the constitutional duty to provide basic services, as *Joseph* has held, Eskom as an organ of state must make it possible for the municipalities to do so. The intuitive appeal of this contention cannot escape this question: what is the source of Eskom's duty? It is not, as we have seen on the case before us, section 7(2) of the Constitution. Nor do the residents make out a case that the Constitution elsewhere casts a constitutional duty upon Eskom to enable the municipalities to carry out their constitutional functions. The duties of Eskom and, in particular its developmental role as I have described it, are set out in the Conversion Act and ERA. The residents have sought no recourse under this legislation. Without a right pleaded and established, intuition cannot make a case.

[169] For this reason also, the mere fact that the reduction decision has been taken by Eskom as an organ of state does not render the decision reviewable, without more. Section 1 of PAJA defines administrative action, applied to the case before us, as the exercise of public power which adversely affects the rights of any person. As I have already explained, on the most generous construction of what this means, following *Grey's Marine* and its progeny, the reduction decision must have had the capacity to affect the rights of the residents. But the residents have no constitutional rights as against Eskom to supply electricity, not on the pleaded case or otherwise established before us. The reduction decision cannot have the capacity to affect rights that have not been established, either existing or prospective, as against Eskom. The residents have thus failed to show that the reduction decision is reviewable. The holding of the High Court in *Resilient High Court* that residents may review Eskom's decision to terminate supply on rationality grounds is not correct. The rights of residents in this position are secured by recourse against the supplier of their electricity, the municipalities, or under the regulatory framework of ERA.

[170] Even if the residents had been able to make a case that Eskom has a duty to supply electricity to the municipalities, it is hard to imagine that Eskom could have been

called upon to discharge that duty to enable the municipalities to perform their constitutional obligations. On the facts before us, the municipalities have abdicated their duty to provide basic services to their residents. Eskom cannot be required to enable the municipalities by supplying electricity when the municipalities cannot or will not carry out their primary constitutional obligations. Nor can the residents subvert the scheme of the Constitution by seeking relief, in effect, to substitute Eskom for the municipalities and require Eskom to do what the municipalities have not done, but are constitutionally required to do.

[171] In sum, the residents have simply failed to make out a case that Eskom owes a duty to them, either directly or through the municipalities, to supply them with electricity. They have not identified the constitutional right that requires Eskom to supply electricity above the contracted NMD. They do not rely upon ERA or the Conversion Act as the basis upon which the reduction decision is rendered reviewable. The residents have not confronted the problems of subsidiarity and the exhaustion of internal remedies. The residents have also not, in these proceedings, sought to compel the municipalities to carry out their constitutional duties. In these circumstances, the proposed review has no prospects of success, and hence the residents have failed to make out a case for interim relief pending that review.

The settlement argument

[172] I turn next to the settlement argument which formed the centrepiece of the holding in *Resilient SCA*. Must Eskom continue to supply electricity to the municipalities at the levels that predate the implementation of the reduction decision on the basis that Eskom failed to comply with its duties to make every reasonable effort to settle an intergovernmental dispute, as required by section 41(3) of the Constitution and IRFA? The Supreme Court of Appeal in *Resilient SCA* held Eskom to have such duties and the Supreme Court of Appeal in the present matter agreed.

[173] I have set out why it is that Eskom is an organ of state, at least as presently constituted. Section 41(1)(h) of the Constitution requires Eskom and the municipalities

to co-operate by assisting and supporting one another. The Associations have not relied on this provision, nor could they because, as I have observed, there can be no duty to co-operate with a sphere of government that has abdicated its own constitutional responsibilities. The burden of the Associations' case, both in the Supreme Court of Appeal and before us, was to rely upon the settlement argument in *Resilient SCA.*

[174] As stated above, section 41(3) of the Constitution places an obligation on an organ of state involved in an intergovernmental dispute to make every reasonable effort to settle the dispute by means of mechanisms and must exhaust all other remedies before it approaches a court to resolve the dispute.[124]

[175] The mechanisms and procedures that have been provided to permit Eskom to comply with its duty to take every reasonable effort to settle an intergovernmental dispute are to be found in IRFA. Curiously, in terms of section 2 of IRFA, that Act applies to the national government, all provincial governments, and all local government; but it does not apply to any public institution that does not fall within the national, provincial or local sphere of government. The state is Eskom's sole shareholder and the Minister of Public Enterprises has an important role to play in agreeing to Eskom's Shareholder compact. Whether that suffices to make Eskom part of national government is a question I do not need to answer because I shall assume that IRFA may, for the purposes of section 2, be of application to Eskom.

[176] There are two reasons that nevertheless render IRFA of no assistance to the case of the residents. First, Chapter 4 of IRFA concerns the settlement of intergovernmental disputes. But Chapter 4 does not apply to the settlement of specific intergovernmental disputes in respect of which other national legislation provides resolution mechanisms and procedures.[125] That is precisely what section 30(1)(b) of ERA does.[126] NERSA

[124] See [109] of the second judgment.

[125] Section 39(1)(a) of IRFA.

[126] In terms of section 30(1)(b)—

enjoys jurisdiction to settle disputes between a customer and a licensee, that is, between the municipalities and Eskom. The central intergovernmental dispute in this matter is between the municipalities and Eskom. Hence, IRFA does not apply to this dispute and ERA does. Granted, this intergovernmental dispute has wider ramifications that may involve provincial government and perhaps national government given the wholesale failure of the municipalities. But Eskom is not in any intergovernmental dispute with provincial or national government. Its dispute is with the municipalities, and that dispute falls to be settled by NERSA under section 30(1)(b) of ERA. IRFA does not apply to the dispute between Eskom and the municipalities. *Resilient SCA* and the Supreme Court of Appeal in the present matter fell into error on this score.

[177] The second reason that IRFA is of no assistance to the Associations is that in terms of section 45(1) no organ of state may institute judicial proceedings in order to settle an intergovernmental dispute, unless the dispute has been declared a formal intergovernmental dispute in terms of section 41 of IRFA and all efforts to settle the dispute, in terms of Chapter 4 of IRFA, were unsuccessful. Section 45(1) determines how Chapter 4 of IRFA impacts upon judicial proceedings. However, the judicial proceedings in the present matter were not initiated by Eskom but by the Associations. There cannot be an intergovernmental dispute between the Associations and Eskom because the Associations are not organs of state. Nothing in section 41(3) of the Constitution, nor in IRFA, can non-suit Eskom in a claim initiated by private bodies against it. The purpose of section 41 of the Constitution, read with section 45(1) of IRFA, is to require that those subject to section 41(3) make every reasonable effort to settle their disputes before having recourse to the courts. What neither the Constitution nor IRFA do is to non-suit Eskom in circumstances where a private party initiates judicial proceedings against it. In the result, Eskom is entitled to defend itself in those proceedings, and IRFA does not prevent it from doing so.

> "[t]he Regulator must, in relation to any dispute arising out of this Act . . . if it is a dispute between a customer or end user on the one hand and a licensee, registered person, a person who trades, generates, transmits, or distributes electricity on the other hand, settle that dispute by such means and on such terms as the Regulator thinks fit."

[178] The settlement argument must therefore fail.

The balance of convenience

[179] The second judgment says the balance of convenience favours the Associations because of the consequences that have ensued from the reduction decisions. Additionally, so it says, it is not as though in the interim Eskom cannot provide the additional electricity. The second judgment does not weigh in the balance what Eskom has set out in its affidavits.

[180] Eskom has indicated that in the past it was able to supply electricity above the NMD levels due to other customers not utilising their NMD allocations to the full. Furthermore, in addition to the strain on the national grid, Eskom makes the case that the municipalities' infrastructure is dilapidated. For as long as this interim order operates, Eskom will be compelled to supply electricity above the NMD, putting the infrastructure and national grid under additional strain. Although Eskom has penalised the municipalities for exceeding the NMD, this has not induced corrective action by the municipalities. On the contrary, the municipalities continue to abdicate their duties.

[181] These are weighty considerations. So too are the terrible conditions that have resulted in the quality of life of residents. There is serial hardship and inequity in that residents who pay for electricity nevertheless suffer great detriment.

[182] I recognise that the harm to human health and well-being that is suffered by the residents without interim relief may appear greater than our collective interest in the integrity of the grid, the national availability of electricity and the solvency of Eskom. But this equation fails to take account of the true source of the problem: that the municipalities are not carrying out their constitutional and statutory duties. They must be made to do so, and if they cannot, then, as the Constitution requires, national and provincial government must step in to see to the effective performance by the

municipalities of their functions (section 155(7) of the Constitution).[127] This scheme of constitutional responsibility should not be subverted by using interim orders sought before the courts to assign the duties of the municipalities to Eskom.

[183] There is one further consideration that is systemic in nature. If Eskom is required to discharge the duties of the municipalities in this case, it will in all likelihood be called upon to do so across the hundreds of municipalities across the country that are in disarray. As the cases to which we have been referred indicate, this process appears to be well advanced. Eskom is a national asset upon which the welfare of the entire country depends. What the residents seek in this case, replicated across the country, will give rise to considerable risks for Eskom, and hence to our national welfare.

[184] The order of the High Court is a mandamus. It compels Eskom to supply electricity above the NMD levels, to install the necessary infrastructure to ensure the supply of this electricity and to provide ringfeed supply that will serve as a back-up during emergencies (this is in respect of Ngwathe Municipality). Orders of this kind, writ large across the country, have grave consequences.

[185] Taking these matters into account, I cannot find that the balance of convenience favours the residents. But even if it did, absent a right to the supply of electricity from Eskom, there is no basis upon which the interim relief granted by the High Court can stand.

Conclusion

[186] The interim relief that the Associations sought and obtained in the High Court was predicated upon their having a *prima facie* right to review the reduction decision. The Associations have failed to establish that right. Furthermore, the Associations have

[127] Section 155(7) states the following:

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

not sought relief under the regulatory scheme created by ERA, as they could and should have done. Their review, as formulated, is stillborn under the principle of subsidiarity and for failing to pursue an internal remedy. IRFA provides no basis to non-suit Eskom, much less does it accord a right of supply to the residents.

[187] Accordingly, leave to appeal must be granted and the appeals upheld. The orders of the Supreme Court of Appeal should be set aside and in their place the applications of the residents must fall to be dismissed. As the residents have raised matters of importance in the public interest, no costs should be awarded against them.

[188] Had I commanded the majority, I would have made the following order:

1. Leave to appeal is granted in both applications.
2. The appeal in respect of both applications is upheld.
3. The order of the Supreme Court of Appeal is set aside and substituted with the following:
   "The appeal is upheld. The order of the High Court is set aside and replaced as follows:
   In Case number 31813/20: The application is dismissed.
   In Case number 35054/20: The application is dismissed."
4. There is no order as to costs.

MADLANGA J (Mathopo J, Mhlantla J, Theron J and Tshiqi J concurring):

Introduction

[189] It is deeply disturbing that – through no fault of their own – the residents of the Lekwa and Ngwathe Municipalities (residents) are subjected to a situation that violates several of their fundamental rights protected in the Bill of Rights. A situation that infringes their right to dignity, their right of access to healthcare services, their right of access to sufficient water, their right to an environment that is not harmful to health

or well-being and the right to basic education. The residents add that there is even a threat or real risk of infringement of the right to life. All this, as a direct consequence of Eskom's conduct. I say all this is happening through no fault on the part of the residents because they say that the two municipalities have a prepaid electricity system and that they (the residents) do pay their dues. That notwithstanding, they find themselves caught up in the dispute between Eskom and the errant municipalities. A dispute at the centre of which is the woeful and reprehensible failure by the municipalities to pay Eskom for the electricity it supplies, and which I do not condone in the least. A classic, practical and painful manifestation of the saying, "When two elephants fight, it is the grass that gets trampled."

[190] At the outset, let me clarify that I make no holding on whether the residents have a constitutional right to the supply of electricity by Eskom.[128] I do not find it necessary to make that holding because, even though the residents did assert that right, they rely on several other constitutional rights and those other rights are dispositive of the matter. I will focus only on those other rights.

[191] At issue is whether – pending the finalisation of review proceedings that the residents intend instituting[129] – this Court must allow the effects of Eskom's conduct to persist. Must this Court – *at an interim* stage – allow the residents to be subjected to such abject misery and horrendous violation of fundamental rights? My colleague Unterhalter AJ, whose judgment (first judgment) I have had the pleasure of reading, says yes. I say no.

[192] Upfront let me highlight a fundamental flaw in my colleague's reasoning. I do so because that fundamental flaw permeates the first judgment and is central to the conclusion my colleague reaches on the merits. That flaw is the idea in the first

[128] My approach does not derogate from *Joseph* above n 51 at paras 34-40, which determined that municipalities bear an obligation to provide basic services, including the supply of electricity.

[129] In terms of the order made by the High Court when granting the interim interdict, the review application had to be launched not later than 30 October 2020. Purely for convenience, I refer to the intended or proposed review.

judgment that the residents should have asserted and proved the existence of a specific constitutional right to be supplied with electricity by Eskom. As I demonstrate more fully later, that idea is mistaken. The residents do not have to rely on any such constitutional right. They assert several other rights protected by the Bill of Rights, which I highlight above. Without question, the residents do enjoy constitutional protection of those rights. Not even the first judgment can suggest otherwise. My judgment does explain the relevance of these rights in the context of these proceedings and the proposed PAJA review.

[193] Secondly, I must underscore a related proposition. On my reading, the first judgment says there must be a direct correlation between what is sought to be restored through an interim interdict and the right alleged to have been breached. Putting it differently and relating it to the present matter, the first judgment suggests that if the interim interdict seeks the restoration of electricity supply, the right alleged to have been breached must be a right to the supply of electricity. And, continues the first judgment, there must first be a duty resting on Eskom to supply the residents with electricity and a breach of that duty before Eskom can be ordered to restore the supply of electricity. To illustrate its point, the first judgment embarks on an extensive, but basic, discussion on rights and duties and how they interface.

[194] The first judgment's proposition fails to take into account the fact that multiple rights protected in the Bill of Rights can be violated by a single action. And those rights are not always squarely or perfectly correlative or corresponding. What informs the need for their vindication is the fact of their violation. In the present matter it is the sudden substantial reduction of electricity that resulted in the rights violations. The logical corrective measure to address the rights violations is the reversal of the causative act. That is, the restoration of the usual electricity supply. How else do you halt the rights violations? Do you do nothing and throw up your hands in complete despair whilst the violations continue unabated? If that were the case, the law would really be the proverbial ass.

[195] This is less about the residents' right to the supply of electricity by Eskom (which they need not assert) and more about correcting Eskom's legally impermissible action. Why is Eskom's conduct legally impermissible? In this matter the rights at issue are rights that the residents enjoy in terms of the Bill of Rights. How these rights feature is that Eskom's conduct of substantially reducing electricity supply has resulted in their infringement. Each infringement constitutes an "adverse" and "material and adverse" effect envisaged in sections 1 and 4(1) of PAJA respectively. So, in accordance with administrative law 101, we have here a decision by Eskom, an organ of state, made in the exercise of a public power in terms of the ERA, which adversely affects the residents' rights. And exactly because of the deplorable conditions to which the residents have been subjected as a result of Eskom's decision, a fact which is accepted by the first judgment, the decision does have a direct, external legal effect. It defies logic how the causative act – the substantial reduction of electricity supply – should suddenly be taken out of the equation and be completely irrelevant in redressing the rights violations.

[196] With all this in mind, one will immediately see that the exposition in the first judgment on rights, duties, rights holders, duty bearers and one or more other basic concepts on rights is totally irrelevant.

[197] Thirdly, I wish to highlight that the first judgment erroneously concludes that section 7(2) of the Constitution finds no application here. Before I go any further, let me make the observation that I am able to reach the outcome I propose even without reliance on section 7(2) of the Constitution. The residents aver that the administrative action of the substantial reduction of electricity supply adversely affected several of their fundamental rights protected in the Bill of Rights. They also say that the administrative action was taken without following a fair procedure. That is sufficient for purposes of a *prima facie* case founded on section 6(2)(c) of PAJA.[130] As I say later, it would be the height of illogicality if those same fundamental rights cannot ground the

[130] I say more about this section later.

interim interdict sought pending finalisation of the intended PAJA review. I explain later that the nature of a "right" that may be asserted for purposes of a PAJA review is quite expansive in its reach. It encompasses rights protected in the Bill of Rights. It is exactly those rights that have been asserted by the residents.

[198] Adverting to section 7(2) of the Constitution – which I deal with purely because of the first judgment's insistence that Eskom owed no duty whatsoever to the residents – the section decrees that "[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights". The basis of the erroneous insistence is that – as the residents enjoy no constitutional right to the supply of electricity by Eskom – there is no right to be respected, protected, promoted and fulfilled by Eskom in terms of section 7(2).

[199] What is particularly relevant in section 7(2) is the obligation resting on the state (which includes Eskom as an organ of state) to *respect* the rights in the Bill of Rights. Of the four section 7(2) obligations (respect, protect, promote and fulfil), I single out "respect" because I am not dealing with the matter on the basis that Eskom bears a direct, positive duty to supply electricity to the residents. The section 7(2) obligation to respect the rights in the Bill of Rights entails that the state must refrain from unreasonable conduct that results in the infringement of rights in the Bill of Rights. I use the reasonableness standard based on the majority judgment in *Glenister*.[131] There Moseneke DCJ and Cameron J held that "[s]ection 7(2) implicitly demands that the steps the state takes must be reasonable".[132]

[200] The sudden *and substantial* reduction of the electricity supply which – according to the residents was made without notice[133] – was the trigger that resulted in the catastrophic infringements of the residents' rights. Therein lies the basis of

[131] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC).

[132] Id at para 194.

[133] I explain the source of the need to give notice later.

the residents' case that Eskom failed to respect several of their rights protected by the Bill of Rights. In terms of section 7(2) of the Constitution the state (including Eskom) bears an obligation to respect the rights in the Bill of Rights. If the conduct – howsoever arising – has the effect of infringing the residents' rights, that is the focal point. The question is: is there a rights violation arising from Eskom's conduct? I say there is. The first judgment says there is not. Of course, it says so because its focus is on the wrong right. When I return to this section 7(2) point later, I rely on *Juma Musjid*[134] by way of analogy.

[201] The first judgment misses all this because it fixates on the idea of constricting the right the residents ought to assert and prove as being a specific constitutional right to a direct supply of electricity by Eskom. That misconceived point of departure naturally leads to a wrong outcome.

[202] I emphasise the substantial nature of the reduction of electricity supply because of its catastrophic effect on the lives of the residents. So, this judgment is not about any reduction. It is about a reduction, the effect of which is of the catastrophic nature I describe shortly. The first judgment's approach is quite absolutist on the idea that the only relevant right is the residents' right to a supply of electricity by Eskom. On that approach, even if Eskom were suddenly *and without notice* to effect a total blackout, for example, for a month or more, affected end users would not be in a position to assert rights protected in the Bill of Rights as a basis for a PAJA review of the decision in terms of which the blackout was effected. To say that even under those circumstances end users would have no right protected by the Bill of Rights to assert revolts against my sense of constitutionalism. And it is not an answer to this rights question to say that the residents may or might well have some other basis to challenge the decision.

[203] Fourthly and relatedly, as I said, the interim interdict at issue was granted pending a PAJA review. What triggers an entitlement to a PAJA review is a decision

[134] *Governing Body of the Juma Musjid Primary School v Essay N.O. (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

that adversely affects the rights of any person.[135] Quinot and Maree point out that this definition may not give all the necessary guidance to an administrator who is yet to take a decision.[136] That is so because "an administrator must know whether [their] decision will impact adversely on the rights *before* that decision is taken in order to know whether it is administrative action and would thus require the prescripts of PAJA".[137] An elucidation by Nugent JA in *Grey's Marine* provides an answer.[138] He said, correctly, "decision" was "probably intended rather to convey that administrative action is action that has the capacity to affect legal rights".[139] This has been accepted by this Court.[140] This, of course, does not serve to exclude a decision that does affect the rights of persons.

[204] Axiomatically, Eskom's decision to reduce electricity supply has adversely affected the residents' right to dignity, their right of access to healthcare services, their right to an environment that is not harmful to health or well-being, the right to basic education and the right to life. So, these rights bear relevance to the intended PAJA review. As I show later, "rights" – as envisaged in the definition of "administrative action" in section 1 of PAJA – has a wide meaning. That meaning encompasses the rights asserted by the residents. These rights and the adverse effect on

---

[135] Section 1 of PAJA defines "administrative action", which is the basis of a PAJA review, as—

> "any decision taken, or any failure to take a decision, by—
>
> (a) an organ of state, when—
>
> (i) exercising a power in terms of the Constitution or a provincial constitution; or
>
> (ii) exercising a public power or performing a public function in terms of any legislation; or
>
> (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,
>
> which adversely affects the rights of any person and which has a direct, external legal effect"

[136] Quinot and Maree "Administrative Action" in Quinot *et al Administrative Justice in South Africa: An Introduction* 2 ed (Oxford University Press, Cape Town 2020) at 93.

[137] Id (emphasis added).

[138] *Grey's Marine* above n 95.

[139] Id at-para 23.

[140] See *Allpay* above n 101 at para 60; and *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd* [2010] ZACC 21; 2011 (1) SA 327 (CC); 2011 (2) BCLR 207 (CC) at para 37.

them are also of significance towards proving the first and second requirements for an interim interdict.[141]

[205] That is the context in which the rights must be viewed. The first judgment disregards this context when it says "the residents cannot claim something as of right which forms no part of the *contents* of the rights they invoke. And no invocation of deplorable social and economic effects can cure this juridical lacuna".[142] There is no lacuna. In fact, it would be perverse to have a situation where a litigant establishes a right adversely affected by a decision for purposes of a PAJA review, but is unable to seek protection of that right by way of an interim interdict pending the PAJA review. So, it manifestly makes sense that the unrestricted right protected by the Bill of Rights can also be the same unrestricted right protectable in terms of an interim interdict. I do not understand why the first judgment insists on restricting the nature of the right.

[206] Fifthly and crucially, my judgment does not hold that the residents are entitled to a continued supply of electricity in quantities that guarantee that the rights they assert are not infringed even in circumstances where Eskom is entitled to terminate or reduce supply in terms of section 21(5) of the ERA. This judgment says no more than that, in this instance, pending the determination of the proposed PAJA review of Eskom's exercise of the section 21(5) power, the residents must be afforded interim relief that directs Eskom to restore electricity supply to what it was before the reduction. This observation is crucial, because it cuts across what the first judgment perceives as an ominous threat of a total collapse if Eskom is not allowed to reduce or terminate supply where that is warranted. That is but a bogeyman and we must see it for what it is. The residents' case does not stand in the way of warranted section 25(1) reductions or terminations of supply. Reductions or terminations must take place in a manner not susceptible to a PAJA review; *that is all that my judgment says*. No bar at all to warranted section 21(5) reductions or terminations. Is the first judgment suggesting

[141] The first and second requirements are: (a) a *prima facie* right even if it is open to some doubt; and (b) a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted.

[142] First judgment at [123] (emphasis in original).

that Eskom is entitled to ride roughshod over the residents' right to just administrative action? Eskom as an organ of state bears a higher duty "to respect the law, *to fulfil procedural requirements and to tread respectfully when dealing with rights*. . . . It must do right, and it must do it properly".[143] Although said in a different context, these words are apposite here as well.

[207] All that my judgment does is to say Eskom is perfectly entitled to avert any ominous grid collapse that it perceives. But because ours is a constitutional state, Eskom must do so in accordance with the Constitution and the law. It is neither above the law, nor a law unto itself. From where the residents are sitting, alleging as they do that Eskom did not give them notice, the substantial reduction came out of nowhere like a bolt of lightning. On their version of the facts, which I do not understand to be contradicted by Eskom, they were denied even the very basic opportunity to brace themselves for the substantial reduction in electricity supply. More importantly, they were not afforded an opportunity to make representations to Eskom. The importance of notice and an opportunity to make representations cannot be overemphasised. The opportunity is so important that authority says it must not be denied, even where it is thought the affected person cannot possibly have anything to say or that whatever they may say is not likely to influence the decision. In *John v Rees*, Megarry J colourfully and aptly put it thus:

> "It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious,' they say, 'why force everybody to go through the tiresome waste of time in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered change. Nor are

[143] *MEC for Health, Eastern Cape v Kirland Investments (Pty) Ltd t/a Eye & Lazer Institute* [2014] ZACC 6; 2014 (3) SA 481 (CC); 2014 (5) BCLR 547 (CC) at para 82 (emphasis added).

> those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."[144]

[208] This has been quoted with approval a few times by our courts.[145] Hoexter and Penfold say:

> "Procedural fairness . . . is concerned with giving people an opportunity to participate in the decisions that will affect them, and – crucially – a chance of influencing the outcome of those decisions. Such participation is a safeguard that not only signals respect for the dignity and worth of the participants, but is also likely to improve the quality and rationality of administrative decision-making and to enhance its legitimacy."[146]

[209] I do not engage in the debate about the interface between sections 3 and 4 of PAJA.[147] That is not necessary for the resolution of this matter. It is enough to say that section 4(1) of PAJA proceeds from the premise that a fair procedure is necessary. Section 4(1) provides for options open to an administrator "in order to give effect to the right to *procedurally fair* administrative action" where the administrative action materially and adversely affects the rights of the public.[148] The reduction decision, affecting as it does two entire municipal areas, affected the public. And the residents aver that Eskom took the decision without following a fair procedure. Administrative action that is procedurally unfair is liable to be reviewed in terms of section 6(2)(c) of PAJA. That is what the residents want to hold Eskom to. That much is clear, and it matters not that they have pleaded more than just that.

---

[144] *John v Rees; Martin v Davis; Rees v John* [1970] Ch 345 at 402D.

[145] Examples of South African cases that have relied on this quote are *S v Van der Walt* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at para 28; *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (CC); 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts I*) at para 176; and *Administrator, Transvaal v Zenzile* [1990] ZASCA 108; 1991 (1) SA 21 (A) at 37E-F.

[146] Hoexter and Penfold *Administrative Law in South Africa* 3 ed (Juta & Co Ltd, Cape Town 2021) at 502.

[147] On that debate, see for example Brynard "Procedural Fairness to the Public as an Instrument to Enhance Public Participation in Public Administration" (2011) 19 *Administratio Publica* 100.

[148] Emphasis added.

[210] There is always something that informs administrative action. At times, just like Eskom says is the case here, the administrative action may be meant to avert grave consequences. But however grave the consequences, the functionary *must* follow the fair process applicable to administrative action affecting the rights of the public set out in section 4 of PAJA.[149] The graveness of the consequences sought to be averted alone can never be a licence for the functionary to act as if our law does not impose rights to just administrative action. Of course, the form and extent of the fair process depends on the nature and circumstances of what is at issue.

[211] At this stage of the proceedings, I say no more than that the residents appear to have made out a strong case for the review that is yet to be pursued in the High Court. The review stage will likely, in the main, be about *process*, something that was protected even by the common law under apartheid. How much more under our constitutional system that guarantees the right to just administrative action in section 33 of the Constitution? The first judgment is an unfortunate retrograde step. It says there need be no notice nor hearing in circumstances where the administrative action of a state functionary or entity is sure to result in the most horrendous violations of rights protected in the Bill of Rights. And few, very few, rights violations surpass what the residents of the two municipalities have been subjected to. And courts must sit idly by and not heed the call of the affected residents for appropriate redress.

---

[149] Section 4(1), which is titled "[a]dministrative action affecting public" provides:

> "In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether—
>
> (a) to hold a public inquiry in terms of subsection (2)
>
> (b) to follow a notice and comment procedure in terms of subsection (3);
>
> (c) to follow the procedures in both subsections (2) and (3);
>
> (d) where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or
>
> (e) to follow another appropriate procedure which gives effect to section 3."

Subsections (2) and (3) provide for the process to be followed: if a public enquiry is to be conducted; and if a notice and comment procedure is to be followed. Subsection (4) provides for a departure from the process provided for in subsections (1) to (3) if it is reasonable and justifiable to do so.

[212] The first judgment mischaracterises what I say when it suggests that I do little more than engage in the "invocation of deplorable social and economic effects".[150] It says this in the context of its central thesis that the residents have no right to assert against Eskom.[151] I identify *rights* that have been *adversely affected*[152] by the decision to reduce the supply of electricity or *rights* that have been *materially or adversely* affected by that decision.[153]

[213] I do not hold that the intended review will succeed. I merely say that pending its determination, the residents are entitled to interim relief. My judgment does not and cannot question Eskom's substantive entitlement, indeed power, to terminate or reduce electricity under section 21(5) of the ERA.

[214] I deal with four of these issues more fully later. I highlight them upfront because the eloquence in the first judgment may easily seduce one not to see the wood for the trees. I will say very little on the point about the correlation between what is sought to be restored through an interim interdict and the right alleged to have been breached.

Section 7(2)(a) and (c) of PAJA

[215] I next deal with what I consider to be a preliminary point. The first judgment non-suits the residents on, amongst others, the basis that they approached the High Court without first complying with the provisions of section 7(2)(a) of PAJA nor showing that they are in a position to convince the reviewing Court to grant them exemption in terms of section 7(2)(c) of PAJA from compliance with section 7(2)(a). Section 7(2)(a) provides that "no court or tribunal shall *review* an administrative action in terms of this Act unless any internal remedy provided for in any other law has first

[150] First judgment at [122].

[151] Id.

[152] Definition of "administrative action" in section 1 of PAJA.

[153] Section 4(1) of PAJA.

been exhausted".[154] And section 7(2)(c) provides that "[a] court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedies if the court or tribunal deems it in the interest of justice".

[216] The substance of the first judgment's point is that the residents ought not to have approached the High Court for the relief sought without first exhausting what the first judgment suggests are internal remedies under the ERA. The first judgment is mistaken in this regard. The operative word in section 7(2)(a) is "review". What was before the High Court, the Supreme Court of Appeal and now this Court is not a review. It is interim relief for an interdict sought by way of urgency pending a review. So, in the proceedings for interim relief, section 7(2)(a) cannot feature because these proceedings are not a PAJA review. It will feature in the review proceedings which, at the time the urgent application for interim relief was launched, were yet to be instituted. This reasoning applies equally to section 7(2)(c) as it concerns exemption from the need to exhaust internal remedies in a *review*. As to what impact, if any, section 7(2)(a) and (c) should have on the outcome of the application for an interim interdict is a different matter. My response is directed at the fact that the first judgment suggests that even in the present proceedings this section should non-suit the residents in the same manner as it would in a PAJA review.

[217] The first judgment says my response is not an answer to its section 7(2) point. That is so, claims the first judgment, because as part of showing – at the stage of interim interdict proceedings – that they "have prospects of prevailing at the [intended] review",[155] the residents must demonstrate what their case is on compliance with section 7(2)(a). That means they must show either that they have exhausted internal remedies, or that they have a basis on which they will seek, before the reviewing court, section 7(2)(c) exemption from the obligation to exhaust internal remedies. The effect

[154] Emphasis added.

[155] First judgment at [131].

of what the first judgment says is to require the application of two similar but different preliminary requirements in interim interdicts sought in the context of PAJA reviews that are either pending or still to be instituted.

[218] The second preliminary requirement, which – for purposes of the brief discussion that follows – I refer to as the common law requirement, is one of the four requirements for the grant of interim interdictory relief. It is that an applicant for an interim interdict must show that there is no other satisfactory remedy. This being one of the requirements for the grant of an interim interdict, whether it has been satisfied is axiomatically a question for decision by the court determining the request for an interim interdict. I say the two requirements are different because the common law requirement is about *all* interim interdicts, not only those sought in the context of pending PAJA reviews or PAJA reviews that are yet to be instituted. Also, the common law requirement is expansive in its reach in the sense that it brings within its sweep any other *satisfactory* remedy. The limit is whether the remedy is satisfactory; a question the answer to which depends on the circumstances of each case. And this remedy, may, but need not, be an internal remedy. On the other hand, what need be exhausted before a court may entertain a PAJA review are *internal* remedies. Hoexter and Penfold say "internal" and "any other law" in the phrase "any internal remedy provided for in any other law" must be "read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned and to exclude optional extras".[156] Lastly, section 7(2)(a) of PAJA, in terms, applies to PAJA reviews, not interim interdicts. That said, the two requirements are similar because both are about the need to exhaust other remedies before relief can be granted.

[219] The first judgment insists that, in the case of an application for an interim interdict pending a PAJA review, in addition to the requirement of showing that there is no other satisfactory remedy, an applicant must show that, at the later PAJA review

[156] Hoexter and Penfold above n 146 at 747. For this, the authors rely on *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) at paras 20-2; and *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) at 188B-C.

proceedings, section 7(2)(a) will not be an impediment. To my mind, this question is not as simple as the first judgment makes it out to be. Without making any decision in this regard, I will point out possible difficulties that lie in the path of the first judgment's approach. And I put it no higher than possible difficulties.

[220] First, the first judgment's approach is unduly restrictive. On its own, the common law requirement is already burdensome to the right of access to court.[157] With the first judgment's insistence on the additional requirement, this burden is doubled. Put differently, the result of the first judgment's approach, implicitly insisting as it does on these two preliminary requirements, is that the attainment of interim interdicts pending PAJA reviews is a tall order. A tall order that has a negative impact on the fundamental right of access to courts guaranteed in section 34 of the Constitution. This, in circumstances where section 7(2)(a) says nothing about interim interdicts sought pending PAJA reviews.

[221] An interpretation that says section 7(2)(a) of PAJA does not apply to applications for interim interdicts pending PAJA review applications better conduces to the enjoyment of the right of access to courts. And there is precedent – albeit in the context of section 7(2)(c) of PAJA – that upheld a preference for an interpretation that better protects the right of access to courts. That is the case of *Earthlife Africa* where Griesel J held that—

> "in case of doubt in relation to either of the two criteria laid down by section 7(2)(c) of PAJA, the Court should, in my view, incline to an interpretation of the facts and the law that promotes, rather than hampers, access to the courts."[158]

[157] In *OUTA* above n 54 at para 45 this Court held:

> "[T]he test [for the grant of interim relief] must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."

[158] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at para 67.

[222] The Court adopted this permissive approach in the context of section 7(2)(c) which already seeks to ameliorate the restrictive effect of section 7(2)(a). One would have thought that this permissive approach must apply with more force in the context of section 7(2)(a), which is more restrictive.

[223] Second, in *Gavric*[159] Theron J effectively held that in exceptional circumstances an applicant's failure to apply for an exemption in terms of section 7(2)(c) may be excused. I am not unmindful of the fact that – on the Court's holding – the *Gavric* facts were highly exceptional. But the point of substance is that there may be any number of exceptional circumstances. That being the case, non-suiting an applicant at the stage of the application for an interim interdict for failure to show that there is enough that will convince the reviewing court to grant a section 7(2)(c) exemption denies the applicant the possibility of an exemption even where there is no application.

[224] Third, the purpose of the section 7(2)(a) requirement is relevant to the interpretative exercise. That purpose, which is to ensure that the administrative process is not undermined, was elucidated thus by Mokgoro J in *Koyabe*:

> "[A]pproaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution."[160]

[225] This purpose will not in the least be undermined if section 7(2)(a) of PAJA plays no role in the determination of applications for interim relief pending PAJA reviews. At the stage of review, an applicant may be non-suited in terms of section 7(2)(a) for

[159] *Gavric v Refugee Status Determination Officer* [2018] ZACC 38; 2019 (1) SA 21 (CC); 2019 (1) BCLR 1 (CC).

[160] *Koyabe* above n 50 at para 36.

failure to exhaust internal remedies before seeking review. Or the reviewing court may refuse a section 7(2)(c) application for the exemption of non-compliance with section 7(2)(a). And when all this is done at the review stage, the purpose of section 7(2)(a) will have been served. On the contrary, the additional requirement insisted upon by the first judgment serves no purpose other than to make the attainment of an interim interdict pending a PAJA review more difficult. I say so because, as I highlight shortly, the facts of this case cry out for the grant of the interim mandatory interdict sought by the residents. And – for reasons proffered later – I see no legal impediment either. But the first judgment says the residents cannot get the interdict. On the facts that I say cry out for the interdict, the residents accurately describe what has happened as a "human catastrophe". And it is. What stands in the way of the grant of the otherwise well-deserved interim interdict are only the first judgment's impermissibly restrictive approach to the nature of the constitutional right to which the application is pegged and technical hurdles, including the additional section 7(2) requirement, imposed by the first judgment.

[226] Fourth, in *Bato Star* O'Regan J accepted the possibility that review proceedings and the exhaustion of internal remedies may run concurrently. In her own words:

> "[A] court minded to grant permission to a litigant to pursue the review of a decision before exhausting internal remedies should consider whether the litigant should be permitted simultaneously to pursue those internal remedies. In considering this question, a court needs to ensure that the possibility of duplicate or contradictory relief is avoided."[161]

[227] All that said, I leave open the question of what role, if any, section 7(2)(a) and (c) must play in proceedings for an interim interdict pending a PAJA review. I do so because there is an easy way of dealing with the issue raised by the first judgment. The residents have pleaded that there was simply no satisfactory remedy other than an urgent approach to court for an interim interdict. The High Court's judgment-call on that was

[161] *Bato Star* above n 48 at para 17.

obviously that, indeed, there was no other satisfactory remedy. Put differently, the High Court was satisfied that the requirement that an applicant for an interim interdict must demonstrate the absence of any other satisfactory remedy had been met. Plainly then, it would be incongruous to suggest that, despite there being no satisfactory remedy other than the grant of an interim interdict, following the ERA internal remedial processes would somehow be an exception and require exhaustion as a satisfactory remedy.

[228] When the proceedings for an interim interdict were instituted, the ERA processes were a possible remedy. But, on the basis of the residents' averment that there was no other satisfactory remedy, that must obviously mean that the residents are saying the ERA processes were not options that they could invoke. Legal remedies exist as a matter of substantive law.[162] But whether – in a given case – it is practical to call in aid any of those remedies is a factual question. Eskom does not appeal against the finding that there was no other satisfactory remedy. It is appealing only the legal question whether, before the High Court, the residents – as a matter of law – ought to have addressed the section 7(2)(a) and (c) issue. Thus, it is not open to this Court to consider the factual question whether it was practical for the residents to pursue other remedies, including the ERA processes. That is a factual question that has been determined by the High Court, and it is not on appeal before us. The first judgment does grapple with this factual question and concludes that there was no evidence on it. That is an idle exercise as it is not open to the first judgment to do so.

[229] In sum, even if the ERA processes could have constituted a type of satisfactory remedy, they cannot now stand alone and somehow ground Eskom's appeal under section 7(2)(a) and (c) of PAJA.

[162] I do not necessarily discount the possibility of some remedies being sourced from adjectival law.

Subsidiarity

[230] The first judgment also invokes the principle of subsidiarity. It says that the ERA comprehensively regulates the generation, transmission and distribution of electricity and the relationships of supply. These relationships include the attendant rights and obligations, insofar as they relate to municipalities and Eskom which supplies bulk electricity to municipalities and to municipalities (as Eskom's customers) and residents of municipalities (as end users).[163] The first judgment then makes the observation that, based on this Court's jurisprudence, the principle of subsidiarity has a number of applications.[164] And—

> "[o]ne application of the principle is that a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case."[165]

[231] The first judgment concludes that where Parliament has legislated as comprehensively as it has done in the ERA, the residents cannot look outside the ERA to assert rights against Eskom. In accordance with the principle of subsidiarity, the residents must assert their rights in terms of the ERA or challenge its constitutionality, which they have not done. Finally, the first judgment non-suits the residents on the basis that "[t]he principle of subsidiarity excludes the relief that the residents have sought in their review, and hence precludes the grant of the interim relief that they have obtained".[166]

[232] The first judgment is wrong in non-suiting the residents on this basis. In the minority judgment in *My Vote Counts I*, Cameron J has this to say:

---

[163] First judgment at [147] to [154].

[164] Id at [149].

[165] Id.

[166] First judgment at [150].

> "Subsidiarity denotes a hierarchical ordering of institutions, of norms, of principles, or of remedies, and signifies that the central institution, or higher norm, should be invoked only where the more local institution, or concrete norm, or detailed principle or remedy, does not avail. The word has been given a range of meanings in our constitutional law. It is useful in considering the scope of subsidiarity, and Parliament's reliance on it – to have them all in mind."[167]

[233] The *My Vote Counts I* minority judgment proceeds to instance how the principle of subsidiarity has been applied by this Court. It first refers to the now discarded *Mhlungu* principle that if a case can be decided without reliance on a constitutional issue, it should be so decided.[168] Cameron J explains that this principle was crafted at the time when "the Appellate Division [now the Supreme Court of Appeal] had no constitutional jurisdiction, and this Court had constitutional jurisdiction only".[169] It makes the point that the abandonment of the *Mhlungu* principle has had the effect of promoting "the primacy of constitutional approaches to rights determination".[170] But it cautions that this does not mean—

> "resort to constitutional rights and values may be freewheeling or haphazard. The Constitution is primary, but its influence is mostly indirect. It is perceived through its effects on the legislation and the common law – to which one must look first."[171]

[234] The minority judgment next renders the most common articulation of the principle of subsidiarity, which is about what Klare calls an "effect giving statute",[172] a tag I adopt for convenience. So called because it concerns statutes that *give effect to constitutional rights*. The articulation is that—

---

[167] *My Vote Counts I* above n 145 at para 46.

[168] Id at para 50. See the original statement of the principle in *S v Mhlungu* [1995] ZACC 4; 1995 (3) SA 867 (CC); 1995 (7) BCLR 793 (CC) at para 59. See also *Zantsi v Council of State, Ciskei* [1995] ZACC 9; 1995 (4) SA 615 (CC); 1995 (10) BCLR 1424 (CC) at para 3 where the *Mhlungu* principle was approved.

[169] *My Vote Counts I* above n 145 at para 50.

[170] Id at para 51.

[171] Id at para 52.

[172] Klare "Legal Subsidiarity and Constitutional Rights: A Response to AJ van der Walt" (2008) 1 *Constitutional Court Review*(2008) 129 at 140.

> "a litigant cannot directly invoke the Constitution to extract a right he or she seeks to enforce without first relying on, or attacking the constitutionality of, legislation enacted to give effect to that right. . . . Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role."[173]

[235] What was at issue in *My Vote Counts I* was an effect giving statute.

[236] I quote extensively from the minority judgment because the majority did not take issue with any of these holdings.[174] In *Masuku*, Khampepe J held, quoting the minority in *My Vote Counts I*:

> "Broadly, the principle of subsidiarity is the judicial theory whereby the adjudication of substantive issues is determined with reference to more particular, rather than more general, constitutional norms. The principle is based on the understanding that, although the Constitution enjoys superiority over other legal sources, its existence does not threaten or displace ordinary legal principles and its superiority cannot oust legislative provisions enacted to give life and content to rights introduced by the Constitution. In simple terms, the principle can be summarised thus:
>
> > 'Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role.'
>
> Ultimately, the effect of the principle is that it operates to ensure that disputes are determined using the specific, often more comprehensive, legislation enacted to give effect to a constitutional right, preventing them from being determined by invoking the Constitution and relying on the right directly, to the exclusion of that legislation."[175]

[173] *My Vote Counts I* above n 145 at para 53.

[174] Id at paras 121-2, in particular.

[175] *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4) SA 1 (CC); 2022 (7) BCLR 850 (CC) at para 102.

[237] Without claiming to be exhaustive, in addition to *My Vote Counts I* and *Masuku*, I have gone through other judgments of this Court that deal with the principle of subsidiarity.[176] In *New Clicks*,[177] *SANDU*,[178] *Pillay*,[179] *Mazibuko*,[180] *PFE International*,[181] *De Lange*,[182] *Thubakgale*[183] and *Residents of Industry House*[184] the mention of, or pronouncement on, the principle of subsidiarity was about effect giving statutes. Although *Bato Star*[185] did not mention the principle by name, "[i]t was the first decision to give explicit recognition to the doctrine of subsidiarity".[186] In that case this Court held that section 6 of PAJA has codified the grounds of review of administrative action and that, therefore, one could no longer rely on the common law as a basis for review.[187] Of importance, the context was section 33(3) of the Constitution, which provides that national legislation must be enacted to give effect to the rights contained in section 33(1) and (2)[188] and that such legislation must, inter alia, "provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal". In this sense, *Bato Star* was also about effect giving legislation.

---

[176] I have been assisted in this exercise by a collection of a number of these judgments in the *My Vote Counts I* minority judgment.

[177] *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC) at paras 92-7 and 436-7.

[178] *South African National Defence Union v Minister of Defence* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC) at paras 51-2.

[179] *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) at paras 39-40.

[180] *Mazibuko* above n 42 at para 73.

[181] *PFE International v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC) at paras 4 and 32.

[182] *De Lange v Methodist Church* [2015] ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC) at para 53, citing with approval *My Vote Counts I* above n 145 at paras 122, 160 and 180.

[183] *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45; 2022 (8) BCLR 985 (CC) at para 178.

[184] *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC) at para 112.

[185] *Bato Star* above n 48 at paras 21-6.

[186] *My Vote Counts I* above n 145 at fn 100.

[187] *Bato Star* above n 48 at para 25.

[188] Section 33(1) provides that "[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair". And section 33(2) stipulates that "[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons".

[238] Even the minority judgment of Jafta J in *Sali* dealt with the principle of subsidiarity in the context of legislation giving effect to a right in the Bill of Rights.[189]

[239] Recently in *Women's Legal Centre Trust*[190] this Court applied the principle of subsidiarity in a context that was unrelated to an effect giving statute. It held that, despite its holding that the Marriage Act[191] and Divorce Act[192] were defective, under-inclusive and had given rise to a number of rights violations, these Acts were legislation nonetheless. It was inappropriate to hold that the state was obliged by section 7(2) to legislate only in respect of Muslim marriages. The appropriate course was to challenge the constitutionality of the legislation and not merely to allege that the state had failed to fulfil a duty to legislate. Tlaletsi AJ completed the picture thus:

> "If, in the face of legislation alleged to violate constitutional rights, litigants could seek to compel the state to legislate on the basis of section 7(2) directly, without challenging the legislation itself, this would permit litigants to by-pass the relevant legislation, and rely directly on the Constitution. Such a course is exactly what the principle of subsidiarity cautions against. Accordingly, given that the state has, albeit deficiently, enacted legislation with regards to matters of marriage and divorce, the litigants are not permitted to compel the legislature to pass legislation purely by virtue of section 7(2)."[193]

[240] Lastly, this Court invoked the principle of subsidiarity in the context of inter-country adoptions. This was in the case of *AD*.[194] Sachs J held that the principle of subsidiarity was a core factor that governed inter-country adoptions and had to be

---

[189] *Sali v National Commissioner of the SA Police Service* [2014] ZACC 19; (2014) 35 ILJ 2727 (CC); 2014 (9) BCLR 997 (CC) at para 4 and fn 2.

[190] *Women's Legal Centre Trust v President of the Republic of South Africa* [2022] ZACC 23; 2022 (5) SA 323 (CC) at para 82.

[191] 25 of 1961.

[192] 70 of 1979.

[193] *Women's Legal Centre Trust* above n 190 at para 82.

[194] *AD v DW (Centre for Child Law as Amicus Curiae; Department for Social Development as Intervening Party)* [2007] ZACC 27; 2008 (3) SA 183 (CC); 2008 (4) BCLR 359 (CC). I touch on *AD* to complete the picture. Otherwise, it is not relevant to the issue at hand.

adhered to.[195] The judgment explains that the principle is sourced from article 17 of the United Nations Declaration on Social and Legal Principles Relating to the Protection and Welfare of Children, with special reference to Foster Placement and Adoption Nationally and Internationally.[196] Article 17 provides:

> "If a child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the country of origin, intercountry adoption may be considered as an alternative means of providing the child with a family."[197]

[241] With the exception of *Women's Legal Centre Trust* and *AD*, mention of, or pronouncements on, the principle of subsidiarity are about effect giving statutes. It is unsurprising, therefore, that the first judgment also places reliance on the "[o]ne application of the principle [that says] a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right".[198] The legislation that the first judgment mentions is the ERA. A difficulty that I have is that no explanation is given as to the constitutional right the ERA supposedly gives effect to. Without that explanation, the point made by the first judgment is incomplete.

[242] The lack of explanation aside, the long title of the ERA and section 2, which sets out the objects of the ERA, suggest that this Act has nothing to do with giving effect to a constitutional right.[199] I could not pick up any part of the ERA that suggests the contrary.

---

[195] Id at para 49.

[196] Id at para 37.

[197] Id. Of course, there the Court emphasised the fact that in inter-country adoptions the principle is a factor that is subject to the injunction contained in section 28(2) of the Constitution that the best interests of the child are paramount.

[198] First judgment at [149].

[199] The long title of the ERA reads:

> "To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, trading and the import and export of electricity are regulated; to regulate the reticulation of electricity by municipalities; and to provide for matters connected therewith."

And section 2 provides:

[243] I am well aware that, in addition to this Court's jurisprudence, there is a lot of learning on the principle of subsidiarity.[200] I do not deal with what all this learning says on the principle. Suffice it to say Murcott and Van der Westhuizen make the point that the principle must apply even in instances involving legislation that does not give effect to a constitutional right or is not in any other way the result of a constitutional injunction.[201] I am paraphrasing. How the principle must apply is that where there is legislation of the nature I have just described that covers the field on a given subject, a legal remedy must be sought from that legislation and not from other "non-specific" legislation or the common law. The effect of this would be that in the instant matter the residents would be precluded from seeking a review of the reduction decision under PAJA and that, instead, they would have to seek redress under the ERA.

[244] I do not express a view one way or the other on what the authors say. What I say instead is that thus far this Court has not pronounced on this point. If this point is to have any impact at all on the case of the residents, at worst for them it would do no

---

"The objects of this Act are to—

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

(b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic;

(c) facilitate investment in the electricity supply industry;

(d) facilitate universal access to electricity;

(e) promote the use of diverse energy sources and energy efficiency;

(f) promote competitiveness and customer and end user choice; and

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

[200] See, for example, Currie and De Waal *Bill of Rights Handbook* 6 ed (Juta & Co, Cape Town 2016) at 12-3; Du Plessis "Interpretation" in Woolman et al (eds) *Constitutional Law of South Africa* Service 6 (2008) at 152-3 and 158; Van der Walt "Normative Pluralism and Anarchy: Reflections on the 2007 Term" (2008) 1 *Constitutional Court Review* 77; Klare "Legal Subsidiarity and Constitutional Rights: A Reply to AJ van der Walt" (2008) 1 *Constitutional Court Review* 129; Du Plessis "Subsidiarity: What's in the Name for constitutional interpretation and adjudication?" (2006) 17 Stellenbosch Law Review 207; Murcott and Van der Westhuizen "The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on *Motau* and *My Vote Counts*" (2015) 1 *Constitutional Court Review* 7; Quinot et al above n 136 at 135, 333 and 399; and Hoexter and Penfold above n 146 at 149-51.

[201] Murcott and Van der Westhuizen above n 200 at 48 and 61-4.

more than cast some doubt on their *prima facie* right. A definitive holding must be left for the reviewing court and, if there be appeals, appellate courts thereafter. It would be mistaken for this Court, at this stage, to make a final decision on the issue. And, because there has not been a definitive holding one way or the other on the point, section 34 of the Constitution[202] entitles the residents to seek appropriate relief in terms of section 38 of the Constitution.[203] Although, as the first judgment says, the ERA is quite expansive in its reach, it is unlike PAJA, which displaced common law grounds of review and codified them under section 6.[204]

[245] These are not proceedings for a final interdict, which requires a showing of: *a clear right*; an injury that has occurred, is occurring or is reasonably apprehended; and absence of any other satisfactory remedy.[205] The first judgment's categorical and definitive approach pitches the standard too high. It does not recognise that all that need be proven at this stage is a *prima facie* right *that may be open to some doubt*. It seems to me the first judgment requires the showing of a clear right. That cannot be. This is uncharted territory. And whether subsidiarity should finally bar a PAJA review must be decided by the reviewing court.

[246] For completeness, in case it may not altogether be clear why the requirement of a *prima facie* right is relevant to a discussion on subsidiarity, let me offer an explanation. The point is that if subsidiarity were to non-suit the residents, that would mean as a matter of substantive law, the rights they assert could not be vindicated by way of a review under PAJA. At the stage of proceedings for an interim interdict, subsidiarity would serve to show that the proposed review would be a non-starter. That

[202] Section 34 provides that "[e]veryone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

[203] Section 38 provides that "[a]nyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threated, and the court may grant appropriate relief, including a declaration of rights". The section then lists categories of persons who have standing in various circumstances.

[204] See *Bato Star* above n 48 at para 25.

[205] See *Setlogelo* above n 57.

is, the residents would have no right or entitlement to it. They would lack a *prima facie* right. As I say, here we cannot reach that final conclusion.

[247] The first judgment says that it is not open to me to decline to decide the question whether the principle of subsidiarity precludes the residents from seeking a review of the reduction decision under PAJA and requires, instead, that they must seek redress under the ERA. It reasons that this is a legal question and that the legal rule that a *prima facie* right may be open to some doubt relates to evidentiary matter, not legal questions. I disagree. It is so that in *Webster v Mitchell*,[206] the leading and oft cited case on interim interdicts, what was at issue was factual matter. Right from the start the case deals with *Molteno Bros*[207] where – according to *Webster v Mitchell* – the respondent in *Molteno Bros* "had put before the Court on the issue concerned merely a bare denial, so that the learned judge was concerned not with the probabilities between two contradictory versions, but with whether the inherent probabilities of the appellant's case were such that the right was *prima facie* established".[208] Yes, that is plainly about facts.

[248] In *Webster v Mitchell* itself Clayden J also invoked the idea of a right's openness to some doubt in the context of factual matter.[209] What was at issue was whether the applicant had placed before the court enough evidentiary material to establish

[206] *Webster v Mitchell* above n 58.

[207] *Molteno Bros v South African Railways* 1936 AD 321.

[208] *Webster v Mitchell* above n 58 at 1187.

[209] He held at 1189:

> "The use of the phrase '*prima facie* established though open to some doubt' indicates I think that more is required than merely to look at the allegations of the applicant, but something short of a weighing up of the probabilities of conflicting versions is required. The proper manner of approach I consider is to take the facts as set out by the applicant, together with any facts set up by the respondent which the applicant cannot dispute, and to consider whether, having regard to the inherent probabilities, the applicant could on those facts obtain final relief at a trial. The facts set up in contradiction by the respondent should then be considered. If serious doubt is thrown on the case of the applicant he could not succeed in obtaining temporary relief, for his right, *prima facie* established, may only be open to 'some doubt'. But if there is mere contradiction, or unconvincing explanation, the matter should be left to trial and the right be protected in the meanwhile."

Of course, the Court held that whether there should be interim protection of the right was subject to "the respective prejudice in the grant or refusal of interim relief".

prima facie ownership of the horse that was the subject of the application. This says nothing about whether the openness of a right to some doubt can be applied to legal questions. Contrary to the first judgment's categorical statement that this applies only to factual issues, this question has been the subject of intense judicial debate, with views being expressed for and against either position.[210] An example of a judgment that expressed disagreement with the idea of a judge at an interim stage approaching a legal question "half-heartedly" is *Fourie*.[211] Amongst others, Viljoen J said the later decision of a legal question half-heartedly decided earlier by another judge would be at odds with the rule on *res judicata*, would unnecessarily increase costs, and would cause embarrassment to the judge considering the matter later, if they want to differ from the earlier judge's view.[212] Goldstein J differed in *Tony Rahme Marketing Agencies*, saying:

> "Whilst there may be situations where a Court having to decide on an interim interdict has sufficient time and assistance to arrive at a final view on a disputed legal point – in which event it probably ought to express a firm view in order to save costs – situations of urgency arise when decisions on legal issues have to be made without the judicial officer concerned having had the time to arrive at a final considered view. In such a situation [they are] surely forced to express only a *prima facie* view. I cannot see how the expression of such a view and the grant of interim relief only would conflict with the principles of *res judicata*. I also see no embarrassment in an urgent Court judge being overridden by a trial judge . . . . The interlocutory decisions of colleagues, and indeed those of our own, are not binding at later stages of the proceedings and should, and I trust, do yield easily to persuasive arguments indicating error or oversight."[213]

[210] An example of a case that said this question applies only to factual questions is *Ivoral Properties (Pty) Ltd v Sheriff, Cape Town* 2005 (6) SA 96 (C) at para 37. And examples of those that held that it is not confined to evidentiary matter are *V&A Waterfront Properties (Pty) Ltd v Helicopter and Marine Service (Pty) Ltd* [2004] 2 All SA 664 (C); *Beecham Group Limited v BM Group (Pty) Limited* 1976 BP 572 (T) at 579-81; and *Mariam v Minister of the Interior* 1959 (1) SA 213 (T) at 218.

[211] *Fourie v Olivier* 1971 (3) SA 274 (T).

[212] Id at 285E-G.

[213] *Tony Rahme Marketing Agencies SA (Pty) Ltd v Greater Johannesburg Transitional Metropolitan Council* 1997 (4) SA 213 (W) at 215-6.

[249] In *Geyser* Van Oosten J held that "a legal issue should only be decided at the interlocutory stage of the proceedings if it would result in the final disposal of either the matter as a whole or a particular aspect thereof".[214]

[250] I take the view that it does not help to be categorical one way or the other on this. The approach to be adopted must be dictated by the circumstances of each case. Sight should not be lost of the fact that a substantial number of applications for interim relief are brought by way of urgency. There is much to be said for the view that a judge sitting in a busy urgent court does not have as much time as does a judge who hears trials or decides non-urgent opposed matters. Although each judge must strive for the attainment of the best possible outcome in the circumstances, this reality cannot be ignored. Of course, this is not an invitation to judges considering urgent interim interdicts to avoid deciding legal questions which – with the necessary diligence – are capable of definitive decision.

[251] There are legal questions that are capable of easy resolution to any judge worth their salt. Those must be decided definitively. If, as a matter of law, the right asserted by the applicant for interim relief is held not to exist at all, that will be the end of the matter. And that will result in a saving in costs as there will be no subsequent litigation. On the other hand, the legal right may definitively be held to exist as a matter of law and all that may remain for determination at the later proceedings may be whether, on the facts, the applicant has made out a case. There may also be those circumstances where – either because of a combination of factors that include the complexity of the legal question, its novelty, little or no assistance from the litigants' argument, the speed with which the outcome is required and lack of sufficient time for the judge to consider the matter as best they can – the judge may not be in a position to reach a definitive decision on a legal question. In *Johannesburg Municipal Pension Fund* Malan J held:

> "Impressive and erudite arguments were addressed to me on all these grounds. I cannot do justice to all the considerations referred to. All the issues referred to involve

[214] *Geyser v Nedbank Ltd: In re Nedbank Ltd v Geyser* 2006 (5) SA 355 (W) at para 9.

> 'difficult questions of law' and none of them can be described as 'ordinary'. Nor is it desirable to rule at this interim stage that there is no prospect of success on any of these bases of review. The issues are simply too involved ('a serious question to be tried') and of such gravity that they cannot be, and should not be, disposed of in these interim proceedings. The city has disavowed reliance on the notices purporting to amend Notice 6766 and I do not intend dealing with their validity, but accept for the purposes of this judgment the applicants' contentions."[215]

I see no legal impediment to a judge in such circumstances reaching a conclusion that says *prima facie* there is enough pointing to the determination of the legal question in the applicant's favour in the envisaged later proceedings.

[252] Coming to the present question, if what I conclude above was open to the Court determining the application for interim relief, it is open to this Court too. After all, this matter is before us on appeal against what that Court decided. In addition, as my discussion of the question shows, it is complex, novel and, although all counsel presented good arguments on the case in general, arguments on this question were not sufficiently extensive. In any event, it would not be prudent for this Court to decide the question.[216] Of course, this Court employs the interests of justice criterion in deciding certain questions. This is a fitting question for the employment of that criterion. I do not consider it to be in the interests of justice to reach a definitive holding on this question. It is best left for decision by the Court that will hear the PAJA review.

Requisites for an interim interdict

[253] A litigant seeking an interim interdict must show: a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favours the grant of an interim interdict; and that the applicant has no other satisfactory remedy.[217]

---

[215] *Johannesburg Municipal Pension Fund v City of Johannesburg* 2005 (6) SA 273 (W) at para 9.

[216] See *Albutt v Centre for the Study of Violence and Reconciliation* [2010] ZACC 4; 2010 (3) SA 293 (CC); 2010 (5) BCLR 391 (CC) at para 82.

[217] See *Webster v Mitchell* above n 58 at 1187-92 as qualified by *Gool* above n 59 at 687H-688C. This formulation of the requirements was accepted by this Court in *OUTA* above n 54 at para 41.

A prima facie right

[254] As I indicated in the introduction, the first judgment says that the residents have not asserted any right in the Bill of Rights as a basis for their entitlement to the supply of electricity. I think the first judgment's focus on the lack of a right to be supplied with electricity which is sourced from the Bill of Rights looks at the matter too narrowly. This narrow focus is magnified by the analogy that the first judgment draws.[218] Let me demonstrate – by first focusing on the analogy – the existence of rights enjoyed by the residents which bear relevance to this matter and their infringement by Eskom's conduct. In the analogy the first judgment says:

> "The right to life or to dignity may be enhanced for particular classes of persons by claims upon state resources. Every poor person would lead a more dignified life if the state gave them a minimum income every month. That may be a good policy for the state to adopt. It is a matter of considerable public debate. Such a policy may or may not be affordable. But these are not measures that may be claimed as an incident of the right to life or the right to dignity. They should not be decided by the courts. They are matters to be decided by other institutions of a democratic state: the Legislature and the Executive."[219]

[255] Yes, poverty – especially extreme poverty in which a disturbingly large number in our country languish – is an unwelcome phenomenon. But I think the analogy is inapt. The residents' case is not just about poverty. There has been the interposition of something additional; something out of the ordinary. In this regard and only for purposes of illustration, I pay particular attention to the averments of the Ngwathe residents.

[256] In addition to extreme poverty, the sudden and substantial reduction in the electricity supply to within NMD levels has, overnight, subjected residents of the affected areas to the reality of having to contend with what they accurately describe as

[218] First judgment at [132].

[219] Id.

a "human catastrophe". I state the facts based on what the situation was when the residents approached the High Court. That is, based on the situation before the grant of the interim interdict.

[257] The substantial reduction in the electricity supply has had an adverse effect on the treatment of sewage. As a result, raw faecal matter flows into the Vaal River, with dire consequences for the environment and health of the residents. The health hazard arises from the fact that the existing infrastructure for the extraction of water from the river is located such that it draws what is supposed to be potable water from the very area of the river into which the faeces flows.

[258] Relatedly, the inadequate supply of electricity has caused the water purification system to malfunction, further affecting the provision of potable water negatively. That means even if there was no faeces in the water, there would still be an inadequate supply of potable water as a result of the malfunction of the water purification system which, in turn, results directly from the reduction in the electricity supply. There is the spectre of loss of human life and general adverse consequences in the provision of proper healthcare services at hospitals and old age nursing homes. This is as a result of the fact that the hospitals and old age nursing homes in the affected areas have not been spared the effects of the reduction of electricity supply. Economic activity has been affected to such an extent that there is a risk of closure of some businesses and loss of jobs. Children of school going age are also victims as all schools from high schools to nursery schools are negatively affected due to lack of electricity for many hours per day.

[259] On the facts and thus on the rights asserted, there are some commonalities with the case presented by the Lekwa residents.[220]

[260] It is worth noting that Eskom has not cogently denied the facts asserted by the residents. If these facts do not demonstrate an infringement of several rights guaranteed

[220] And I use "some" advisedly because there are differences. But the differences do not affect my approach.

in the Bill of Rights, nothing will. Of course, the implicated rights are the right to dignity, the right to life, the right of access to healthcare services, the right of access to sufficient water (I would add this must surely mean potable and generally usable water, not water contaminated with faecal matter and generally not cleaned properly), the right to an environment that is not harmful to health or well-being and the right to basic education. The rights violations arise directly from Eskom's conduct. Thus, there is simply no comparison with what the first judgment – in concluding its analogy – says may not be claimed as an incident of the right to life or the right to dignity.[221]

[261] The first judgment suggests that the rights relied upon by the residents were not pleaded clearly for Eskom to know the case it had to meet.[222] I disagree. The articulation of the rights relied upon and the facts pleaded in support of the rights violations is clear enough. The first judgment's difficulty stems from its refusal to accept that the relief sought could be obtained on the basis of the rights violations graphically pleaded by the residents. There is simply no way Eskom would have been at sea as to what case it had to meet. To suggest that Eskom would not have known what case it had to meet would be a classic example of *ukuzimela ngesicithi* (a siXhosa saying that means to hide behind a small, short tuft of grass).

[262] At the risk of being repetitive, I need to quote something else the first judgment says. It says:

> "I have identified the rights relied upon by the residents as the basis upon which the Associations contend that the reduction decision is unlawful, and hence reviewable. The more expansive account of the rights of the residents that are said to have been compromised by the reduction decision, taken up in the reasoning of the High Court, and by way of submission before this Court, is not borne out by the pleaded case. This is of no small significance. Eskom was entitled to know the case it had to meet, and,

[221] See the first judgment's analogy at [132].

[222] First judgment at [61].

> in particular, the rights claimed by the residents that are claimed to give rise to a duty owed by Eskom to supply them with electricity."[223]

[263] This misses the point. The residents make a simple case. Eskom's decision of substantially reducing electricity supply has resulted in a breach of several rights protected by the Bill of Rights. That decision was taken without first giving notice or following a fair procedure. That is borne out by the pleaded case.

[264] The first judgment proceeds to make the point that in the absence of a right claimed by the residents to give rise to a duty owed by Eskom to supply them with electricity, Eskom's duty in terms of section 7(2) of the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights is not triggered.

[265] Without deciding the question whether the residents have a constitutional right to a direct supply of electricity by Eskom, it is so that there is contractual privity between Eskom and the municipalities, and not between the residents and Eskom. That matters not. The lack of contractual privity does not stand in the way of the residents asserting other rights protected by the Bill of Rights, which have been infringed by the decision to reduce electricity supply substantially.[224] That is, rights other than the contentious right that the first judgment says they do not enjoy.

[266] The first judgment says the municipalities, and not Eskom, should be that component of the state that must make good the state's obligations under section 7(2). The residents were enjoying all the fundamental rights I have identified. What dramatically and suddenly changed all that was Eskom's implementation of its decision to reduce supply. In terms of section 7(2) of the Constitution which, amongst others, provides that the state must respect the rights in the Bill of Rights, Eskom (an organ of state) had a duty not to conduct itself in a manner that would result in an infringement

[223] Id.

[224] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) (*Allpay II*) at para 49.

of those rights. It had a duty to respect those rights through refraining from acting in a manner that would cause their infringement. That, of course, is subject to the *lawful* exercise of the power Eskom enjoys in terms of section 21(5) of the ERA to reduce or terminate the supply of electricity.

[267] The duty resting on the state to respect the rights in the Bill of Rights is uncontroversial. That is especially so as this Court held in *Juma Musjid*[225] that *even a private person or entity* bears a negative obligation in terms of section 8(2) of the Constitution not to act in a manner that "interfere[s] with or diminish[es] the enjoyment of a right".[226] The state's duties under section 7(2) can be breached "directly" or "indirectly", for instance, when there is a "failure to respect the existing protection [or enjoyment] of the right by taking measures that diminish that protection [or enjoyment]".[227] And, more specifically in the context of what was at issue in that case, the Court held that a private person or entity bears a negative duty "not to impair the learners' right to basic education".[228]

[225] *Juma Musjid* above n 134. Briefly, here is what this case was about. In 1957 a government-aided school was established on property owned by the Juma Musjid Trust. In 2002, the Trust informed the Department of Education that it had taken a decision to establish an independent school on the property and that it would, in due course, afford the Department notice to close the existing school. In 2003, the Trust gave written notice terminating the Department's right of occupation with effect from 31 December 2004. The Department undertook to vacate the premises but did not do so. Following further developments, which included the school continuing to operate on the property, the Trustees, in July 2008, launched a High Court application for the eviction of the school. This Court recognised that there was "no primary positive obligation on the Trust to provide basic education to the learners" much less was there an obligation "on the Trust to make its property available . . . for use as a public school". But this Court held that negative obligations flowing from section 8(2) enjoin private persons or entities – in that case, the Trust – to "not interfere with or diminish the enjoyment of a right". In *Juma Musjid*, at paras 61-5, the Court assessed the reasonableness of the Trust's actions with reference to its willingness to enter into an agreement with the Department, the length of time – including periods of grace – afforded to the Department, and copious communication sent to the Department and extensive negotiations held. There was meaningful engagement. That is not true of this matter. Eskom acted as if no constitutional rights would be impacted negatively by its decision

[226] Id at para 58. Section 8(2) of the Constitution provides:

> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

[227] Id at para 58.

[228] Id.

[268] Also, the relationship between Eskom, the municipalities and residents, on the one hand, and the relationship, in *Joseph*,[229] between the municipality, the lessor and lessee, on the other, is analogous. In *Joseph* the applicants were tenants in a residential property. The lessor owed a substantial amount of money to City Power, the City of Johannesburg's electricity service provider, in respect of the supply of electricity to the property. As a result, the electricity supply was terminated.[230] This Court noted that the "difficulties" that arose in the case were: the fact that the applicants were tenants who had no contractual right to receive electricity from City Power; and the fact that the applicants, instead, paid their electricity bills to the lessor whose company had a contract with City Power for the supply of electricity.[231] The Court then had to answer the question whether "any legal relationship exists between the applicants and City Power outside the bounds of contractual privity that entitles the applicants to procedural fairness before their household electricity supply is terminated".[232] The termination of supply had taken place without City Power giving notice.[233] The applicants contended that the termination of supply without notice was procedurally unfair. The rights that they claimed had been infringed as a result of the termination and which founded the PAJA cause of action were: the right of access to housing in terms of section 26 of the Constitution; the right to human dignity in terms of section 10 of the Constitution; and the contractual right to electricity supply in terms of the contract of lease.[234]

[269] What is of importance is that *Joseph* had to grapple with what constituted "rights" for purposes of PAJA's conception of that term. Before giving an answer on this, Skweyiya J said that the lessor—

[229] *Joseph* above n 51.

[230] Id at para 1.

[231] Id at para 2.

[232] Id.

[233] Id at para 7.

[234] Id at para 12.

"concluded a contract as a 'customer' with City Power for the sole purpose of facilitating the supply of electricity to tenants in his building. He was a conduit. In supplying electricity to [the residential property], City Power knew that it was providing electricity to tenants living in the building. It is therefore, in my view, artificial to think of the contractual relationship between [the lessor] and City Power as being unrelated to the benefits that accrued to the applicants under this contract."[235]

[270] Proceeding to deal with rights, he held:

"The focus of the enquiry therefore is the relationship, if any, between City Power as a public service provider and users of the service with whom it has no formal contractual relationship. This is similar to the approach adopted by Sachs J in *Residents of Joe Slovo*, in which the lawfulness of the occupation of municipal council land by homeless families was considered. Sachs J observed that this question—

> 'must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act . . . . The very manner in which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law . . . . They flow instead from an articulation of public responsibilities . . . and possess an ongoing, organic and dynamic character that evolves over time.'

I am of the view that this case is similarly about the 'special cluster of relationships' that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. At this level, administrative law principles operate to govern these relations beyond the law of contract."[236]

[271] In the present case, Eskom is well aware that the municipalities receive electricity from it for onward supply to the residents. It is certainly also aware of the

[235] Id at para 23.

[236] Id at paras 24-5.

adverse impact a sudden, substantial reduction in electricity supply would have on the residents' fundamental rights. Those facts cry out for conduct on the part of Eskom that recognises this reality. Conduct that respects the residents' constitutional rights that may be infringed by the termination or substantial reduction of electricity supply. Initially, it is for this simple point that I place reliance on *Joseph*.

[272] If, in the interim interdict proceedings, it were to appear unlikely that the intended review would succeed, that would detract from the requirement of a *prima facie* right. The residents complain that the substantial reduction in electricity supply was effected without any notice. Amongst others, this will be the basis of the PAJA review. So, the question is whether the residents can show – for purposes of the proposed review – that they were entitled to procedural fairness under PAJA.

[273] Let me immediately get rid of any possible issue around the fact that there is in existence a contract for the supply of electricity between Eskom and the municipalities. The interposition of the contract cannot alter what is essentially a statutory relationship governed by the ERA between these organs of state. It matters not that the contract makes provision for the reduction or termination of supply. Of importance is the fact that section 21(5) of the ERA provides for the reduction and termination of supply. It would be sophistry to suggest that a reduction or termination of electricity supply was effected in terms of the contract of supply, and not in terms of section 21(5) of the ERA. Indeed, contracts interposed to serve purposes that are concurrently served by statutory fiat would be the simplest stratagem to avoid consequences of the improper exercise of public power.[237] Therefore, the termination of supply is unquestionably the exercise of a statutory power. I then move on to the question of the residents' entitlement to procedural fairness.

[237] It is so, of course, that *Allpay II* above n 224 would serve to block that escape avenue. In *Allpay II* Froneman J held at para 49:

> "Organs of state have obligations that extend beyond the merely contractual. In terms of section 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'."

[274] On that, *Joseph* provides an answer yet again. There, this Court first dealt with whether the termination of supply constituted administrative action. To that end, it had to answer the question whether the termination had a "direct, external legal effect" on the residents. In answering the question affirmatively, it held:

> "I need do no more on the facts of this case than endorse the broad interpretation accorded to [the phrase 'direct, external legal effect'] by the Supreme Court of Appeal in *Grey's Marine*, where it stated that the phrase 'serv[es] to emphasise that administrative action impacts directly and immediately on individuals'. Indeed, a finding that the rights of the applicants were materially and adversely affected for the purposes of section 3 of PAJA would necessarily imply that the decision had a 'direct, external legal effect' on the applicants. Conversely, a finding that the rights of the applicants were not materially and adversely affected would have the result that section 3 of PAJA would not apply – barring, of course, a claim based on a legitimate expectation which was not raised in this case."[238]

[275] *Joseph* found it unnecessary to decide the case on the basis of the alleged infringement of the rights of access to housing and of dignity. It decided it on the basis that the tenants enjoyed the right to receive electricity as a basic municipal service. For the reasons I have stated already, in the instant matter, the several rights asserted by the residents are of relevance for purposes of the intended PAJA review. Let me set out the residents' case on the intended PAJA review more fully.

[276] The Lekwa residents aver that Eskom reduced electricity to within NMD levels without any notice to them and, therefore, without any hearing. They also contend that actual electricity usage is 38% more than the NMD levels and that looking to historic NMD levels for justification for the reduction in electricity supply is irrational, unreasonable and divorced from reality. The Ngwathe residents aver that Eskom's conduct is not genuinely about wanting to keep within NMD levels for the reasons Eskom has given.[239] Rather, Eskom is seeking to force the affected municipalities to

[238] *Joseph* above n 51 at para 27.

[239] I explain this a little bit more when I deal with the balance of convenience.

settle their outstanding debts. Even though not pleaded explicitly, this implicates section 6(2)(e)(ii) of PAJA. This section renders administrative action that was taken for an ulterior purpose or motive susceptible to review.

[277] It matters not even if the Ngwathe residents have not specifically alleged that one of the grounds of review will be that Eskom took its decision for an ulterior purpose. Although ordinarily parties must be held to their pleadings, courts must not be dogmatic about this. Just under a century ago Innes CJ held in *Robinson* held:

> "The object of pleading is to define the issues; and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been."[240]

[278] The Lekwa residents characterise this as a rationality issue. They plead that it is irrational of Eskom to reduce the electricity supply in an attempt to force Lekwa Municipality to pay its debt. Based on this, they then say the means chosen by Eskom are not rationally connected to the purpose sought to be achieved. That is plainly a case founded on section 6(2)(f)(ii) of PAJA.

[279] I am satisfied that the residents have not only demonstrated their entitlement to the pleaded fundamental rights, but have also set out grounds of review which are sufficient for this stage of the proceedings. Whether they will satisfy the reviewing court is for that court to determine.

---

[240] *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198. Maya JA expressed herself in similar terms in *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* [2009] ZASCA 70; 2010 (2) SA 1 (SCA) at para 42 saying:

> "[S]ince pleadings are made for the court and not the court for the pleadings, it is the duty of the court to determine the real issues between the parties, and provided no possible prejudice can be caused to either, to decide the case on those real issues."

[280] The first judgment adopts a restrictive approach to the nature of the rights that may be asserted. It claims in this regard, apparently for purposes of both the interim interdict and the intended PAJA review, that the residents can assert only the right to the supply of electricity by Eskom. I repeat that this is mistaken. On first principles, the nature of the right envisaged by the definition of "administrative action" in section 1, read with section 4(1), of PAJA is not restricted. All that it need be is a right. It may take whatever form based on what we know of that concept in common law, statutory law or in respect of constitutionally protected rights.[241] The only question is whether the decision in issue has adversely (section 1) or has materially and adversely (section 4(1)) affected (or has the capacity so to affect (*Greys Marine*[242])) that right, whatever its nature. It is unsurprising that Quinot and Maree say that—

> "the impact element of the definition of administrative action should not be narrowly interpreted to refer only to private-law or common-law rights or to fundamental rights in the Bill of Rights, but also includes so-called 'public-law rights', which emerge from broad constitutional and statutory obligations placed on organs of state."[243]

[281] According to them, the envisaged right is so expansive as to include what are "obviously much broader than a traditional understanding of legal rights".[244] By this they are referring to what they call "public-law rights".[245] Generally when – outside of the Bill of Rights – the Constitution imposes obligations, it simultaneously creates a corresponding entitlement in respect of each such obligation. Those are the public law rights the authors are referring to. De Ville says "[t]here is no natural limit to what can be understood as falling within the concept of 'rights'".[246] Likewise, I understand

[241] I repeat that for my purposes, I am not concerned with the debate whether "right" includes something more than what we know to be a right. It is not necessary to engage in that debate because here we are concerned with what are unquestionably rights. The debate between the first and my judgments is about what right or rights can properly be asserted for purposes of the interim interdict and intended PAJA review.

[242] *Grey's Marine* above n 95 at para 23.

[243] Quinot et al above n 136 at 93.

[244] Id at para 95.

[245] Id.

[246] De Ville above n 112 at 53.

Hoexter and Penfold – who quote, amongst others, De Ville – not to place any restriction on the nature of the right that may be asserted for purposes of a PAJA review.[247] Again, let me emphasise that I am here not concerned with the question of "interest" or "legitimate expectations". My focus is on rights. That is what is at issue.

[282] To summarise, and leaving out some of the pleaded bases of the intended PAJA review, the residents say that the decision that substantially reduced the electricity supply was taken without giving them notice. More specifically and in answer to the first judgment's suggestion of the holding of a meeting that involved some of the residents, let me point out that the Ngwathe residents aver that a meeting was held between, amongst others, themselves and Eskom *after* the reduction decision had been taken. That does not assist Eskom. According to the Lekwa residents, no meeting was held.

[283] I am satisfied that the residents put up enough for purposes of showing a decision that has had an adverse impact on their rights. I do not understand the difficulty the first judgment has with that, especially since it accepts that the residents have pleaded an infringement of the right to life, the right to human dignity, the right of access to water, the right to basic education and the right to an environment that is not harmful to health or well-being.[248]

[284] Let us strip all this to its bare essentials. A decision substantially reducing the supply of electricity was taken. That decision resulted in a "human catastrophe" characterised by gross violations of the residents' fundamental rights. The residents were not given notice before the decision was taken. No fair process of whatever nature preceded the decision. On first principles, the residents have shown that they have a viable case in the intended PAJA review; a case founded on section 6(2)(c) read with section 4(1) of PAJA. Why the first judgment does not see that escapes me. This is a

[247] Hoexter and Penfold above n 146 at 309-20.

[248] First judgment at [95] to [96].

far cry from the first judgment's suggestion that my judgment relies on nothing more than "deplorable social and economic effects" that leave a judicial lacuna.

[285] It is so, as the first judgment points out, that *Bato Star* held that "it is desirable for litigants who seek to review administrative action to identify clearly both the facts upon which they base their cause of action, and the legal basis of their cause of action".[249] What I summarise above cannot possibly leave any doubt in Eskom's collective mind as to the nature of the pleaded case. I am quite alive to the fact that more has been pleaded. But what I have highlighted is enough to show the existence of a viable PAJA review. So, what shortcomings, if any, there may be about whatever else has been pleaded by the residents cannot detract from this reality.

[286] And as I said, it would be perverse to suggest that the residents cannot rely on the same fundamental rights for purposes of the interim interdict. It is in respect of those same rights that – at the time they sought the interim interdict – the residents were suffering harm, which would be irreparable if the interim interdict were not granted. There is absolutely no reason to restrict the residents to the one right that the first judgment insists upon.

[287] The first judgment engages in a lengthy discourse about the content of the rights relied upon by the residents and whether that entails a claim by the residents to a given quantity of electricity. So as not to do an injustice to what the first judgment says, here it is:

> "None of [the approaches by the High Court and me] commences with the correct starting point: what is the content of the right invoked, and, in particular, does the content of the right include a right enjoyed by the residents to be supplied with a given quantity of electricity by Eskom?"[250]

[249] *Bato Star* above n 48 at para 27.

[250] First judgment at [116].

This is an introduction to a much longer discourse on the content of the rights, including the impact of the rights on the state's budget.

[288] I am at a loss as to why I must start with the content of the rights. I would understand the first judgment's point if there was an issue about the nature of each of the rights that I highlight. Does it not infringe one's dignity to cause them to drink water that is contaminated with faecal matter? Of course, it does. Does the real threat of loss of human life at hospitals and old age nursing homes occasioned by the reduction of electricity supply not constitute a threatened infringement of the right to life? It certainly does. If the flow of raw faeces into the Vaal River is not violative of the right to an environment that is not harmful to health or well-being, I do not know what is. Does the negative impact on schooling caused by the reduced supply of electricity not infringe the right to basic education? Surely, it does. The asserted rights have been established.

[289] Crucially, the residents' case is not a claim to a specific quantity of electricity. Rather, read holistically, the residents' fight concerns the process by which the substantial reduction in electricity supply, which has undeniably had catastrophic effects, came about. That is a far cry from the claim made by the first judgment, which is that the residents are claiming a specific quantity of electricity. Thus, it does not assist the first judgment to straitjacket my approach into having to "demonstrate that the content of the rights [my judgment] references includes the right of the residents to a particular level of supply of electricity".[251] I make no such point. And I do not have to. For the reasons I have given, the following is enough to establish a viable case for a PAJA review. The residents enjoy constitutionally protected rights. Those rights have been materially and adversely affected by Eskom's reduction decision. That decision was taken without following a fair procedure. The same fundamental rights and their infringement satisfy some of the requirements for the interim interdict. It is for this reason that I earlier said I do not need to rely on section 7(2) of the Constitution, but

[251] First judgment at [128].

that I do so because of the first judgment's insistence that Eskom had no obligation whatsoever towards the residents. So, from what I have said, the lengthy discourse in the first judgment about the content of rights at issue, the interpretation of the rights and the impact on the state's budget does not arise from what I hold.

[290] In *OUTA* Moseneke DCJ had this to say about the nature of the right that must be proved in an application for an interim interdict:

> "[T]he *prima facie* right a claimant must establish is not merely the right to approach a court in order to review an administrative decision. *It is a right to which, if not protected by an interdict, irreparable harm would ensue*. An interdict is meant to prevent future conduct and not decisions already made. Quite apart from the right to review and to set aside impugned decisions, the applicants should have demonstrated a *prima facie* right that is threatened by an impending or imminent irreparable harm."[252] (Emphasis added.)

[291] Irreparable harm would definitely ensue if the fundamental rights pleaded by the residents were not protected by an interim interdict. If there is no interdict, there can be no question that you cannot repair the continued indignity of denying people their usual supply of potable water and availing to them, instead, water full of faecal matter. I need make no illustration about the other rights that have also been, and continue to be, violated. It follows as a matter of course that the rights can only be protected through a reversal of the trigger event that resulted in their infringement. That trigger event is the reduction decision and the resultant actual reduction.

[292] In some cases the very question whether the right in issue does exist in law may be contested. In *OUTA* this Court held that "[i]f the right asserted in a claim for an interim interdict is sourced from the Constitution it would be redundant to enquire whether that right exists".[253] The rights invoked by the residents are sourced from the Constitution. So, their existence cannot be contested.

---

[252] *OUTA* above n 54 at para 50.

[253] Id at para 51.

[293] The threshold for an interim interdict in terms of a breached right or in terms of a threat of breach is not showing the *certain* existence of the right. You need only show a right, though at the level of interim relief it may be "open to some doubt".[254] In my view, the residents, who also demonstrate bases for seeking a review, have done more than this test requires. The first judgment takes the view that the residents have not proved the existence of a right to which the interim interdict application is pegged. It reasons that the provision of electricity is a means by which the rights to dignity, life, housing, food, healthcare, water and social security may be secured. It then says that "[a] particular means by which a right may be secured does not make that means the subject matter of the right".[255] Yet again, this misses the point. The point is about Eskom's conduct, which is the direct cause of the breach of the residents' rights.

[294] The first judgment continues immediately after what I have quoted in the preceding paragraph:

> "In the case of the right to housing (section 26) or rights to health care, food, water and social security (section 27), it is for the state to take reasonable measures within its available resources to achieve the progressive realisation of these rights. The state must determine the means by which these rights are progressively realised. But the means to realise the rights do not define the contents of the rights, not least because there may be entirely different, but equally permissible, means used to realise the same right. These rights must be progressively realised. How that is to be done is for the state to determine, provided the measures taken are reasonable. Thus, how the state may use the supply of electricity, through what agency and under what conditions to realise the rights in sections 26 and 27 of the Constitution, is for the state to determine."[256]

[254] See *Webster v Mitchell* above n 58 at 1189 and *Gool* above n 59 at 688A. The requirements for an interim interdict are: a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; the balance of convenience must favour the grant of the interdict; and the applicant must have no other satisfactory remedy available. Of course, in this Court overall, we use the interests of justice standard. See *OUTA* above n 54 at para 41.

[255] First judgment at [112].

[256] Id.

[295] This is a curious approach. Unlike socio-economic rights, the right to dignity, the right to life, the right to an environment that is not harmful to health or well-being and the right to basic education are not subject to progressive realisation in accordance with reasonable measures, which are taken within the state's available resources.[257] The residents aver that the infringements are as a result of Eskom's conduct. And there is a basis for review; this, I dealt with above.

[296] I do not shy away from meeting the first judgment's point frontally. Insofar as socio-economic rights are concerned, the residents are asserting rights they were already enjoying. By way of one example, the residents are saying as a result of Eskom's conduct, water that is supposed to be potable has faeces. Now they cannot drink water which – immediately before Eskom's conduct – they could drink. This has nothing to do with the point about the progressive realisation of socio-economic rights made by the first judgment. This reasoning applies equally to the adverse effect that Eskom's conduct has had on healthcare services.

A reasonable apprehension of irreparable harm

[297] Coming to the second requirement,[258] is there a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted? In this regard, we must look at the impact Eskom's conduct has had on the asserted constitutional rights. As I have said, the substantial reduction of electricity supply has had the effect of violating several of the residents' rights guaranteed in the Bill of Rights. At the time the interim interdict was sought and obtained, the violation was continuing. But for the

[257] Subsections (1) and (2) of section 27 of the Constitution provide:

> "(1) Everyone has the right to have access to—
>
> (a) health care services, including reproductive health care;
>
> (b) sufficient food and water; and
>
> (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
>
> (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[258] I do not understand this requisite to be directly in issue. It is indirectly in issue only because of the fact that the first judgment does not focus on the rights asserted by the residents and also because it takes the view that some of the rights were not pleaded by the residents.

interim interdict, the breach would have been ongoing and the harm suffered would certainly be irreparable. In fact, I believe that much of the suffering the residents say they have been subjected to may not be repaired merely by the restoration of electricity. For example, how do you repair the deeply offensive indignity suffered as a result of being forced to choose between drinking or using water contaminated with faecal matter, on the one hand, and not drinking or using that water at all, on the other? Bear in mind that a significant many in our country live in conditions of extreme poverty. Bottled water is not an option for them.

[298] An interim interdict serves the purpose of halting the continuation of the offending conduct which – for as long as it continues – exacerbates the rights violations. But, and I emphasise for those who might fixate on the bogeyman and think that my approach will cause Eskom to collapse, an interim interdict serves this purpose pending the final determination of the review. It can never be that just because there is a fear of collapse Eskom must be given a licence to ride roughshod over the rights of individuals. If a review of its decisions to reduce or terminate electricity supply is warranted, courts must not shy away from exercising their review power.

Balance of convenience

[299] On this subject, I must consider what this Court held in *OUTA*, which is that—

> "[t]he balance of convenience enquiry must now carefully probe whether and to what extent the restraining order will probably intrude into the exclusive terrain of another branch of Government. The enquiry must, alongside other relevant harm, have proper regard to what may be called separation of powers harm. A court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant's case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm."[259]

[259] *OUTA* above n 54 at para 47. In *Economic Freedom Fighters* above n 62 at para 48, Khampepe J placing reliance on *OUTA* held:

> "We were cautioned by this Court in *OUTA* that, where Legislative or Executive power will be transgressed and thwarted by an interim interdict, an interim interdict should only be granted in the clearest of cases and after careful consideration of the possible harm to the separation of powers principle. Essentially, a court must carefully scrutinise whether granting an interdict

[300] The Court added that "one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights".[260] And it noted that *OUTA* was not such a case.

[301] The Court emphasised the fact that it was required to intrude into a policy laden and polycentric decision of the Executive.[261] The decision was "about the ordering of public resources, over which the Executive Government disposes and for which it, and it alone, has the public responsibility".[262] And "the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government and domain".[263] All this is what informed the Court's point on separation of powers harm.[264]

[302] On my reading of *OUTA*, the fact that the harm grounding the interim interdict sought amounts to a breach of one or more fundamental rights protected by the Bill of Rights tempers the impact of what may otherwise be too stringent a test. As Hoexter and Penfold observe, the overemphasis of "clearest cases" may have the effect of: (a) being overly favourable to the public authority; and (b) not paying sufficient regard to the significantly important factor of protecting fundamental rights.[265] Raboshakga says "[t]he test adopted by the *OUTA* Court provides the space for a consideration of competing interests, in particular, the rights interpretation and

---

> will disrupt Executive or Legislative functions, thus implicating the separation and distribution of power as envisaged by law. In that instance, an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out."

[260] *OUTA* above n 62 at para 47.

[261] Id paras 67-8.

[262] Id at para 67.

[263] Id.

[264] On this point, the Court at para 65 of *OUTA* above n 62 appeared to lay emphasis on decisions of the Executive or Legislative arms of Government. Perhaps that is to be understood in the context of the fact that the case concerned the exercise of Executive power at a high level, i.e. at ministerial level. I need not get into what the position should be if the exercise of power is at a lower level, for example, at the level of an administrative functionary or at the level of an organ of state like Eskom.

[265] Hoexter and Penfold above n 146 at 806.

enforcement".[266] Indeed, *OUTA* does recognise – as an *important consideration* – the question "whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights".[267]

[303] *OUTA* must be read in the context of the fact that what was at issue there was a highly policy laden decision by a member of the Executive arm of government *and* violations of fundamental rights protected in the Bill of Rights were not at issue. In the main, it is those two considerations that informed the Court's final conclusion.[268] I believe that the role to be played by this factor must depend on the nature of the Executive decision. Ordinarily, this factor must apply on a sliding scale. The more policy laden or polycentric the decision, the more the role this factor must play in influencing the court's determination. The lesser the policy-ladenness or polycentricity, the lesser the influence of this factor. But courts must never lose sight of the fact that this remains a balancing exercise. Affected fundamental rights must always play a critical role in that balance. And in some cases the affected rights may be of such a nature and their breach so grievous that they may influence the decision in favour of the victim of the rights violation even in the face of a highly policy laden and polycentric executive decision.[269] The ultimate question is: what is the outcome dictated by the balancing exercise?

---

[266] Raboshakga "The Separation of Powers in Interim Interdict Applications" (2013) 5 *Constitutional Court Review* 366 at 372.

[267] *OUTA* above n 54 at para 47.

[268] Hoexter and Penfold above n 146 at 805.

[269] Raboshakga, above n 266 at 376, says that "[t]he separation of powers plays a role, but can be outweighed by other factors". At 373, the author also says that on an alternative reading of *OUTA*—

> "the Court was not establishing a new general rule of 'abstinence' in policy-laden or polycentric matters. Instead, the Court was emphasising that, in the context of interim relief interdict cases against the state, the doctrine of separation of powers may possess greater weight than in other circumstances. . . . Under such circumstances, courts must tread cautiously in order to respect the authority of the Executive to make policy choices."

In *City of Cape Town v South African National Roads Agency Ltd* [2013] ZAWCHC 74 (WCC) at para 76 Binns-Ward J held:

> "*OUTA* does not enjoin a culture of undiscriminating deference by the courts . . . when seized of applications for interim interdictal relief in particular to executive conduct. The judgment does not abjure the courts' constitutional duty to uphold the rule of law and to ensure, as far as possible, the achievement of effective remedies for breaches of fundamental rights, including the right to lawful, reasonable and procedurally fair administrative action."

[304] An example of this Court's decision involving an interim interdict where rights violations took centre stage in the face of a policy laden decision of a municipality is *South African Informal Traders*. There Moseneke DCJ held:

> "[T]he eviction of traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important component of the right to human dignity. Without it they faced 'humiliation and degradation'. Most traders, we were told, have dependants. Many of these dependants are children, who also have suffered hardship as the City denied their breadwinners' lawful entitlement to conduct their businesses. The City has not disputed this. The City's conduct has a direct and ongoing bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services."[270]

[305] In the present case the harm suffered, which was continuing at the time the interim interdict was sought and obtained, does amount to a breach of several fundamental rights protected by the Bill of Rights. The rights violations at issue are most atrocious and must count for quite a lot in the balancing exercise. As I said earlier, very few rights violations surpass what the residents have been subjected to. On balance and without any hesitation, I conclude that the balance of convenience certainly favours the residents. Who would want to be subjected to this "human catastrophe" (e.g. to drink and use water contaminated with faecal matter and generally not cleaned properly even absent the faeces-related problem) whilst a review is winding its way through our court system? In addition, it is not as though in the interim Eskom cannot provide the additional electricity. It can. It has done so well over the NMD for years; and what it has been doing is to levy penalties on the municipalities for electricity provided in excess of the NMD. Has anything changed which now makes it impossible for Eskom to continue doing so?

[270] *South African Informal Traders Forum v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) at para 31.

[306] The Ngwathe residents refer to and quote from correspondence in which Eskom – in so many words – indicated to at least one of the municipalities its preparedness not to lower supply to levels that are within the NMD *if the municipality paid its outstanding debt by a stipulated deadline*. Therefore, all this appears to be a well calculated debt collection strategy. Surely, this must be a relevant factor to the balance of convenience element. It tends to show that the skies will not fall if – *purely in the interim* – Eskom continues to provide electricity at above NMD levels. I would sooner have the residents of the municipalities – *purely on an interim basis* – living lives that are as near as possible to wholesome, than subject them to the current "human catastrophe".

[307] I am not unmindful of Eskom's version that being required to supply electricity above NMD levels will put the dilapidated infrastructure of the municipalities and the national grid under additional strain. But what Eskom says in this regard rings hollow in the face of its attempt to extract payment on pain of effecting a reduction in the electricity supply. Put differently, indications are that – had payment been forthcoming – Eskom would have supplied electricity above NMD levels notwithstanding the concerns it now puts forth.

Other satisfactory remedy

[308] I dealt with this extensively above. The High Court's acceptance of the fact that this requirement has been met must stand.

[309] In conclusion, leave to appeal must be granted, but the appeal must fail.

Order

[310] The following order is made:

1. Leave to appeal is granted.
2. The appeal is dismissed with costs, such costs to include the costs of two counsel.

For the Applicant:	S Shangisa SC and L Rakgwale instructed by Maponya Incorporated
For the First Respondents:	H van Eeden SC and DH Wijnbeek instructed by Lou Van Wyk Incorporated and Andreas Peens Attorneys