

SOUTH AFRICA / JUDGMENT

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

[2017] ZAGPPHC 199

COURT

North Gauteng High Court, Pretoria

BEFORE

Murphy

CASE / FILE NUMBER

99984/2015

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IN

THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE:

24/5/2017
Case
numbers: 99984/2015
4545/2017
3078/2017
19819/2017
In

the applications between:

AFRIFORUM
NPC &
OTHERS Applicants
ASTRAL OPERATIONS LIMITED &
ANOTHER
BRIDGESTONE SA (PROPRIETARY)
LIMITED & OTHERS
MEDICLINIC
BRITS (PROPRIETARY) LIMITED & OTHERS
and
ESKOM
HOLDINGS SOC LIMITED &
OTHERS Respondents

JUDGMENT

Murphy J

1. This matter originally involved four applications brought by: i) Astral Operations Limited and others (“the Astral applicants”) – case number 4545/17; ii) Bridgestone SA (Pty) Limited and others (“the Bridgestone applicants”) – case number 3078/17; iii) Mediclinic Brits (Proprietary) Limited (“Mediclinic”) – case number 19819/17; and iv) Afriforum NPC and others (“Afriforum”) – case number 99984/15.
2. The applications are brought against Eskom Holdings Soc Ltd (“Eskom”) as well as various other respondents. In three of the applications only Eskom actively opposed the application. In the application brought by the Astral applicants, the Lekwa Municipality initially also opposed the application. However, during the course of argument the parties in the Astral application reached a settlement, which I will briefly discuss later. The other respondents in the four applications abide the decision of the court.
3. The applications have not been consolidated but were set down for hearing together because the same key legal issues arise in each.
4. The applications challenge Eskom’s decisions to implement scheduled interruptions of the supply of electricity to three

municipalities: Madibeng, Lekwa and Kamiesberg (collectively “the municipalities”).[1] The applications brought by the Bridgestone applicants and Mediclinic concern Madibeng; the application brought by the Astral applicants

concerns Lekwa; and the application brought by Afriforum concerns Kamiesberg. Eskom has resorted to scheduled interruptions in certain municipalities in an attempt to collect arrear debts owed to it for the supply of electricity. The applicants contend that Eskom’s conduct in all the cases is unconstitutional, unlawful and unreasonable and should accordingly be reviewed and set aside.

The statutory framework

5. Electricity is distributed in South Africa in large measure by municipalities established in terms of section 2 of the Local

Government: Municipal Systems Act, 32 of 2000 (“the Systems Act”) read with section 155 of the Constitution. Sections 152 and 153 of the Constitution oblige municipalities to strive, within available resources, to ensure the provision of services to communities in a sustainable manner and to structure and manage their budgeting and planning to give priority to the basic needs of communities. “Services” and “basic needs” include electricity.[2] These constitutional obligations are reinforced by national legislation.[3]

6. The Electricity Regulation Act[4] (“the ERA”) is the legislative scheme regulating the supply of electricity in South Africa. Its objects include the achievement of an efficient, effective, sustainable and orderly operation of the electricity supply infrastructure in South Africa and to facilitate a fair balance between the interests of customers and end-users, licensees, investors in the electricity supply industry and the public.[5] It establishes the National Energy Regulator of South Africa (“NERSA”) as the independent body responsible as the custodian and enforcer of the regulatory framework.[6] In terms of section 4 of the ERA, NERSA is obliged to consider applications and issue licences for the operation of generation,

transmission or distribution facilities;[7] and may mediate disputes between generators, transmitters, distributors, customers or end-users, and undertake investigations and inquiries into the activities of any licensee.[8] Section 7 of the ERA prohibits the generation, transmission or distribution of electricity without a license issued by NERSA, which

is empowered to issue licenses to parties wishing to generate, transmit or distribute electricity, or be involved in the trading of electricity.[9] In terms of section 15 of the ERA, NERSA is required to set an electricity tariff for a licensee such that the licensee is able to cover the costs of its licensed activities, and earn a reasonable rate of return.[10] NERSA may also impose conditions on the licence as to inter alia, the area of electricity supply to which the licensee is bound; the classes of customers that may be supplied by a licensee; and the termination of electricity supply to customers and end-users under certain circumstances.[11]

7. The supply of electricity in South Africa is thus divided into three functional components generation, being the production of electricity by any means; transmission - the operating of power lines and substation equipment that operate at a nominal voltage of 132kV and above; and distribution - the function of owning, operating and distributing electricity through an electricity network at a nominal voltage of less than 132kV.
8. The functions of generation and transmission of electricity in South Africa are carried out by Eskom. It is the only holder of a licence for the generation and transmission of electricity and exercises a licensed monopoly over the supply of electricity in South Africa. Eskom therefore is responsible for the generation of all electricity within South Africa. It is a major public entity in terms of Schedule 2 of the Public Finance Management Act[12] (‘the PFMA’), and therefore an organ of state.[13] It has approximately 5 949 209 customers spread across South Africa. Approximately 20 809 of these customers are classified as “large

power users”, of which 801 are municipalities. The distribution function is either carried out by Eskom directly to electricity

consumers or it may be carried out by one of a number of licensees, whom NERSA has licensed to distribute electricity, the majority of whom are municipalities.

9. Municipalities licensed by NERSA distribute electricity to end-users such as the applicants and the general public at tariffs approved by NERSA. In terms of sections 84(1)(c) of the Local Government: Municipal Structures Act[14] (“the Structures Act”), district municipalities are empowered to manage the bulk supply of electricity to end-consumers.
10. Section 27 of the ERA provides that, in relation to the exercise of its powers in respect of the supply of electricity, a municipality must inter alia: (i) provide basic reticulation services free of charge, or at a minimum cost, to certain classes of end-users; (ii) ensure sustainable reticulation services through effective and efficient management; (iii) must report to National Treasury and NERSA; and (iv) keep separate financial statements, including a balance sheet of its reticulation business. This means that once electricity is delivered by Eskom to the municipal switchgear, the municipality is responsible for performing the distribution function.
11. Eskom supplies the licensed municipalities in bulk at a pre-determined tariff, and the municipalities then re-sell electricity to end-users within their municipal borders at a mark-up. The terms on which electricity is supplied by Eskom to municipalities

are recorded in electricity supply agreements (“ESAs”). In this arrangement municipalities are “customers” of Eskom for purposes of the ERA[15], and the parties (such as the applicants) who purchase electricity from municipalities are end-users.[16] Eskom invoices municipalities monthly for the supply of electricity in terms of the ESAs concluded with each municipality. Municipalities

are obliged to effect payment of all amounts owing in terms of section 41 of the Local Government: Municipal Finance Management Act[17] (“the Municipal Finance Act”).

12. Eskom supplies bulk electricity to municipalities at pre-defined points. From these points of supply, municipalities are responsible

for the reticulation of electricity to end-users, who purchase electricity from their respective municipalities. The electricity

supply network is designed in a way that it is not possible for Eskom ordinarily to isolate supply to selected end-users.

13. Thus the duties of municipalities to pay Eskom and to distribute to end-users within their area of jurisdiction are sourced in the Constitution and reinforced by the two legislative schemes, one for local government and the other regulating electricity supply.
14. Section 21 of the ERA sets out the powers and duties of licensees vis-à-vis their customers. The relevant part dealing with the reduction or termination of supply reads:

- (1) A licence issued in terms of this Act empowers and obliges a licensee to exercise the powers and perform the duties set out in such licence and this Act, and no licensee may cede, transfer any such power or duty to any other person without the prior consent of the Regulator.....
- (5) A licensee may not reduce or terminate the supply of electricity to a customer, unless —
 - (a) the customer is insolvent;
 - (b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or
 - (c) the customer has contravened the payment conditions of that licensee.

The general background

15. Because of widespread delinquency it has become necessary for Eskom to take extraordinary steps to collect substantial outstanding debts from various municipalities across South Africa. In the period March 2016 to November 2016, total municipal debt owed to Eskom increased from R6 billion to R10.2 billion. As at the end of November 2016, twenty defaulting municipalities owed Eskom approximately R7.476 billion of which ten owed approximately R6.032 billion. Seventy four municipalities were overdue in respect of debts exceeding R10 million; and ninety nine municipalities were overdue in respect of debts exceeding R500 000. In the circumstances, it has become unsustainable for Eskom to continue to supply bulk electricity to municipalities that do not pay for it. Eskom needs to collect the outstanding debt to ensure its financial stability. Eskom's engagements with municipal officials in an attempt to recover the debt and to secure compliance with the municipalities' obligations until fairly recently have been largely unsuccessful.
16. Eskom avers that it has become urgent to collect revenue from all offending municipalities in order to ensure that: (i) its cost of debt for capital expansion does not become unmanageable; (ii) it is not compelled to raise funds on the capital markets to meet operating expenses; and (iii) it can maintain and expand electricity generation to meet the needs of all South Africans. This has become more important in light of recent credit ratings downgrades in relation to Eskom's debt.
17. Eskom borrows money to fund capital projects necessary for it to maintain and grow its capacity to generate and distribute electricity. This debt comes at a significant cost, which increases if Eskom is unable to collect revenue owing to it effectively. This is because lenders evaluate Eskom's ability to collect revenue in considering whether, and on what terms, to extend debt facilities to Eskom. If Eskom is unable recover funds owed to it for electricity supplied, it will be compelled to incur additional debt at unaffordable rates to fund operating costs. Operating costs should be funded by revenue collected from the sale of electricity to municipalities, and other customers, and not through borrowings. Borrowing money at a high cost to fund operational requirements is not sustainable, and will lead to an exponential increase in electricity generating costs to the detriment of all South Africans.

18. Should Eskom not be able to recover municipal debts, and be compelled to continue to supply bulk electricity to municipalities that do not pay for it, it will face the prospect of a significant write-off at the end of the financial year. This, coupled with the current low rate of debt recovery, has a negative impact on the fundamental financial metric: earnings before interest, tax, depreciation and amortisation (“EBITDA”), a measure used by ratings agencies to determine credit ratings. Eskom’s EBITDA is negatively affected by non-payment of electricity charges, and was the main cause of the recent downgrading of Eskom’s credit rating by ratings agencies.
19. Eskom is moreover statutorily obliged to collect all revenue owed to it in terms of section 51(1)(b)(i) of the PFMA and municipalities have a concomitant obligation to Eskom to pay for the electricity they distribute to end-users.
20. In November 2016, Eskom gave notice of its intention to interrupt the supply of bulk electricity to forty four municipalities, and called for representations to be made by interested and affected parties. The decisions to interrupt supply to the relevant municipalities were taken pursuant to notice and comment procedures, in terms of which interested parties were invited to submit comments on Eskom’s planned course of action. After receiving and considering comments from interested persons, Eskom ultimately elected to pursue planned interruptions during pre-arranged and advertised times. It asserts it is permitted to proceed in this fashion under section 21(5) of the ERA where a customer has failed to honour an agreement for the supply of electricity or has contravened the payment conditions of the licensee.
21. Eskom’s decision in November 2016 to interrupt supply to forty four municipalities had a positive outcome and resulted in it concluding repayment plans in respect of thirty municipalities (including Madibeng and Kamiesberg) and collecting approximately R980 million between the period November 2016 and January 2017. This rendered it unnecessary for Eskom to proceed with the scheduled interruptions in those cases and it accordingly withdrew its decisions to interrupt supply.
22. Despite that, the remaining applicants (the Bridgestone applicants, Mediclinic and Afriforum) all anticipate further inconvenience and disruptions to the activities of the residents of Madibeng and Kamiesberg by possible future interruptions of electricity supply. They accordingly persist with their challenges to Eskom’s earlier decisions, on diverse grounds, despite the decisions not having been implemented.
23. Each applicant seeks different relief against Eskom, which I deal with more fully later. In summary, they seek variously: i) declaratory orders to the effect that Eskom is not permitted to interrupt the supply of electricity to any local authority as a means to collect acknowledged debts owed to it; ii) final interdicts interdicting Eskom from exercising the power to interrupt electricity as a debt collection measure in respect of any local authority; alternatively iii) interdicts restraining Eskom from

exercising such power without in each instance first obtaining an order of court authorising it to do so; and iv) orders reviewing and setting aside Eskom's decisions to interrupt electricity to the municipalities on constitutional and administrative law grounds. Moreover, the Bridgestone applicants and Afriforum challenge the constitutionality of section 21(5) of the ERA and invite the court to read into the section a requirement of judicial pre-authorisation for the termination or reduction of the supply of electricity when employed as a means of debt collection.

The Lekwa application - Astral

24. When Eskom took its decision in late 2016 to implement scheduled interruptions of supply to the Lekwa municipal area, Lekwa was indebted to Eskom in the amount of approximately R300 million. Lekwa had breached two previous acknowledgements of debt concluded in May 2015 and May 2016. Despite numerous engagements between representatives of Eskom and municipal officials, Lekwa continued to default on its admitted payment obligations. On 25 November 2016, Eskom published a notice of its intention to interrupt the supply of bulk electricity to Lekwa, and called for representations to be made by interested parties. It received representations from the Astral applicants. Eskom considered these representations, but nonetheless decided in January 2017 to proceed with scheduled interruptions of supply to Lekwa. Eskom did not withdraw its decision in relation to Lekwa as it did in other municipalities and evinced an intention to proceed with supply interruptions to Lekwa.
25. The Astral applicants made out a compelling case in their application that the decision to interrupt electricity supply to Lekwa would have negative and disproportionate financial, commercial, industrial relations and health consequences for its daily operations. None of them was in arrears in any of their electricity payments to Lekwa. Their consumption accounted for a substantial percentage (more than 50% on average) of the electricity supplied by Eskom to Lekwa. The companies are the economic backbone of Lekwa and their sustainable operation is crucial to the survival of the Lekwa local economy. Their production processes are particularly vulnerable to breaks in the electricity supply and would require additional start-up time after each interruption. They submitted that it was therefore incumbent on Eskom before making a decision to interrupt supply to have regard to the particular facts relevant to their production processes, the extent of their electricity consumption relative to the total electricity consumption in Lekwa, their centrality to the Lekwa local economy, their unblemished track record of paying their electricity accounts, and their tender to pay electricity accounts directly to Eskom.
26. They therefore contended that Eskom was obliged to consider whether special arrangements could be made with them which would enable Eskom to avoid disconnecting the entire Lekwa municipality. Any failure by Eskom to do so would render its decision to interrupt supply unconstitutional and unreasonable and thus subject to review under the Constitution and the Promotion of Administrative Justice Act[18] ("PAJA"). In addition to the general relief mentioned above, the Astral applicants sought an order (as just and equitable

relief in terms of section 172(1)(b) of the Constitution[19] in respect of Lekwa's unconstitutional conduct) that until such time as Lekwa paid its arrears to Eskom, it and other end-consumers of electricity in that municipality are authorised to pay Eskom directly for electricity consumed by them.

27. As mentioned, Eskom and the Astral applicants reached a settlement agreement during the course of argument at the hearing of the application. On 3 May 2017 I made the agreement between them an order of court and the Astral applicants and Lekwa withdrew from the proceedings. The order provides inter alia for the Astral applicants to pay the monthly electricity payments owed by them to Lekwa directly to Eskom and for Eskom not to disconnect the electricity supply to Lekwa for reasons other than technical necessity for so long as the Astral applicants comply with the payment arrangement.

The Kamiesberg application - Afriforum

28. The earliest decision taken by Eskom to interrupt supply to a municipality was that related to Kamiesberg in the Northern Cape. It has been challenged by Afriforum, a non-profit company whose principal business is the advancement and advocacy of democracy by stimulating civil society participation in constitutional issues.
29. During 2015, representatives of Eskom held various meetings with municipal officials regarding Kamiesberg's indebtedness. As at 31 March 2015, the total municipal arrear debt greater than thirty days was R4,6 billion. On 10 April 2015 Eskom published a notice on its website to inform all parties likely to be materially and adversely affected that it contemplated interrupting bulk electricity supply to defaulting municipalities across the country with effect from 5 June 2015. The notice contemplated a regulated interruption of electricity supply from Monday to Friday at 06h00 - 10h00 and 17h00 - 21h00; and Saturday and Sunday at 7h00 - 10h00 and 17h00 - 20h00; and was intended as a debt collection and credit control measure.
30. After the notice was published, all of the targeted municipalities, including Kamiesberg, concluded repayment agreements with Eskom. Kamiesberg breached that agreement, and on 13 November 2015, Eskom published a further notice directed at Kamiesberg declaring its intention to disrupt the electricity supply, and called for written submissions before 14 December 2015. Eskom received written representations from members of the public and Afriforum, and was in the process of considering them when Afriforum launched the present application on 17 December 2015, seeking interdictory relief.[20] On 12 January 2016, Eskom and Kamiesberg concluded a revised payment plan in which Kamiesberg acknowledged that it was indebted to Eskom in an amount of R3 034 882 and agreed to pay the debt off at a rate of R433 554 per month over the ensuing seven months. In light of this repayment plan Eskom agreed not to proceed with its planned interruption of supply and has not done so since.

31. Afriforum originally sought orders declaring that Eskom is not entitled as a debt collection and credit control measure to interrupt

the electricity supply to any local authority and that Eskom is obliged to submit its disputes regarding non-payment of bulk electricity supply by local authorities to arbitration or mediation before NERSA. It also sought interdicts restraining Eskom from interrupting the electricity supply to Kamiesberg and other municipalities as a debt collection and credit control measure.

32. On 17 March 2017, and at the hearing of this application, Afriforum amended its notice of motion to seek far-reaching relief in the following terms:

1. It is declared that the First Respondent is not entitled as a debt collection and credit control measure to interrupt the electricity

supply to any local authority resulting in the interruption of electricity supply to the towns and/or points of electricity supply

within the jurisdiction area of a local authority.

2. In the alternative to alternatively accumulatively with prayer 1:

2.1 It is declared that section 21(5) of the Electricity Regulation Act 4 of 2006 (ERA) is inconsistent with section 34 of the Constitution;

3. It is declared that the First Respondent is not entitled to terminate the electricity supply as contemplated in paragraph 1 above unless and until one or more or all of the following occurred:

3.1 Eskom has obtained a court order authorising it to terminate the electricity supply to the relevant local authorities as a debt

collection and credit control measure.

3.2 Eskom has requested the Eighth Respondent (NERSA) to revoke a licence in terms of section 17 of the ERA.

3.3 Eskom has in terms of section 18 of the ERA referred the contravention or failure by the relevant local authorities to comply

with their licensing conditions to the Eighth Respondent (NERSA) and the remedies provided for in section 18 of ERA have been exhausted

against the relevant local authorities.

3.4 Eskom has in terms of section 19 of ERA requested the Eighth Respondent (NERSA) to apply by way of Notice of Motion to the High

Court for an order suspending or revoking a licence granted to a local authority.

3.5 Eskom has in terms of Section 30 of the ERA requested the Eighth Respondent (NERSA) to act as mediator in relation to a dispute

arising out of the ERA.

3.6 Eskom has laid a complaint with the Eighth Respondent (NERSA) in terms of section 32 of the ERA pertaining to the failure by the local authority to comply with its licensing conditions.

3.7 Eskom has declared an intergovernmental dispute with the relevant local authorities in accordance with Chapter 3 of the Constitution of the Republic of South Africa, read with section 42 of the Intergovernmental Relations Framework Act 13 of 2005.

3.8 Eskom has in terms of section 44 of the Local Government: Municipal Finance Management Act 56 of 2003 ("the MFMA")

referred the dispute with the local authorities to the National Treasury to mediate a dispute of a financial nature between organs of state.

3.9 Eskom has requested National Treasury in terms of section 216 of the Constitution, read with section 38 of the MFMA to stop the transfer of funds to the relevant local authority and/or to pay Eskom from those funds.

3.10 Eskom has notified the MEC for Local Government in accordance with Chapter 13 of the MFMA that there is a serious financial problem in a municipality.

3.11 Eskom has requested the Ninth Respondent (the Minister of Co-operative Governance and Traditional Affairs) to revoke the authorisation to a local municipality to supply bulk electricity.

3.12 Eskom has requested the relevant Premier of the relevant Provincial Government to intervene by taking appropriate steps to fulfil the executive obligations of a municipality as intended by section 139 of the Constitution as read with section 139 of the MFMA.

3.13 Eskom has implemented a system whereby electricity consumers in the area of jurisdiction of a defaulting local municipality may make direct payments to Eskom.

3.14 Eskom has referred the dispute with a municipality to dispute resolution in terms of clause 25 of its Electricity Supply Agreement

with such municipality.

4. A final interdict be granted in terms whereof the First Respondent (Eskom) be interdicted and restrained from interrupting the

electricity supply to the Second Respondent (resulting in the interruption of electricity supply to the towns and/or points of

electricity supply within the jurisdiction area of the Second Respondent) as a debt collection and credit control measure before it has exhausted the remedies listed in paragraphs 3.1 to 3.14 above.

5. A final interdict be granted in terms whereof the First Respondent be interdicted and restrained from interrupting the electricity supply to any local authority (apart from the Second Respondent) resulting in the interruption of electricity supply to the towns and/or points of electricity supply within the jurisdiction area of any local authority (apart from the Second Respondent) as a debt collection and credit control measure before it has exhausted the remedies listed in paragraphs 3.1 to 3.14 above.
33. The legal basis for such far-reaching relief is insufficiently articulated in Afriforum's heads of argument and has proved to be something of a moving target.
34. In the first instance, Afriforum suggests that section 21(5) should be "read down" to include a requirement of judicial

pre-authorisation before the power to reduce or terminate or reduce electricity supply to a municipality is exercised. Reading down is a method of statutory interpretation postulated in section 39(2) of the Constitution which enjoins every court when interpreting legislation to promote the spirit, purport and objects of the Bill of Rights. Hence, it is a fundamental principle of our law that every statute must be interpreted in a manner that is consistent with the Constitution, insofar as the language of the construed provision reasonably permits. Reading down does not follow a finding of invalidity, but avoids such a finding by choosing an interpretation

that does not violate the Constitution. The purpose of reading down is to avoid inconsistency between the law and the Constitution and the technique is limited to what the text is reasonably capable of meaning.³⁷

35. Afriforum submitted further that Eskom's conduct in interrupting the electricity supply without prior recourse to the

courts and without exhausting its internal remedies against the municipalities who fail to pay promptly for the bulk electricity,

denies end-users access to courts and amounts to self-help. The approach taken by Eskom, it argued, is inconsistent with the right

enshrined in section 34 of the Constitution, which provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or, where appropriate, another independent and impartial

tribunal or forum.

36. In its supplementary heads Afriforum stated baldly that "the action of termination" is contrary to the principle of legality.
37. Afriforum's assertion of unconstitutionality and illegality forms the basis of its claim for declaratory and interdictory relief and its allegation that its clear rights have been infringed.

38. Afriforum suggested that the court should ask two questions in determining the existence of its clear right: the first

question is whether a right in the Bill of Rights has been infringed by section 21(5) of the ERA or by the conduct of Eskom and secondly whether the infringement can be justified as a permissible limitation of the constitutional right to electricity of citizens in the municipal areas of defaulting local municipalities. That much is trite.

39. Afriforum however failed in its papers and heads of arguments to perform any limitations analysis under section 36 of the Bill of Rights. Instead it set about a detailed analysis to show that there are other ways to resolve the problem of municipal debt, being the processes identified in paragraph 3 of its amended notice of motion. It offered no clear legal basis for obliging Eskom to follow these alternative methods instead of or before exercising the power under section 21(5) of the ERA. On a generous approach, there are a few possibilities. Firstly, one might find that the fourteen requirements in prayer 3 of the notice of motion may be mandatory and material procedures or conditions prescribed by legislation, non-compliance therewith permitting review under section 6(2)(b), 6(2)(f)(i) or 6(2)(i) of PAJA; or perhaps under the principle of legality. Secondly, the failure to pursue the alternative remedies or to consider them might be construed to be a failure to take account of relevant considerations and thus reviewable in terms of section 6(2)(e)(iii) of PAJA. Thirdly, the submission may be that the exercise of the power under section 21(5) of the ERA will infringe the principle of proportionality and be unreasonable unless these “less restrictive remedies” are not pursued first and thus would be reviewable under section 6(2)(h) of PAJA. Fourthly, the failure of Eskom to follow one of the alternatives in preference to the exercise of the section 21(5) power may support a conclusion that the limitation of the bill of rights infringement is not reasonable or justifiable. Fifthly, it could be argued (at a stretch) that the requirements should be read into section 21(5) of the ERA to ensure constitutional consistency.

40. As stated, the formulation of Afriforum’s complaint is ambiguous. It makes no reference to PAJA and rests on a superficial

allusion to sections 34 and 36 of the Constitution. For reasons that will become apparent presently, there is fortunately no need to resolve the dilemma created by this lack of clarity and precision in pleading.

The Madibeng applications – Bridgestone

41. The Bridgestone application was brought by eight applicants, all of whom are companies conducting business and consumers of electricity in Madibeng.

42. The Madibeng municipality has been in financial difficulty for some time and has defaulted on its obligations to Eskom repeatedly. On 30 March 2015 following negotiations with Eskom, Madibeng concluded a written acknowledgement of debt and repayment plan in favour of Eskom in the amount of R66 193 685 to be paid in instalments until July 2015. Madibeng reneged on this arrangement and by March 2016 the debt to Eskom including arrears had risen to R68 242 730.

43. On 4 February 2016 Eskom published a notice of its intention to interrupt supply of electricity to Madibeng. The notice stated that Madibeng was in arrears and that Eskom intended to interrupt bulk supply to Madibeng commencing on 30 March 2016. The contemplated

interruption would take place between 07h00-10h00 and 18h00-20h00.

44. The Bridgestone applicants attempted to negotiate with Eskom to prevent the interruptions. When they failed, they launched an

application for interdictory relief on 24 March 2016. Two days before that, on 22 March 2016, Madibeng paid Eskom an amount of

approximately R42 million. Eskom therefore furnished an undertaking not to interrupt the supply of electricity to Madibeng and the application for an interdict was not proceeded with.

45. Madibeng however continued to default. On 26 October 2016 a second repayment plan was entered into. The debt at that stage was

approximately R61 million. The agreement reached with Eskom was that Madibeng would pay the amount with compounded monthly interest in two instalments on 31 December 2016 and 31 March 2017.

46. Madibeng failed to honour its obligations and made no payments for October and November 2016. Eskom then demanded payment of the full amount owing to it by Madibeng, at that stage being more than R90 million. When Madibeng failed to respond, Eskom on 2 December 2016 published a notice of its intention to interrupt supply to Madibeng commencing on 13 January 2017 and continuing indefinitely. Affected parties were invited to submit written representations and submissions indicating why Eskom should not proceed with interruptions by 18 December 2016. Eskom would consider such representations and would publish its final decision in another

notice on 23 December 2016.

47. On 5 December 2016, three days after publication of the notice, Madibeng made payment of R75 million. At this stage the arrear

account remained with a shortfall of about R45,5 million whilst the balance for on-going consumption charges was underpaid by R29,3

million.

48. On 18 December 2016 Eskom received only two representations from individual end users. None of the Bridgestone applicants or

Mediclinic filed any representations, because they believed the matter may have been resolved.

49. On 22 December 2016, Eskom decided to proceed with the interruptions. However, the decision was not published on that date because the acting CEO of Eskom gave an instruction for the suspension of the process over the Christmas period.
50. Madibeng made a further payment of R29,3 million on 3 January 2017. Eskom nonetheless published its decision to implement the proposed scheduled interruptions on 10 January 2017 to commence on 18 January
2017. The arrears remained at about R45,4 million and the current account remained short paid by R21,9 million.
51. The Bridgestone applicants, after not succeeding to obtain an undertaking from Eskom not to implement the interruptions, acting in their own interest and in the public interest,[21] launched an urgent application to be heard on 16 January 2016 seeking an interim order interdicting the scheduled interruptions pending the present review of the decision. On that date Eskom agreed to suspend the operation of the decision until 26 January 2017.
52. On 18 January 2017 the Deputy Judge President met with the parties involved in similar disputes with Eskom and directed that all the matters be heard before me on 21 February 2017. Eskom undertook not to terminate or interrupt electricity supply to the municipalities concerned until 28 February 2017.
53. On the same day, 18 January 2017, Eskom published a public notice on its webpage which read:
- “Since the commencement of supply interruptions earlier this week, a number of municipalities have come forward with their payments and signed payment plans. As a result these municipalities have had their supply interruption suspended. There will be no supply interruptions in the Madibeng and Mkwasi Hills municipalities in the North West Province. We will be monitoring the strict adherence to the payment plans and the payment of current accounts of these municipalities and any defaults will result in the interruption of supply without further notice.”*
54. Between 16 to 23 January 2017 Madibeng made further payments and on 23 January 2017 Eskom accepted another repayment plan in which Madibeng agreed to settle the arrears of R17,8 million. The acceptance is recorded in a letter dated 23 January 2017 (Annexure

ESK9 to the answering affidavit) addressed by the Eskom General Manager: North West Operations Unit to the municipal manager of

Madibeng. It reads:

“You are hereby informed that the Madibeng Local Municipality payment proposal sent to Eskom to settle the outstanding debt in March 2017 whilst servicing the monthly current account has been accepted by Eskom.

Eskom therefore requests that your earlier proposal be revised to reflect the latest overdue debt which is currently sitting at R17 859 220.31 (Seventeen Million, Eight Hundred and Fifty Nine Thousand, Two Hundred and Twenty Rand and Thirty One Cents). Subsequently, your council resolution should also address the same outstanding amount as mentioned above.

We are also glad to announce that due to this acceptance of your proposal, Eskom has removed you from the PAJA disconnection list with immediate effect. Should the municipality fail to honour current account, PAJA will be reinstated within seven days of the default.

Eskom welcomes and supports the municipality on their endeavours to finally pave a way to settle the outstanding debt and appreciates all the payments that municipality has been paying to Eskom to ensure that the outstanding debt is not getting out of control.”

55. A special council meeting of Madibeng on 27 January 2017 noted that the amount due on the current account was R21,9 million and resolved to pay that amount on 31 January 2017 and further resolved to pay the outstanding arrears of R17,8 million by 31 March 2017.
56. No further steps were taken or have been taken to implement the impugned decision since that date.
57. On 21 February 2017 I issued various orders inter alia postponing the review proceedings to 2-5 May 2017, regulating the further conduct of the proceedings and giving effect to undertakings

between the parties pending the final determination of the matter. In terms of the Bridgestone order, Eskom agreed to be interdicted from interrupting supply of electricity to Madibeng pending the finalisation of the application. The applicants were granted leave to amend their notice of motion before 17 March 2017.

58. The Bridgestone applicants base their claim upon “the profound and potentially devastating impact” the interruption of electricity would have on their businesses, mainly in the automotive industry, and emphasise the availability of other more proportional, less drastic remedies to resolve the problem. The interruptions, had they occurred, would have caused significant financial losses to all businesses operating in the area. Most of the larger industries in the area run continuous production processes which cannot be switched on and off in an instant. A failure to follow start-up and shutdown protocols will result in irreparable damage to machinery and equipment. Moreover, the termination of supply will result in overtime, additional unforeseen and unbudgeted energy and other costs having a detrimental effect on profitability. The applicants have no means to ameliorate such losses. The financial impact would likely result in significant retrenchments and a loss of employment. The decision, they contended, was therefore illegal and unreasonable.

59. In the amended notice of motion, the Bridgestone applicants seek the following orders:

1. It is declared that:

- a) a decision by the First Respondent to terminate or interrupt the electricity supply to a municipal customer in terms of section 21(5) of the Electricity Regulation Act 4 of 2006 is unconstitutional and invalid unless, prior to taking that decision, the First Respondent seeks and obtains an order from a High Court authorising the reduction or termination of the supply of electricity to the municipality as being just and equitable in all the circumstances of the case;
- b) alternatively to prayer 1(a)
 - i) It is declared that section 21(5) of the Electricity Regulation Act 4 of 2006 is unconstitutional and invalid to the extent that it does not require judicial oversight of a decision by the First Respondent to reduce or terminate the electricity supply to a municipal customer;

ii) declaring that section 21(5) of the Electricity Regulation Act is to be read as follows:

“(5) A licensee may not reduce or terminate the supply of electricity to a customer unless:

the customer is insolvent;

the customer has failed to honour or refuses to enter into, an agreement for the supply of electricity; or

the customer has contravened the payment conditions of that licensee; and

where the customer is a municipality, unless prior to taking that decision, the licensee seeks and obtains an order from a High Court authorising the reduction or termination of the supply of electricity to the municipal customer as being just and equitable in all the circumstances of the case.”

2. It is declared that a decision by the First Respondent to terminate or interrupt the electricity supply to a municipal customer is unconstitutional and invalid unless:

- a) prior to taking that decision, the First Respondent complies with condition 11 of Eskom's Transmission Licence dated 31 August 1995 by seeking approval from NERSA of the notice period for any such reduction or termination;
- b) alternatively to prayer 2(a), prior to taking that decision, the First Respondent complies with condition 10(b) of the unsigned and undated Transmission Licence annexed to Eskom's Further Answering Affidavit dated 14 February 2017 as Annexure “SAA1”,

by seeking and obtaining a determination of the relevant period required for the termination from NERSA.

3. It is declared that the decision of the First Respondent, taken on 22 December 2016 and published on 10 January 2017, to interrupt the supply of electricity to the Third Respondent is unconstitutional and invalid.
4. The decision of the First Respondent, taken on 22 December 2016 and published on 10 January 2017, to interrupt the supply of electricity to the Third Respondent is reviewed and set aside.
60. The relief initially sought by the Bridgestone applicants was limited to interim relief under Part A of the notice of motion and a PAJA or legality review under Part B. With the unfolding of the litigation, they have become more ambitious. Looking to the future, they now seek, in addition to a PAJA review, constitutional relief involving a reading down of section 21(5) of the ERA, or alternatively a declaration of constitutional invalidity and a reading in, to include a requirement of prior judicial authorisation of the exercise of the power by Eskom to terminate or reduce the supply of electricity to municipalities.
61. The Bridgestone applicants in addition seek narrower declaratory and interdictory relief (prayer 2) to the effect that Eskom may not lawfully exercise its power to interrupt the supply of electricity to a municipality unless prior to taking that decision it obtains the approval of NERSA of the notice period for such interruption. It would follow axiomatically, they maintained, from a favourable finding in relation to prayers 1 and 2 that the decision would have to be reviewed and set aside on the grounds of illegality.

The Madibeng applications - Mediclinic

62. The Bridgestone applicants joined Mediclinic as the tenth respondent in their application against Eskom. Mediclinic Brits (Pty) Ltd (“Mediclinic”) is a company based in Madibeng. It is part of the Mediclinic Group, which operates numerous hospitals throughout South Africa. Mediclinic only became aware on 13 January 2017 of the threatened disruption of the electricity supply to Madibeng. In an exchange of correspondence with Eskom’s legal department on 18 January 2017, Mediclinic was informed that the threatened electricity supply disruption “has been halted for now”, Madibeng having submitted an acceptable payment plan.
63. Mediclinic did not resist the joinder by the Bridgestone applicants, which was duly effected. Mediclinic’s attorney thereafter

sought clarification from Eskom’s attorney of record of the terms of the stay of disruption that had been negotiated and sought an undertaking that Eskom would give it at least 14 days’ notice of any future interruption of supply to Madibeng. Eskom’s attorney of record replied that Eskom’s instructions were that, should Madibeng fail to honour the payment agreement, the process would be reinstated and all those affected given at least 14 days’ notice of any future interruption of supply to Madibeng.

64. Subsequent to my order of 21 February 2017, Mediclinic opted to bring its own application under a different case number in its own name, on behalf of patients seeking access to medical services and in the public interest, for relief against Eskom. Its stated reasons for taking such an approach are that the threatened supply disruptions will have different implications for Mediclinic as the operator of a hospital, for the patients, medical practitioners and nursing staff at such hospital, and for the wider general public than is the case with other applicants for relief against Eskom. It accordingly deemed it advisable to set out its case in a discrete application brought in terms of the rules as a matter of urgency
65. Mediclinic brought the application on an urgent basis for two reasons. First, the undertaking given by Eskom in respect of Madibeng

was conditional and of limited duration. Second, my order of 21 February 2017, and the directive of the Deputy Judge President on 23 January 2017, envisaged that all the matters against Eskom regarding the threatened interruptions would be heard together on 2 May 2017.

66. Eskom nonetheless argued that Mediclinic had not made out a proper case for urgency. I disagree. The urgency is linked to the duration of the Eskom undertaking and the legitimate need for it to become an applicant in the proceedings of 2 May 2017. The procedural election made by Mediclinic has not inconvenienced Eskom any more than the permissible answering affidavit would have done and, on the contrary, has provided Eskom with a fuller opportunity of canvassing the case made out and the relief being sought by Mediclinic. The failure by Mediclinic to comply with the rules, time periods, forms and service is thus condoned and the application is heard as one of urgency.
67. Mediclinic seeks relief under three different heads: i) declaratory and review relief impugning Eskom's decision to interrupt

electricity supply to Madibeng; ii) an interdict restraining the voluntary interruption by Eskom of electricity supply to Madibeng

until Eskom either has made provision for the supply of electricity directly to health establishments (including Mediclinic) or has obtained an order of court; and iii) an order directing Eskom to ensure that any regime of selective electricity disruption will not adversely affect the supply of potable water to health establishments within the area of interruption.

68. Mediclinic argued that access to an uninterrupted supply of electricity is key to the right of access to health care services and to the right to water, both of which receive explicit constitutional recognition. Section 27(1)(b) of the Constitution enshrines the right to sufficient water. By the same token, section 24 of the Constitution obliges hospitals to ensure that the environment in which patients are treated is not harmful to their health or well-being. While the Constitution does not explicitly provide for a right to electricity, access to electricity is key to the realization of the rights of access to sufficient water and health care services. Although constitutional rights may be impacted, Mediclinic categorised the decision taken by Eskom on 22 December 2016 as administrative action as defined in PAJA.

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

69. Mediclinic's founding affidavit describes in detail how it will be adversely affected by Eskom's decision. It provides emergency medical and nursing care and out-patient medical and nursing services to the community and operates surgical theatres, intensive care units and a range of related ancillary medical services, which are essential to the well-being of patients admitted to its hospital as well as the broader Madibeng community. The ability of the hospital to provide such services effectively, safely and continuously is severely undermined by any termination or disruption of electricity to the hospital. The disruption of electricity to the municipality will have the additional fallout effect of interrupting the municipality water pumps from delivering

potable water to the hospital; this interruption or cessation of potable water delivery to the health facility will have severe

negative consequences. Mediclinic as an essential service provider is in a very different position from that of other applicants in that it provides a service (health care) in respect of which the interruption or hindrance will endanger life, personal safety or health of the whole or at least a significant portion of the population.

70. Mediclinic accordingly challenges the rationality of the decision to interrupt the supply of electricity to Madibeng, having regard to its position as an essential service provider and the impact that the limitation of water and electricity would have on the provision of health care.
71. Moreover, the interruption of the service, Mediclinic submitted, is being employed as a debt collection measure, and is deliberately

punitive of consumers like Mediclinic who have unblemished payment records. Eskom has notably failed to pursue other more usual and less stringent mechanisms of debt collection. The municipality has repetitively been in breach of its financial obligations to Eskom. Eskom granted the municipality a number of opportunities to discharge its indebtedness. Despite this, Eskom did not obtain court orders against the municipality. Clause 9 of the relevant ESA provides that if the Madibeng should at any time be in arrears, Eskom is entitled to demand security for the due payment of accounts in an amount sufficient to cover the estimated amount payable for the bulk supply for three months. Eskom failed to enforce this provision. Eskom also failed to enforce the ring-fencing of electricity payments to the municipality, to ensure the payment over of the amounts collected as payment from consumers. Eskom, having allowed the serial default by the municipality of its obligations, instead prefers to inflict harm on electricity customers of the

municipality, which Mediclinic claims would be disproportionate.

72. Mediclinic also believes there is a need for prior judicial oversight to assess and interrogate:
i) the degree of indebtedness of the end users and the municipality; ii) any prior measures taken by Eskom in respect of the collection of arrear debt; iii) whether the termination or interruption of the electricity supply to the municipality is an appropriate means of enforcing payment; the implications of an interruption of electricity services on health care facilities; iv) the period of notice; and v) the extent of the opportunity afforded to health care facilities in to remedy any default.
73. The lack of proper motive, the questionable basis and disproportionate effects, Mediclinic submitted, render the impugned decision unreasonable and irrational and thus reviewable under PAJA.
74. Mediclinic also aligned itself with two constitutional arguments advanced by Astral before it settled with Eskom. Accepting that the provision of electricity services to residents is a constitutional obligation of a municipality,[23] the applicants' primary constitutional right to the provision of electricity is a right against the municipalities. However, the municipalities are dependent on Eskom for the supply of electricity. Eskom is an organ of state bound by the Constitution. As such, Eskom cannot act in a manner that directly violates constitutional rights; nor can it act in a manner that indirectly violates constitutional rights by preventing other organs of state from fulfilling their constitutional obligations.
75. All organs of state are bound by the Constitution, and specifically by the principles of co-operative government, to assist each other to perform their constitutional duties. All the spheres are interdependent and interrelated in the sense that the functional

areas allocated to each sphere cannot be seen in isolation of each other.[24] As an organ of state in the national government, Eskom is bound in terms of section 154(1) of the Constitution to support and strengthen

the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions and thus may not impede a municipality's ability to perform those functions. If Eskom disconnects the supply of electricity to municipalities, it is inevitable that they will be unable to discharge their constitutional obligation to supply electricity to their residents.

76. The Constitution recognises the doctrine of necessity.[25] So where Eskom lacks the generation capacity to supply the entire country, it is entitled to put in place load shedding arrangements on a temporary basis to avert the collapse of the grid. However, when the issue is one, not of necessity, but of convenience or expedience, the Constitution does not permit Eskom deliberately to disconnect a defaulting municipality and thus to ensure that the constitutional rights of its residents to electricity will be violated. Eskom took the disconnection decision in order to pressurise the municipalities to pay their outstanding arrears. This, says Mediclinic, amounts to self-help which is constitutionally prohibited. The

resort to self-help will inevitably result in a violation of the constitutional rights of innocent third parties who have dutifully been paying for municipal services.

77. The interdict sought by Mediclinic is of a limited scope. It would not restrain Eskom absolutely from disconnecting the power supply to Madibeng. It would only restrain Eskom from doing so without first making provision for hospitals or approaching the court on notice to affected persons.

Eskom's plea of mootness

78. Eskom has raised several defences and has challenged the competency of the relief sought by the various applicants in all the

applications. It also raised a plea of mootness as a preliminary issue based on the fact that after reaching agreement with Madibeng and Kamiesberg on payment proposals there is no longer a live controversy. Eskom has expressly stated that it will not be implementing its decisions to interrupt bulk electricity supply.

79. A case is moot and therefore ordinarily not justiciable if it no longer presents an existing or live controversy which should exist if the court is to avoid giving advisory opinions on abstract propositions of law.[26] Eskom maintains that there are no exceptional circumstances in the Madibeng or Kamiesberg applications which justify hearing the moot applications. There is accordingly no longer any basis for the interdictory or review relief. In its opinion, the court's

resources should not be consumed by pronouncing on the abstract issues of declaratory relief, or the belated attack on the constitutionality of the ERA.

80. The agreement to settle Madibeng's indebtedness is contained in its letter of 23 January 2017 (Annexure ESK9) and the council resolution of 27 January 2017 set out above. In paragraphs 16-18 of its answering affidavit, Eskom stated:

"The relief sought in Part A of this application has become academic for the simple reason that Eskom and the Municipality have agreed on a plan that will enable the Municipality to pay off the debt that led Eskom to take the current impugned decision. In other words the obligation by the Municipality to pay Eskom its current debt in terms of the Electricity Supply Agreement ("ESA"), has been novated. Eskom can in law, no longer proceed with the planned interruption on (sic) suspension based on the November 2016 notice and/or proceed with the public process introduced by the December 2016 notices to the general public.

81. In paragraph 75 of the answering affidavit Eskom added:

"On 23 January 2017, Eskom accepted a repayment plan in which the Municipality agreed to settle the then outstanding arrear amount of R17 859 220.31, following a series of additional payments made between 16 to 23 January 2017. A copy of such acceptance is attached marked "ESK9". I also attach marked "ESK9.1" a copy of a council resolution dated 27 January 2017 accepting acknowledging (sic) liability of the aforementioned sum and a commitment to on 31 March 2017(sic)

82. The Bridgestone applicants did not deal with these allegations in their replying affidavits.

83. In the Mediclinic application, Eskom dealt with the issue of mootness in paragraphs 21-2 of its answering affidavit as follows:

21. What the applicant fails to mention in its founding affidavit is that Eskom will no longer proceeding (sic) with the scheduled supply interruptions that are the subject of this application, and the application brought by Bridgestone SA (Proprietary) Limited

("Bridgestone") and others under case number 3078/2017.

22. On 23 January 2017, Eskom accepted a payment proposal made by the Municipality. I attach a copy of the proposal and Eskom's

acceptance of it as "ESK2" and "ESK3" respectively. In terms of the repayment plan, the Municipality has undertaken to discharge its indebtedness to Eskom over a period of time.

23. I confirm that the Municipality has complied with the payment plan, and Eskom will not proceed with the scheduled interruption of electricity supply to the Madibeng Municipality that is the subject of the applicant's attack.

24. I am advised that in these circumstances the relief sought by the applicant has become moot, and accordingly for this reason alone its application must fail.

84. Mediclinic did not deal specifically with these paragraphs in its replying affidavit. However, in paragraphs 6-11 thereof it dealt with the issue of mootness as follows:

"6. I respectfully aver that the conclusion of a payment plan by no means renders the relief sought in this application moot. Crisply put, in the event that the municipality fails to honour its obligations in terms of the payment plan at any stage, the threat of an interruption of the electricity supply to and, in consequence, by the municipality will once more arise. Indeed, it is appears (sic) from Eskom's affidavit that payment plans that were concluded in the past were not complied with, notably that of October 2016, the breach of which led to Eskom's impugned decision to interrupt supply to the municipality....."

9. Most importantly, however, the Eskom counter-proposal (which is what was accepted by the municipality on 27 January) includes the following statement: "Should the municipality fail to honour current account, PAJA will be reinstated within seven days of the default."

10.The applicant's attorney, John Bromley, had addressed a letter to Eskom recording that he had received instructions "to bring or join in an urgent application to interdict the interruption of power to the municipality. In response thereto, one Amen Koma (whom I am informed by Mr Bromley is an Eskom legal adviser) wrote to applicant's attorney on the 18 January 2017 that "I confirm that supply disruption to Madibeng has been halted for now. They have submitted an acceptable plan. Thus it is not necessary at this stage to bring an urgent application" (emphases supplied). Of course, as appears from the documents now annexed to the answering affidavit, no such agreement existed on 18 January and, indeed, the municipality's proposed settlement of 11 January 2017 had been rejected by Eskom.

11. That this suspension of the threat to disrupt supply was conditional or temporary appears from annexure JRB3 to ESK4 (particularly

paragraph 7 thereof).....”

85. Mediclinic’s attorney wrote a letter to Eskom (Annexure JRB3) on 25 January 2017 asking for an undertaking that Eskom would give at least 14 days’ notice of any further interruptions of supply to Madibeng. Eskom’s attorney replied on 31 January 2017 (Annexure JRB4 to ESK4) stating:

“...should Madibeng municipality fail to honour the payment agreement, our client will reinstate the process and all those affected will be given at least 14 days’ notice of any future interruptions of supply to Madibeng municipality.”

86. Mediclinic concluded on the question of mootness in paragraphs 12-14 of its replying affidavit as follows:

12. In short, therefore, the suspension of the threat to interrupt the supply of electricity to the municipality – and, therefore, to the applicant’s hospital – was conditional upon the municipality reforming its payment delinquency in the future and honouring its payment obligations. Eskom’s threat to interrupt the supply of electricity to the municipality and en passant also to the provider of an essential service, who is not itself in any payment default, was expressly restated. The applicant understood

the 14 days’ notice to be a concession to cure the immediate issue of urgency, but not one that in any way abandoned the

contemplated means of debt enforcement.

13.....[T]he applicant had received an acceptable undertaking from Eskom and therefore “had no interest in the short term interdictory relief sought against Eskom”....The applicant, however, expressly stated that it did have a direct interest in the broader and further reaching concerns raised by the various applicants and in the final relief sought by them. It also stated that the factual impact of a disrupted supply and the implications thereof for the applicant, its patients and staff differed in important respects and for that reason the applicant

would seek relief in some respects different from that sought by the applicants in the sundry applications arising from Eskom’s

threat to disrupt electricity supply....

14. In the circumstances, I am advised that the threshold for mootness (viz, that this matter presents abstract, academic and hypothetical

questions and any resultant order will have no practical effect, and that the issues raised will have no future public importance) finds no application.”

87. Eskom has confirmed that Madibeng has honoured this payment plan, and it will therefore not be proceeding with the scheduled supply interruptions.

88. Eskom likewise has concluded a repayment plan with Kamiesberg that has made the intended supply interruptions unnecessary. In paragraph 9 of its answering affidavit filed in February 2016, Eskom stated:

“Secondly, the matter is academic in that Eskom and the municipality have agreed on a repayment plan that has made the intended interruption of electricity supply to the municipality unnecessary.”

89. In paragraph 10 of its replying affidavit Afriforum baldly denies the content of this averment without explanation.

90. Eskom reiterated its position in paragraphs 48-49 of the answering affidavit, where it stated:

“48. On 12 January 2016, Eskom and the municipality, duly represented concluded another Repayment Plan (hereinafter referred to as “the Second Repayment Plan”) in terms of which the municipality acknowledged its indebtedness to Eskom for in the sum of R3 034 882-44, payable in 7 monthly instalments of R433 554-62, effective from 1 February 2016, and the balance,

plus interest on or before 1 August 2016. In addition, the municipality undertook to discharge its obligation to ensure payment

of ongoing electricity consumption as and when charges therefor fall due and payable in terms of the ESA. A copy is attached marked

“ESK6”.

49. The conclusion of the Second Repayment Plan, in line with Eskom’s usual practice of affording defaulting municipalities an opportunity to bring their arrear debt up to date to ensure continued supply of electricity, resulted in Eskom taking a decision suspending the taking of any further steps to interrupt the supply of electricity.”

91. Afriforum did not deal with these averments in reply.

92. Eskom accepts that it is precluded from electing to revive any interruptions to the electricity supply to the municipalities without further consultation. It concedes that as a matter of law it will be required to follow a fresh notice and comment procedure under PAJA. It referred to the penultimate paragraph of its letter of 23 January 2017 to the municipal manager of Madibeng advising that Madibeng had been removed from its PAJA disconnection list, and that a PAJA process would be reinstated in the event that it defaulted on its payment proposal.

93. In its heads or argument Eskom gave an undertaking that its decisions to interrupt the supply of electricity to Madibeng and Kamiesberg will as a fact not be implemented (it gave no similar undertaking in relation to Lekwa). Hence, it argued, there is no longer anything in substance to interdict, review, or set to aside.

The applicants' submissions on mootness

94. The Bridgestone applicants did not deal with the problem of justiciability in their heads of argument. However, they filed a

comprehensive scholarly note on the topic during the course of argument. They argued that the relief sought in prayers 1 and 2 of the notice of motion (relating to the proper interpretation and constitutionality of section 21(5) of the ERA and the conditions in the relevant transmission licence) could never as a matter of constitutional principle be moot, but even if the court should disagree with that proposition it should in the interests of justice still deal with the issues. The relief sought is declaratory in nature and relates to the proper interpretation of the relevant instruments and will have a significant bearing on any future

decisions Eskom may wish to take.

95. The relief sought in prayers 3 and 4 of the Bridgestone application is of a different nature to prayers 1 and 2. Prayer 3 seeks a declaration that Eskom's decision of 22 December 2016 published on 10 January 2017 is unconstitutional and invalid; while prayer 4 seeks an order reviewing and setting aside that decision. The relief is not of a general nature, but relates to the specific decision. In relation to prayer 3, Bridgestone argued that Eskom has not conceded the unlawfulness of the decision and that a declarator to that effect would inform and guide Eskom's future decision-making. In relation to prayer 4, it was submitted that although the review of the withdrawn decision may prima facie be moot, it would be in the interests of justice to review it.

96. Mediclinic argues that Eskom's claim of mootness on the basis of the repayment plans and its stated intention not to proceed with the planned interruptions ignores the fact that the controversy which has led to the litigation is very much present in other

municipalities in which the Mediclinic group operate and in which Eskom is threatening similar action.

97. Mediclinic points out that the offer made in Eskom's letter of 23 January 2017 is conditional upon the municipality continuing to honour the current account and provides in terms:

"..Eskom has removed you from the PAJA disconnection list with immediate effect. Should the municipality fail to honour current account, PAJA will be reinstated within seven days of the default"

98. This, Mediclinic says, shows the temporary nature of the cessation of the current threat to interrupt electricity supply. The intended temporary nature of the cessation, it maintains, is evident from other correspondence. In the letter addressed by Eskom's legal adviser to Mediclinic's attorney on 18 January 2017 the author stated:

"I confirm that the supply disruption to Madibeng has been halted for now. They have submitted an acceptable payment plan. Thus it is not necessary at this stage to bring an urgent application" - [emphasis supplied]

99. Eskom's attorney's letter of 20 January 2017 to Bridgestone's attorney referred to the public notice on its

webpage, which stated that a number of municipalities have come forward with their payments and signed payment plans and thus there

would be no supply interruptions to the Madibeng but that any defaults on the payment plans would "result in the interruption

of supply without further notice".

100. Likewise it appears from the correspondence in late January 2017 that should Madibeng municipality fail to honour the payment agreement, Eskom will reinstate the process with 14 days' notice of any future interruption of supply. This, according to Mediclinic, confirms that Eskom continues to rely on its "final decision" as announced to the public on 12 January 2017.

101. In addition, Mediclinic submitted, having regard to the Madibeng's past performance and its failure to honour a previous repayment plan, in October 2016, it is likely that threatened interruptions, based on the impugned decision will be reinstated in the future. The relief sought in paragraphs 3.1 to 3.5 of the notice of motion remains competent in terms of section 8 of PAJA, when considered in the context of the facts as they presently stand, because there is a reasonable likelihood of future harm despite the voluntary cessation of the threatened conduct.

102. Mediclinic relied also on the proposition that an administrative decision continues to exist as a fact and cannot be merely

overlooked, since it continues to have legal consequences until such time as it is set aside by a court in proceedings for judicial

review.[27] Whilst the administrative decision remains extant, and capable of execution, the relief sought arises from an existing controversy and will have a practical result in the continuing operation of Mediclinic's business.

103. Afriforum made similar submissions in relation to Kamiesberg. It addressed the issue on the basis that the agreements with municipalities are too ambitious and have been repeatedly breached. In its view the threatened actions of Eskom are unlawful and void and therefore the court should once and for all rule on the question whether Eskom is entitled to use termination of bulk electricity supply to local authorities as a debt collection and credit control measure. The issue presents an existing and live controversy and the conclusion of repayment agreements does not make the issue moot. A single municipality defaulting may result in new notices of termination. Therefore the issue of mootness should not be dealt with on the limited basis that a repayment plan was agreed to by Kamiesberg. The issue is so important that the court has

to exercise its discretion in the interests of justice and consider the matter.

Justiciability: the doctrines of mootness and ripeness

104. The parties' debate about mootness engages the broader question of justiciability. Not every constitutional argument raised by litigants is deserving of judicial consideration. The doctrine of justiciability permits courts to avoid rendering decisions where an insufficient legal interest is impacted.[28] Justiciability is not a legal concept with fixed content. Courts apply it in response to subtle pressures regarding the appropriateness of the issues for decision and the actual hardship to the litigants of denying them the relief sought.[29]

105. The doctrine teaches that the courts should decide only cases entailing a real, earnest and vital controversy between litigants and not entertain merely hypothetical cases or cases that are only of academic interest. The business of a court is generally retrospective; it deals with situations or problems that have already crystallised, and not with prospective or hypothetical ones.[30] Any claim to be justiciable must present a real and substantial controversy which unequivocally calls for the adjudication of the

rights asserted. Litigants should not approach a court if they have not been actually subjected to prejudice or face the real threat of prejudice as a result of legislation or conduct alleged to be unconstitutional or illegal.[31]

106. The rules regarding mootness and ripeness are sub-rules of the doctrine which relate to the timing of an application –

ripeness discourages a court from deciding an issue too early, mootness prevents a court from deciding an issue when it is too late. Ripeness requires a litigant to wait until a judicial decision can be grounded in concrete relief. A case is moot if it no longer presents an existing or live controversy.[32] The rules apply equally in constitutional and administrative law.[33]

107. The mootness barrier therefore usually arises from events arising or occurring after an adverse decision has been taken or a lawsuit has got underway, usually involving a change in the facts or the law, which allegedly deprive the litigant of the necessary stake in the pursued outcome or relief. The doctrine requires that an actual controversy must be extant at all stages of review and not merely at the time the impugned decision is taken or the review application is made.

108. The ripeness barrier arises usually in applications for anticipatory relief. Courts are often reluctant to grant declaratory or interdictory relief without a clearly defined record to assure informed and narrow adjudication. The courts must be astute to

distinguish between a fear resting on speculative apprehensiveness and a probable threat of specific future harm; and should refuse to give advance expressions of legal judgment upon issues which remain unfocused “because they are not pressed before the court with that clear concreteness provided when a question emerges precisely framed and necessary for a decision from a clash of adversary argument exploring every aspect of a multi-faceted situation embracing conflicting and demanding interests”.^[34]

109. Courts therefore avoid giving advisory opinions on matters in the abstract.^[35] In applications for declaratory relief, mootness and ripeness are considered against the statutory requirement that the relief sought must have its basis in an existing, future or contingent right or obligation.^[36]
110. An application for an interdict or other relief with continuing force is not rendered moot solely by the voluntary cessation of allegedly unconstitutional, illegal, unreasonable or unfair conduct, since the offending party may return to its old ways. An issue will normally not be deemed moot if it is capable of repetition, yet evading review. The court should enquire into whether the claim has been mooted only because the respondent has voluntarily, but not necessarily permanently, acquiesced.^[37] So long as the person mounting the legal challenge confronts continuing harm, collateral harmful consequences that continue to

endure,^[38] or a significant prospect of future harm, the case cannot be deemed moot. By similar token, in the event of a voluntary cessation of wrongful conduct, a case might well become moot if subsequent events make it sufficiently clear that the allegedly unlawful behaviour may not reasonably be expected to recur.

111. But even where there has been permanent acquiescence or cessation, there may still remain a public interest in having the legality of the practice settled. Courts retain a discretion to hear matters where there is no live controversy when it is in the interests of justice to do so. ^[39] The onus rests on the party seeking to have the matter heard to show that there are sufficiently exceptional circumstances for the exercise of this discretion.^[40]
112. A prerequisite for deciding an issue despite the fact that it is moot is that any order the court may make must have some practical effect on the parties or someone else. Relevant factors include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties.
113. Where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied. Continuing uncertainty about the meaning of a statutory provision may prejudice the general administration of justice. Where a manifestly unconstitutional provision continues to be applied with potentially adverse consequences, such considerations should override the mootness of the issue, especially if there are conflicting first-instance decisions.^[41] However, the court should always keep in mind: i) the delicacy of the function of judicial

review in matters of public interest; ii) the comparative finality of its consequences; iii) the consideration due to the judgment of the other repositories of constitutional power; and iv) the inherent limitations of the judicial process, arising from its largely negative character and limited resources of enforcement.[42]

114. In *Independent Electoral Commission v Langeberg Municipality*[43] the Constitutional Court observed that if a court decides to determine one moot issue arising in a case it is not obliged to determine all other moot issues in the same case. It may elect to determine one moot issue because it is in the interests of justice to do so, but may decide that it would serve no purpose to resolve other moot issues, or to grant the relief sought in relation to them, as future cases might present different factual matrixes.

Findings on the issue of mootness

115. The essential question for decision in relation to the justiciability of the issues and the relief sought in these applications, therefore, is whether the voluntary cessation of Eskom's alleged wrongful conduct has rendered the applications moot. As just said, applications for interdictory relief or review should not be rendered moot solely by the voluntary cessation of allegedly wrongful conduct where it appears that the offending party may return to its old ways. The question then is whether Eskom has voluntarily and permanently acquiesced and does not intend to implement the impugned Madibeng and Kamiesberg decisions. Put differently, do the applicants still face continuing harm, enduring collateral harmful consequences or a significant prospect of future harm? Does the evidence make it sufficiently clear that the allegedly wrongful conduct may not reasonably be expected to recur?
116. The public notice in relation to Madibeng, published by Eskom on its website on 18 January 2017, indicated that the voluntary cessation did not amount to a permanent acquiescence and that the alleged wrongful conduct was capable of repetition evading review. It stated that because the municipality had come forward with payment plans, there would be no supply interruptions in the Madibeng. However, the undertaking to cease was accompanied by a threat. Eskom indicated that it expected strict adherence to the payment plan and any defaults would "result in the interruption of supply without further notice." In the circumstances, there is no denying that the applicants confronted a significant prospect of future potentially wrongful conduct causing harm that would evade

review or judicial supervision. The statement on the website gave notice that Eskom would summarily interrupt supply without notice to those who would be affected. At that stage, the application was not moot.

117. However subsequent events cast a different complexion on the matter. As discussed earlier, Madibeng made further payments after 16 January 2017 and Eskom finally accepted the new repayment plan in its letter dated 23 January 2017. The letter informed Madibeng that Eskom had removed it "from the PAJA disconnection list with immediate effect", but that should it "fail to honour current account, PAJA will be reinstated within seven days of the

default". The special council meeting of Madibeng on 27 January 2017 resolved to meet its obligations as set out in the letter.

118. Counsel for Eskom, Mr Gauntlett SC, argued that this letter effectively mooted the Madibeng applications. He also gave an undertaking to the court that Eskom would not implement the impugned decisions without following a full PAJA process in relation to any default, be it in relation to the arrears or the current account. In effect, he offered the assurance that the impugned decisions would not be proceeded with and that any future interruption of supply would occur only pursuant to a fresh decision and a new PAJA process. He made a similar undertaking in relation to Kamiesberg. He thus submitted that there was no likelihood of repetitive conduct evading review, nor any significant prospect of future harm or enduring collateral consequences. For that reason the applications were moot.
119. Mr Irish SC, who appeared for Mediclinic, submitted that the undertaking in the letter of 23 January 2017 was undeniably ambiguous. It could be interpreted to mean that seven days after a default on payment of the current account Eskom would proceed with the impugned decision and effect interruptions on 14 days' notice as provided for in its original notice published in December
2016. Defaults on the arrears would be met with summary interruptions without notice.
120. The assurances offered by Eskom in its heads of argument and in court commit it to a different, more benevolent, interpretation. The letter should be read to include an undertaking by Eskom to follow a PAJA process in the event of default by Madibeng. Such a process would entail compliance with section 3 of PAJA which would oblige Eskom at the very least to give affected persons, including the Bridgestone applicants and Mediclinic, adequate notice of the nature and purpose of the action proposed to be taken and a reasonable opportunity to make representations. The affected persons would also be entitled to request an opportunity to appear before Eskom to present and dispute information and arguments through their legal representatives.
121. Engagement in a fresh process of this kind will then result in a decision different to the impugned decision, which would take account of and be informed by any representations made by the Bridgestone applicants and Mediclinic and may well result in the reasonable accommodation of their rights and interests in a way the impugned decision might not have done. In this regard, it is worth remembering that Eskom did not have the benefit of any representations from these applicants when it took the impugned decision. Any new decision will be subject to a PAJA review on the grounds of legality, reasonableness and procedural fairness, and where there is a well-grounded apprehension of harm, and the balance of convenience favours the applicants, its implementation may be interdicted pending review.

122. Eskom's commitment to follow such a process before taking and implementing any interruptions of electricity supply to Madibeng is in effect a permanent acquiescence to desist with the impugned decision and its alleged wrongful injurious consequences. The alleged wrongfulness cannot reasonably be expected to recur and there is no significant prospect of future harm evading review. The Madibeng applications are accordingly moot.
123. The Afriforum application is moot for the same reasons. In that case, Eskom suspended its decision to interrupt supply sixteen months ago, on 12 January 2016, and has since made no threat or taken any action indicating that it intends to interrupt electricity supply to Kamiesberg or Thembelihle. The passage of time has caused the impugned decision to lose its character as a present, live

controversy requiring judicial intervention (beyond an advisory opinion) on what would now be an abstract proposition about the

application of the principles of constitutional and administrative law to a historical factual scenario. Subsequent events have deprived the case of any compelling necessity for a judicial pronouncement on the merits of the decision to interrupt electricity supply to these municipalities. This is even more the case in the light of Eskom's general undertaking offered from the bar not to proceed with any future supply interruptions without following a PAJA process. There is no significant likelihood of repetitive wrongful conduct, a future prospect of harm evading review or any enduring collateral consequences arising from the impugned Kamiesberg decision.

124. The matter however does not end there. As outlined earlier, a court may in the interests of justice still decide an issue that is moot having regard to the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument that has been advanced by the parties. And it may elect to determine only some of the moot issues arising in an application but decide not to resolve others on the grounds that future cases might present different factual matrixes. The court nevertheless should be astute to distinguish between context specific factual issues and issues of compelling public interest requiring decision because of continuing legal uncertainty or possible adverse future consequences for litigants.
125. For the reasons which follow I am disinclined to pronounce on the validity, constitutionality, legality or reasonableness of the withdrawn Madibeng and Kamiesberg decisions or to grant declaratory, interdictory or review relief in relation to them. Although the decisions were taken, they were never implemented and had no adverse direct legal effect. The applicants in persisting with their claims for decision in relation to these moot issues ask the court to offer an advisory opinion that the now withdrawn decisions would have been illegal and unreasonable had they been implemented, even though they were not implemented. The doctrine of mootness discourages precisely this kind of adjudication. Future cases between the parties in relation to proposed conduct of a similar nature will present different factual matrixes nuanced and faceted by subsequent events. Thus, for example, Eskom, after

receiving representations from Mediclinic, in consultation with it, might find creative ways of ensuring the continued supply of electricity to hospitals during any scheduled interruptions, thereby excluding hospitals from the disproportionate and unreasonable effects identified by Mediclinic in its application.

126. Judicial assessments of past hypothetical events can impact litigants in ways unforeseen. Courts, therefore, should pause prudently before offering ex post facto pronouncements on the rights and interests of contracting parties engaged in positional bargaining, even where the contractual decisions and conduct by virtue of their public character invite constitutional and administrative law review. Sight must not be lost of the fact that Eskom's positional bargaining has had positive results in rectifying the delinquency of municipalities which caused a financial crisis of substantial proportions. Consideration must be given to the delicacy of judicial review and structural constraints requiring deference to other organs of state rationally exercising constitutional power. The courts serve

as guardians ensuring legality, rationality and proportionality, but should be cautious not to dictate substantive outcomes in the resolution of conflicting adverse contractual interests between different organs of state, especially where there is no longer a live or existing controversy and thus no immediate need to do so.

127. Mr Irish's reliance on the decisions in *MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd*[44] and *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others*[45] to contend that the impugned decisions continue to exist and are effective until such time as they are set aside by a court in

proceedings for judicial review, is misplaced. Those cases involved situations where affected individuals placed reliance upon

administrative decisions that were communicated to them. Once an individual has relied on a defective decision, justice and equity

dictate that the organ of state that made the defective decision cannot be allowed to set aside and correct the decision without

affording those who have relied on it an opportunity to object. The decisions in issue in this case are of a different kind. None of the applicants relied upon the decisions to their benefit.

128. In the premises, the prayers of all the applicants seeking declaratory, interdictory and review relief in relation to the impugned decisions on the grounds of constitutionality, illegality and unreasonableness fall to be dismissed. This finding applies

equally to Mediclinic's claim that Eskom breached section 154(1) of the Constitution by impeding the municipalities'

ability to fulfill its obligation to supply electricity. The municipalities were not actually impeded because the decision was not implemented. The claims are moot and there are no exceptional circumstances requiring decision of the moot issues in the interests

of justice.

129. The prayers of the Bridgestone and Afriforum applications related to the constitutionality of section 25(1) of the ERA and prayer 2 of the Bridgestone application related to the requirements of Eskom's transmission licence, however, are on a different footing. Where there is a compelling public interest that the constitutionality of a statutory provision be determined, the doctrine of mootness should be less strictly applied. The litigation is of a public character and the relief sought is forward looking and general in its application, and thus likely to directly affect a wide range of people. Different considerations are appropriate to the determination of justiciability in such instances.[46]
130. Moreover, section 21(1)(c) of the Superior Courts Act grants courts a discretion to enquire into and determine any existing, future or contingent right or obligation and they often will do so to clarify legal and constitutional obligations even if there is no live or existing dispute. [47]
131. Mr Katz SC, who appeared for the Bridgestone applicants, and Mr Louw SC, for Afriforum, were persuasive in their submissions that it would be in the interests of justice to pronounce on these issues. Mr Katz was guilty of overstatement in his submission that declaratory orders of the kind sought can never be moot. Litigants have to establish exceptional circumstances supporting a claim that it will be in the interests to determine a matter that is moot or not ripe. I agree though that the continuing uncertainty about the requirements of section 25(1) of the ERA and the licence may prejudice the general administration of justice. Clarity is needed about the scope and application of the relevant instruments so that affected persons may regulate their future conduct appropriately. It is accordingly in the interests of justice to determine these moot or non-ripe issues.

The interpretation and constitutionality of section 21(5) of the ERA

132. The Bridgestone applicants and Afriforum ("the applicants") seek declarators to the effect that Eskom must approach a High Court to authorise it to terminate or interrupt the supply of electricity to a municipality customer in terms of section 21(5) of the ERA, failing which any decision will be unconstitutional and invalid. They contend that section 21(5) must be interpreted to require High Court pre-authorisation of any decision to terminate or interrupt the supply of electricity to municipalities as being just and equitable in all the circumstances of the case. The process envisaged would be akin to an "anterior review" in which the court would look at all relevant considerations to determine in advance the reasonableness and proportionality (the justice and equity) of the proposed decision.[48]

133. In the alternative, they seek orders declaring section 21(5) of the ERA unconstitutional to the extent that it does not require judicial oversight of Eskom's powers to interrupt supply, coupled with an order reading a requirement into section 21(5) of the ERA that prior to taking a decision to interrupt the supply of electricity, Eskom must first approach a High Court for an order confirming that this would be just and equitable, and authorising such an interruption.
134. The applicants rely on several Constitutional Court judgments requiring judicial oversight where a party seeks an order to execute against or seize control of the property of another person.[49] The requirement for judicial oversight, they maintain, stems from sections 1(c) and section 34 of the Constitution. Section 1(c)

provides that South Africa is founded on the principle of the rule of law and section 34 provides that everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or another tribunal.

135. The applicants submit that the interruption of the supply of electricity for debt collection purposes is similar to the processes

for which the Constitutional Court has held prior judicial oversight is required. Given the potential devastating effects if electricity

supply is terminated or interrupted, they believe that prior judicial oversight is required over a decision by Eskom to terminate or interrupt electricity to a municipality. They rest that submission firstly on a reading down of section 21(5) of the ERA in terms of section 39(2) of the Constitution.[50] An interpretation to that effect, they submit, would balance the rights of Eskom to enforce its debt-collection measures against the rights of those who would be affected by the decision.

136. There can be no doubt that the termination or interruption of electricity supply by Eskom to a municipal licensee constitutes a significant constraint on the rights and duties of municipalities and residents and will impact on and infringe amongst others the constitutional rights to dignity (section 10), practice a trade, occupation or profession (section 22), property (section 25) and housing (section 26). A reading down will circumvent infringement.
137. Eskom contended that there is no basis for the reading down relief inserting judicial oversight as a requirement of the section. The specialist regulator NERSA oversees how licensees exercise their rights and obligations under the ERA and the courts should defer to the specialist expertise of administrative agencies. The interpretation contended for would impose unsustainable burdens on the courts by constituting them inappropriately as an adjunct in the administrative function of electricity distribution.

138. The contention that section 21(5) of the ERA must be interpreted as requiring judicial oversight, in my opinion, is not supportable. The language of the statute does not permit this. The interpretation favoured by the applicants is unduly strained, and “risks

stepping beyond the limits of the judicial function into the terrain of the legislature by interpreting the statute beyond what is linguistically viable”.^[51] When reading down in terms of section 39(2) of the Constitution, a court should not construe a provision unreasonably to distort the meaning in the hope of finding constitutional consistency. The interpretive process of reading down is limited to what the text is reasonably capable of meaning.^[52] In *Rennie NO v Gordon*^[53] the Appellate Division held that supplying an omission in a statute should be done only when necessary. It requires the provision as it stands not to make sense and or to be incapable of implementation. In addition, the proposed formulation must not be one of several possible wordings, but the only one to make the provision workable.

139. Where a provision is not reasonably capable of the sought for meaning, the applicants are left to seek a declaration of constitutional inconsistency or invalidity under section 172(1)(a) of the Constitution and a reading of words into the provision as a just and equitable remedial measure under section 172(1)(b). In short, a requirement of judicial oversight in this case can only be achieved through reading-in under the applicants’ alternative

constitutional argument. This requires a determination of whether section 21(5) of ERA is inconsistent with the Constitution and

invalid to the extent of its inconsistency.

140. Section 21 of the ERA deals with the powers and duties of licensees. Section 21(5) is concerned specifically with the reduction and termination of the supply of electricity and is negatively framed as an exception to a provision limiting power in that it prohibits a licensee from reducing or terminating the supply of electricity to a customer unless certain conditions are met. The exercise of the power is subject to conditions precedent. Those relevant to the present matter are that the customer must have failed to honour the agreement for the supply of electricity or contravened the payment conditions of the licensee.

141. To repeat: the absence of any express provision requiring judicial pre-authorisation to the exercise of the power in section 21(5) of ERA, the applicants maintain, violates section 34 of the Constitution and the principle of legality in section 1(c) of the Constitution. Therefore the requirement should be read in as proposed in prayer 1(b)(ii) of Bridgestone’s amended notice of motion.

142. The purpose of section 34 is to guarantee the right to have justiciable disputes settled by independent courts and fora. It is a fundamental principle of the rule of law that anyone may challenge the legality of any law or conduct. For this entitlement to be meaningful, alleged illegalities must be justiciable by an entity that is separate and independent from the alleged perpetrator of the illegality. The key aspect of the right raised by the applicants is the

right of access to justice prior to an adverse decision regarding the supply of electricity. They argue that the exercise of the power in section 21(5) is a form of self-help which the Constitution ought not to countenance.

143. The applicants place particular reliance on the decision of the Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another*[54] where the court invalidated section 38(2) of the Northwest Agricultural Bank Act[55] which permitted the bank, without need of a court order, to attach and sell the property of a debtor given in security for a loan. That Act was held to violate section 34 of the Constitution in that it allowed the bank to be a judge in its own cause and to usurp the powers and functions of the courts. The fact that the debtor could approach the courts after the attachment did not cure the violation but merely restricted its duration. The justification of providing the bank with a speedy and inexpensive remedy to realize its securities did not pass the limitations test as the bank could achieve the same result by the less invasive option of a court

judgment coupled with an interim interdict preventing the debtor from disposing of the property.

144. The applicants also rely on the recent decision of the Constitutional Court in *University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others*[56] in which it held that emoluments orders that are issued by officials of the magistrates courts in terms of section 65J of the Magistrates

Court Act[57] without being sanctioned by the court violate section 34. Execution orders are part of the judicial process, and judicial supervision of the execution process against all forms of property is constitutionally indispensable. By the same token, although not dealing with section 34 of the Constitution, the applicants also relied on *Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others*[58] and *Gundwana v Steko Development CC and Others*[59] holding respectively that the failure to provide judicial oversight over sales in execution against immovable property of judgment

debtors in section 66(1)(a) of the Magistrates Court Act, and the High Court rules and practice allowing registrars to grant orders

declaring immovable property executable, were unconstitutional. In both cases the court held the relevant provisions and conduct to be unjustifiable limitations of the right of everyone to have access to adequate housing enshrined by section 26(1) of the Constitution.

145. The applicants submit that the use of the power in section 21(5) of the ERA for debt collecting purposes is no different. It is a form of execution and thus cannot be resorted to in a self-help manner without prior judicial oversight.
146. Eskom argued that the contention that the requirement for judicial oversight in these circumstances is an incidence of section 1(c) and section 34 of the Constitution is without merit. The cases relied upon to support this proposition relate to sales in execution of private residences and emoluments orders, and are entirely inapposite in the present context. The temporary interruption of supply of electricity to a municipality is not the same

as a case where property (whether movable or immovable) is attached. It involves a limited interruption of a service that is sanctioned by statute.

147. There is merit in Eskom's submission. The temporary termination or reduction of the supply of electricity to a municipality is different to the execution of a court order resulting in the attachment and the permanent alienation of another person's

property. It is more akin to withholding contractual performance in accordance with the principle of reciprocity – though the point should not be overstated given Eskom's public law duties and the requirement that it act reasonably. The interruption of the supply of electricity does not involve the seizure and disposal of property of others. The nature and extent of the intrusion is thus qualitatively and quantitatively different. Eskom is not acting as a judge in its own cause in deciding whether it has an enforceable claim and the appropriate relief. It is rather refusing to supply goods and services for which it has not received payment. It is suspending performance of its obligations in the face of non-performance or non-reciprocity by the municipalities. Its conduct differs materially from that of the defendants in the execution cases. There is no dispossession of any vested proprietary right or property already in possession of another. Eskom's conduct comprises the cessation of the delivery of its property to another. There is no self-execution of a debt bypassing the courts. If Eskom wants to seize property to satisfy the payment of arrears it must still follow the ordinary judicial process for that purpose.

148. Moreover, the higher courts have provided a strong indication that prior judicial oversight is not required for the exercise of the power in section 21(5) of the ERA. The Constitutional Court in *Rademan v Moqhaka Local Municipality* [60] held that a municipality may exercise its powers under section 21(5) of the ERA to disconnect electricity supply to defaulting customers. It was not suggested that this was subject to any requirement for judicial oversight. The Supreme Court of Appeal in that case expressly rejected the notion of pre-authorisation by the courts for the discontinuation of services (albeit in relation to the applicable by-laws in that case). It observed:[61]

“Is a municipality expected to approach the court each time a ratepayer defaults to seek a court order authorising discontinuation of services?”

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

149. Eskom in acting under section 21(5) of the ERA is implementing legislation and as such the exercise of the power constitutes

administrative action in terms of PAJA and section 33 of the Constitution. The exercise of power is accordingly subject to constitutional and administrative law review. Those subjected to the exercise of power will be free to approach the courts for an ex post facto review. Section 21(5) of ERA by allowing a termination or interruption of electricity supply to a delinquent municipal customer

does not purport to oust the jurisdiction of the courts or deny access to them for the resolution of any dispute arising from the

exercise of the power. Those affected will have all the rights that all citizens subjected to administrative action have.[62]

150. The applicants however say that will not be enough and more is required. They say an ex post facto review does not adequately protect their rights or the rights of citizens who might be affected by an interruption. It is correct, as the applicants say, that the Constitutional Court has in the past decried the limits of an ex post facto review. In Jaftha[63] it stated:

“Even where there is awareness, it would generally be difficult for indigent people in the position of the appellants to approach a court to claim protection. They are a vulnerable group whose indigence and lack of knowledge prevents them from taking steps to stop the sales in execution, as is demonstrated by the facts of this case.”

In support of a requirement of prior judicial authorisation, the court concluded:

It is my view that this is indeed an appropriate remedy in this case. Judicial oversight permits a magistrate to consider all the relevant circumstances of a case to determine whether there is good cause to order execution. The crucial difference between the provision of judicial oversight as a remedy and the possibility of reliance on ss 62 and 73 of the Act (ex post facto remedies) is that the former takes place invariably without prompting by the debtor. Even if the process of execution results from a default judgment the court will need to oversee execution against immovable. This has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the Act.”

151. It is clear from these passages that the court felt that an ex post facto review was an inadequate remedy for the protection of indigent persons from permanently losing their homes and only asset of value. The same considerations do not apply to the exercise of power by an organ of state temporarily interrupting the supply of electricity to a municipality. Although such action will impact on indigent members of the community, the entire community and its political structures will be affected and it is likely that sufficient resources and knowledge will be available to seek an interim interdict to halt any interruption pending a review of the rationality and proportionality of any interruption. The rationale supporting the need for prior judicial authorisation does not apply in cases like the present.

152. The case may be different when Eskom acts under section 21(5) of ERA against an individual. However, there is no such case before us, and the doctrine of ripeness precludes us from pronouncing definitively on a hypothetical situation. Suffice it to say that the observation made by the SCA in Rademan is compelling. And, again, the temporary interruption of supply on the basis of the contractual principle of reciprocity of performance is significantly different to permanently depriving a person of their home or means of livelihood.
153. In summary, any exercise by Eskom of the power in section 21(5) of ERA will be administrative action reviewable by the courts on the grounds of legality, reasonableness and procedural fairness under section 33 of the Constitution and PAJA. Such review and the ancillary remedy of an interim interdict pending review give adequate expression to the right of access to the courts in section 34 of the Constitution. None of the applicants' contentions that section 21(5) of ERA violates the constitutionally protected right of access to the courts under section 34 or 1(c) of the Constitution is sustainable. That being the case there is no need to embark upon a limitation analysis in terms of section 36 of the Constitution to determine whether any infringement of the section 34 right is reasonable and justifiable in an open and democratic society. There is consequently no legal basis to read in a requirement of prior judicial authorisation for the exercise of the power in section 21(5) of ERA.
154. The applicants, neither in argument nor in their written submissions, presented much in the way of a coherent argument that section 21(5) of ERA was an unjustifiable limitation on other rights in the Bill of Rights, preferring instead to hoist their flag to the mast of sections 34 and 1(c) of the Constitution.
155. However, the Bridgestone applicants did touch on future decisions impacting other constitutional rights. In argument Mr Katz submitted that "there can be no doubt that the termination or interruption of electricity supply by Eskom to a municipal licensee constitutes a significant constraint on a vast number of rights of persons and properties". He identified the rights of the public which may be violated as being the rights to dignity (section 10), life (section 11), freedom of trade and occupation (section 22), fair labour relations (section 23), the environment (section 24), property (section 25), housing (section 27), healthcare (section 27), the rights of the child (section 28) and the right to education (section 28). The interests protected by these rights will invariably be infringed, impaired or trespassed upon by any future exercise of power under section 21(5) of ERA. Such may be self-evident in that the residents and businesses will suffer loss and inconvenience. The ultimate enquiry will be whether the infringing conduct is justifiable. From what I have held earlier in this judgment, the submissions made in that regard cannot properly be evaluated in the abstract as the claims made are moot or ripe. For the reasons already explained, courts should refuse to give advance expressions of legal judgment upon issues which remain unfocused and lack the clear concreteness they would possess if they were precisely framed in an actual existing controversy arising from a decision actually implemented. The enquiry and issues involved are of a different

nature to one about the general application of section 21(5) of ERA.

156. As I have explained, insofar as individual rights may be limited by the scheduled interruptions, the temporary limitation may be justifiable under section 36 of the Constitution or be held to be reasonable and proportional administrative action, in view of the compelling national interest in Eskom's financial sustainability and any proportional safeguards that may attend a

future decision by Eskom.

157. In the result, there is no basis to grant the Bridgestone applicants the relief they seek in prayer 1 of their notice of motion or that sought by Afriforum in prayers 1, 2 and 3 of its notice of motion sought on the basis of the alleged constitutional inconsistency and invalidity of section 21(5) of ERA.

The notice requirements of Eskom's transmission licence

158. Prayer 2 of the Bridgestone application seeks a declaration that a decision by Eskom to terminate or interrupt the electricity supply to a municipality is unconstitutional and invalid unless prior to taking that decision Eskom complies with condition 11 of its transmission licence dated 31 August 1995 by seeking approval from NERSA of the notice period for any such reduction or termination.

159. There is some uncertainty about which licence applies. Therefore the Bridgestone applicants seek alternative relief that prior to taking that decision, Eskom must comply with condition 10(b) of the unsigned and undated transmission licence annexed to Eskom's further answering affidavit as Annexure "SAA1", by seeking and obtaining a determination of the relevant period required for the termination from NERSA. The issue is strictly speaking not justiciable but it will be in the interests of justice to offer some guidance for future purposes.

160. Eskom carries on business as the sole licensed transmitter of electricity in terms of a transmission licence granted by NERSA. The Bridgestone applicants claim that Eskom's rights to transmit electricity to Madibeng derive from the 1995 licence – Annexure WG1 of the founding affidavit. Clause 11 of that licence provides:

The licensee shall not, except for reasons beyond its control, reduce or discontinue the transmission of electricity to a user unless:

1. The user is insolvent;
2. The user has failed to pay the agreed charges or to comply with the conditions of supply and has failed to remedy the default within the time specified by the National Electricity Regulator."

161. Eskom maintains that the current transmission licence is Annexure SAA1 to its supplementary answering affidavit which was issued on 1 April 2004 and amended the 1995 licence. The relevant part of the 2004 licence is similar to Clause 11 of the 1995 licence, but with one important difference. Clause 10 of the 2004 licence provides:

The licensee shall also not, except for reasons beyond its control, reduce or discontinue the transmission of electricity to a customer unless-

1. The customer is insolvent;
 2. The customer has failed to pay the agreed charges or to comply with the conditions of service delivery and has failed to remedy the default within 14 days, or within such longer period as may be specified by the NER.”
162. These provisions, according to the Bridgestone applicants, enable NERSA to exercise its oversight function over the activities of Eskom, in accordance with the applicable legislative framework, and empower NERSA, acting in the public interest, after following a constitutionally compliant consultative process and being fully apprised of all relevant circumstances, to ensure that Eskom does not act irrationally, capriciously or unlawfully.
163. The Bridgestone applicants say that while Eskom may be empowered to decide that it intends to terminate or interrupt the supply of electricity to a municipality, in terms of condition 11 of the 1995 licence the decision regarding the actual notice period to be given by Eskom preceding such termination or interruption falls within the purview of NERSA, and is ultra vires the powers of Eskom. It is common cause that NERSA did not approve the notice period for the decision in question regarding the

termination or interruption of supply to Madibeng.

164. Eskom submits that the dispute about the applicable licence is irrelevant. In the first instance, the ERA expressly permits Eskom, as a licensee, to interrupt the supply of electricity for non-payment. It is a power conferred by statute. Second, and even

assuming that this power could be limited by a licence issued under the ERA, there is nothing contained in either licence that does so by requiring Eskom to seek NERSA’s “approval” of a notice period. That is correct, in my view. But the true issue (not addressed by either party in relation to this issue) is whether Eskom’s provision of notice to Madibeng was illegal or procedurally unfair and that question is moot (at least prima facie) by virtue of the decision not being implemented.

165. Whether non-compliance with the conditions of clause 11 of the 1995 licence or clause 10 of the 2004 licence will result in

constitutional invalidity is not straightforward. The issue posed in the way it is, and the relief sought, display the underlying wisdom of the mootness and ripeness doctrines. The declaratory relief sought by the Bridgestone applicants is an absolute declaration that non-compliance with the notice provisions of either licence will result in invalidity, and takes no account of the possible relative application of the law.

166. The question posed by prayer 2 first requires a determination of whether the notice provisions are a mandatory and material procedure prescribed by the ERA requiring strict compliance, or merely directory provisions requiring substantial compliance. Procedural

non-compliance normally should result in invalidity, but it must be kept in mind that section 3(4) of PAJA or section 36 of the

Constitution may be relied upon to show that non-compliance was reasonable and justifiable in the circumstances.[64] That determination is better left to a concrete case where the actual adverse effects of non-compliance may be measured. At risk of laboring the point, determinations of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case usually involves too remote and abstract an enquiry for the proper exercise of the judicial function.[65]

167. Apart from the legality question, I in any event do not accept that the conditions of the two licences in issue can be interpreted to require prior approval from NERSA of the applicable notice period for interrupting supply. The conditions of licence primarily regulate the notice periods not prior approval of such. Under the 1995 licence the applicable period would be any period stipulated by NERSA, failing which Eskom would be obliged to give adequate notice in terms of section 3(2)(b)(i) of PAJA. Under the 2004 licence, the notice period would be 14 days or any longer period prescribed by NERSA. Absent any period prescribed by NERSA the permitted period is 14 days. And the consequence of any future non-compliance with these conditions of the licence will depend on the reasonableness or justifiability of any departure.

168. In the result there is no basis for the abstract and general relief sought in prayer 2 of the Bridgestone application.

Costs

169. Normally a successful party, in the absence of special circumstances, is entitled to its costs. However, in this case Eskom has succeeded mainly because in its wisdom it rendered the challenge to the impugned decisions moot and some of the declaratory relief non-ripe. Additionally, the applicants while acting in their own interest also acted in the public interest and on behalf of a broader class of residents who would have suffered the impact of the decisions had they been implemented. Although I have avoided deciding the moot issues, there is no denying that implementation along the lines initially proposed by Eskom would have had disproportionate impacts. That possibility most likely fed into Eskom's decision not to implement the scheduled interruptions. These factors lead me to conclude

that it will be in the interests of justice not to award costs against the unsuccessful applicants who acted to vindicate the constitutional rights of themselves and others. Representative litigants should not be discouraged from pursuing constitutional claims for fear of being mulcted in costs.[66]

Orders

170. For the reasons stated, I make the following orders:

170.1 The applications under case numbers 99984/2015; 3078/2017; and 19819/17 are dismissed.

170.2 There is no order as to costs.

JR MURPHY

JUDGE OF THE HIGH COURT

Date Heard:

2-3 May 2017

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Adv JG Gauntlett SC

Adv M Khoza SC

Adv L Uys

Adv L Kelly

Adv N Moloto

Instructed by:

Ngeno and Mteto Inc

Date of Judgment:

24 May 2017

- [1] Afriforum joined Thembelihle Local Municipality as the twelfth respondent in its application. I will refer throughout only to Kamiesberg as ultimately the same issues apply to both.
- [2] *Joseph and Others v City of Johannesburg* 2010
- [4] SA 55 (CC) at para 40; *Mkontwana v Nelson Mandela Metropolitan Municipality*; *Bissett v Buffalo City Municipality*; *Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng* (KwaZulu-Natal Law Society and Msunduzi Municipality and *Amici Curiae*) 2005 (1) SA 530 (CC) at para 38.
- [3] Section 9(1)(a)(iii) of the Housing Act 107 of 1997 provides that every municipality must, as part of the municipality's process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economically efficient.

- [4] Act 4 of 2006
- [5] Sections 2(a) and 2(g) of the ERA.
- [6] Section 3 of the ERA provide that the National Energy Regulator established by section 3 of the National Energy Regulator Act is the custodian and enforcer of the regulatory framework provided for in this Act.
- [7] Section 4(a) of the ERA.
- [8] Section 4(b) of the ERA.
- [9] Section 7(1)(a) and (c) read with section 14 of the ERA.
- [10] Section 15(1)(a) of the ERA.
- [11] Sections 14(1)(o), (p) and (n) of the ERA.
- [12] Act 1 of 1999
- [13] In terms of section 239 of the Constitution read with Schedule 2 to the PFMA.
- [14] Act 117 of 1998
- [15] The ERA defines a customer as a person who purchases electricity or a service relating to the supply of electricity.
- [16] The ERA defines an end-user as a user of electricity or a service relating to the supply of electricity.
- [17] Act 56 of 2003
- [18] Act 3 of 2000
- [19] Section 172(1)(b) of the Constitution provides that a court when deciding a constitutional matter may make an order that is just and equitable.
- [20] Three applications have been brought by Afriforum in relation to the electricity issue. The first is the present application instituted

during December 2015. Power interruptions led Afriforum to seek an urgent interdict by way of a second application and restoration of power in January 2016. The court ordered reinstatement of power until Eskom filed its answering papers. The second application was not proceeded with as Eskom did not intend to implement scheduled interruptions because agreement was reached on a repayment plan. In December 2016, Afriforum brought another urgent application related to the December 2015 application to interdict the implementation of scheduled interruptions in eight municipalities in the Free State, pending the hearing in March 2017 of the December 2015 application. This urgent application was dismissed in January 2017 by Fabricius J.

37 National Coalition for Gay and Lesbian Equality v Minister of Home Affairs 2000

(2) SA 1 (CC)

[21] In terms of section 38(d) of the Constitution on behalf of the users of electricity in Madibeng

[22] Section 1 of PAJA

[23] Joseph and Others v City of Johannesburg and Others 2010

(4) SA 55 (CC) at para 34; and Mkontwana v Nelson Mandela Metropolitan Municipality and Another; 2005 (1) SA 530 (CC) at para 38.

[24] IEC v Langeberg Municipality

[2001] ZACC 23; 2001 (3) SA 925 (CC) at para 26

[25] Judge President Hlophe v Freedom Under Law and Others 2012

(6) SA 13 (CC) at paras 19-21.

[26] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000

(2) SA 1 (CC) at para 21

[27] MEC for Health, Eastern Cape and Another v Kirland Investments (Pty) Ltd 2014 (3) SA 481 (CC); Oudekraal Estates (Pty) Ltd v City of Cape Town and Others 2004 (6) SA 222 (SCA) at para 26; and Camps Bay Ratepayers' and Residents' Association and Another v Harrison And Another 2011 (4) SA 42 (CC) at para 62

[28] In constitutional cases the doctrine is an expression of the higher-level principle of avoidance embracing the notion that the

judicial resolution of constitutional issues should only take place as a matter of last resort and that decisions should be taken only on those issues that the facts of a case require to be decided. Where it is possible to decide any case without reaching a constitutional issue that is the course which should be followed – National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000

(2) SA 1 (CC) at para 21; Transvaal Agricultural Union v Minister of Land Affairs

[1996] ZACC 22; 1997 (2) SA 621 (CC) at paras 24-31; and Minister of Education v Harris 2001

(4) SA 1297 (CC) at para 19. See Currie and De Waal: The Bill of Rights Handbook (6th Ed – Juta) 72-73

[29] Poe v Ullman

[1961] USSC 144; 367 US 497, 509

[30] Ferreira v Levin NO and Others 1996 (1) SA 984 (CC) at para 199

[31] Dawood v Minister of Home Affairs 2000(1) SA 997 (C) 1030-1031

- [32] Wiese v Government Employees Pension Fund 2012 (6) BCLR 599 (CC) at para 22; Director-General Department of Home Affairs and another v Mukhamadiva 2014
- (3) BCLR 306 (CC); Mazibuko NO v Sisulu and Others NNO 2013 (6) SA 249 (CC); Sebola and Another v Standard Bank of South Africa Ltd and Another (Socio-Economic Rights Institute of South Africa and Others as Amici Curiae) 2012 (8) BCLR 785 (CC); and Phumla Ruth Patricia Ngewu and Another v Post Office Retirement Fund and Others 2013 (4) BCLR 421 (CC).
- [33] Chairman, State Tender Board v Digital Voice Processing (Pty) Ltd 2012 (2) SA 16 (SCA)
- [34] United States v Freuhof 356 US 146 (1961) 157
- [35] Director-General Department of Home Affairs and another v Mukhamadiva 2014
- (3) BCLR 306 (CC) para 33.
- [36] In terms of section 21(1)(c) of the Superior Courts Act 10 of 2013.
- [37] Southern Pacific Terminal Co v Interstate Commerce Commission 219 US 498, 514-515 (1911)
- [38] A good example of enduring collateral consequences is where a court faces a criminal appeal against a conviction and sentence after the appellant has completed the sentence. The challenge is not mooted because of the possibility of the conviction having relevance to sentencing for any future convictions, disenfranchisement and character impeachment in other proceedings.
- [39] Independent Electoral Commission v Langeberg Municipality 2001 (3) SA 295 (CC) at para 11; Wiese v Government Employees Pension Fund 2012
- (6) BCLR 599 (CC) at para 40.
- [40] Legal Aid South Africa v Magidiwana 2015 (6) SA 494 (CC) at para 28.
- [41] S v Manamela 2000 (3) SA 1 (CC) at para 12; and Sebola and Another v Standard Bank of South Africa Ltd and Another (Socio-Economic Rights Institute of South Africa and Others as Amici Curiae) 2012
- (8) BCLR 785 (CC) at paras 32-34
- [42] Rescue Army v Municipal Court of Los Angeles 331 US 549, 571 (1947)
- [43] 2001 (3) SA 295 (CC) at paras 11 and 14
- [44] 2014 (3) SA 481 (CC)
- [45] 2004 (6) SA 222 (SCA) at [26]
- [46] Ferreira v Levin NO 1996 (1) SA 984 (CC) at para 229
- [47] Ex parte Nell 1963 (1) SA 754 (A) at 759-760

[48] I use the word “review” here loosely to mean a consideration of all relevant factors to determine the appropriateness of the decision.

[49] Chief Lesapo v North West Agricultural Bank and Another

[1999] ZACC 16; 2000 (1) SA 409 (CC); Jaftha v Schoeman and Others, Van Rooyen v Stoltz and Others [2004] ZACC 25; 2005

(2) SA 140 (CC); Gundwana v Steko Development CC and Others 2011 (3) SA 608 (CC); University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2016 (6) SA 596 (CC).

[50] Section 39(2) of the Constitution provides that when interpreting legislation every court should promote the spirit, purport and

objects of the Bill of Rights.

[51] University of Stellenbosch Legal Aid Clinic and Others v Minister of Justice and Correctional Services and Others 2016 (6) SA 596 (CC) at para 148.

[52] National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000

(2) SA 1 (CC) at para 24.

[53] 1988 (1) SA 1 (A) at 22D-H

[54] 2000 (1) SA 409 (CC)

[55] Act 14 of 1981

[56] 2016 (6) SA 596 (CC)

[57] Act 32 of 1944

[58] 2005 (2) SA 140 (CC)

[59] 2011 (3) SA 608 (CC)

[60] 2013 (4) SA 225 (CC) – which upheld the judgment of the Supreme Court of Appeal in Rademan v Moqhaka Local Municipality 2012 (2) SA 387 (SCA).

[61] Rademan v Moqhaka Local Municipality 2012 (2) SA 387 (SCA) at paras 15-16.

[62] See Metcash Trading Ltd v Commissioner, SARS 2001

(1) SA 1109 (CC) at paras 42-48

[63]

[2004] ZACC 25; 2005 (2) SA 140 (CC) at paras 47 and 55

[64] Joseph v City of Johannesburg 2010 (4) SA 55 (CC) para 59.

[65] International Longshoremen's and Warehousemen's Union Local 37 v Boyd 347 US 222, 224 (1954)

[66] Biowatch Trust v Genetic Resources 2009

(6) SA 232 (CC).

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