

SOUTH AFRICA / JUDGMENT

**Sonae Arauco (SA) Pty Ltd v Mbombela
Local Municipality and Others
(3151/2023) [2023] ZAMPMBHC 44;
[2023] 4 All SA 543 (MM) (16 August 2023)
[2023] ZAMPMBHC 44**

COURT

Mbombela High Court, Mpumalanga

BEFORE

Roelofse AJ

CASE / FILE NUMBER

3151/2023

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FLYNOTES:

CIVIL PROCEDURE – Structural orders – Separation
of powers –
Adequacy
of action plan – Inadequate to ensure safety and security of
bus drivers and passengers – Order compels
MEC's and
Minister's compliance with their constitutional and statutory
obligations – Failure to comply – Plan
developed and
filed by MEC without Minister's involvement – SAPS failure
to maintain police presence and provide escorts
along certain
routes as required by plan – Rule nisi granted.
REPUBLIC
OF SOUTH AFRICA
IN
THE HIGH COURT OF SOUTH AFRICA, MPUMALANGA DIVISION (MAIN SEAT)
Case

Number:

3151/2023

In the matter between:

SONAE
ARAUCO (SA) PTY LTD
Applicant
and
MBOMBELA
LOCAN MUNICIPALITY
First
Respondent
ESKOM
HOLDINGS SOC LTD
Second
Respondent
PREMIER
OF MPUMALANGA
Third
Respondent
DIRECTIER
GENERAL, OFFICE OF THE PREMIER OF MPUMALANGA
Fourth
Respondent
MINISTER
OF MINERAL RESOURCES
Fifth
Respondent
MINISTER
OF ELECTRICITY
Sixth
Respondent
This
judgment will be handed down electronically by circulation to the
parties' legal representatives by email and release
to SAFLII.
The date and time for hand-down is deemed to be at 11h00 on 16 August
2023

JUDGMENT

Roelofse AJ:

Introduction

- [1] Load shedding – a term all South Africans are painfully familiar with. It costs lives and livelihoods. It is a necessary evil to protect all South Africans from a total collapse of the national electricity grid, more often referred to as a total blackout. Load shedding is implemented as a result of Eskom, who is South Africa's national electricity generator and distributor, and Government who is Eskom's only shareholder's failure to properly and diligently execute their Legislative and Constitutional

obligations.[1] This judgment shows but one example to the disastrous effect of load shedding upon business, our economy and all the people of South Africa.

[2] The applicant (Sonae) is a subsidiary of Sonae Arauco International. Sonae Arauco International has an international footprint. Sonae specialises in the manufacturing of wood based panels which is an essential input in the building and construction industries. Sonae's factory (the factory) is situated in the Rockey Drift area between Mbombela and White River. Rocky Drift falls under the Mbombela Local Municipality[2] (the municipality)'s jurisdiction.

[3] Sonae is the single largest contributor to the municipality's electricity revenue. Sonae spends more than R 100 million annually on electricity which it purchases from the municipality.[3]

[4] Sonae employs 250 people and spends in excess of R 600 million per year in the local economy. Sonae is therefore a major contributor

not only to the municipality's revenue but is also a major contributor to the local economy.

[5] The factory operates continuous production lines, running 24 hours per day. The factory is dependent on a steady electricity

supply to safely conduct its operations and to be sustainable.

[6] The equipment that is installed in the factory operates at high temperatures and is tremendously sensitive to electricity supply interruptions, specially load shedding, as it causes severe damage to the production Lines, the electrical and electronic control equipment, which in turn creates a major fire risk and jeopardizes the eventual output of the entire factory.

[7] Sonae alleges that if it is subjected to continuous load shedding it will have to let go of its employees and close its operations. In addition, Sonae alleges that load shedding creates a real and substantial risk of fire at the factory. This causes a health and safety risk for all persons at the factory which includes employees, contractors, suppliers and the general public.

[8] Sonae alleges that it has no alternative energy source and that an alternative electrical supply plant will require a capital expenditure of approximately R 600 million and it would take at least 12 to 18 months to commission. Sonae is not in a position to install or implement such a massive power plant.

[9] In order to address the load shedding problem, Sonae approached the municipality during the beginning of 2020 and proposed the conclusion

of a controlled curtailment agreement[4] (the agreement). The agreement would entail: that the municipality refrains from implementing load shedding to the factory; in turn Sonae will control its electricity usage at the factory and limit the same to approximately 70% or less of its usual electricity usage; the curtailment is achieved by shutting down that the operations at the factory during periods of load shedding; the electricity supply to the factory would remain

uninterrupted. Sonae alleges that the agreement was entered into between it and the municipality orally.

[10] The effect of the agreement was that Sonae could continue with its operations albeit at a diminished scale, avoid damage to equipment and continue with production, therefore remaining commercially viable. Sonae alleges that it and the municipality complied with the terms of the agreement from its conclusion until December 2022.

[11] During December 2022, and for reasons then unknown to Sonae, the municipality implemented load shedding at the factory. Sonae alleges that the municipality therefore breached the agreement and the load shedding was done in conflict with the municipality's

obligations in terms of the agreement. Furthermore, the municipality implemented load shedding without any prior notification

or warning to Sonae.

[12] On 28 December 2022, Sonae wrote to the municipality and requested that the municipality comply with its obligations in terms of the agreement. No response was received from the municipality to this communication.

[13] Sonae alleges that during January 2023, "...the Municipality came to its senses and made a commitment to Sonae that it will continue to comply and adhere to its obligations in terms of the controlled curtailment agreement, the same as since its inception in 2022."

[14] Sonae expressed its gratitude to the municipality and requested that municipality inform Sonae immediately if any future non-compliance with the agreement is anticipated so that continuous electricity supply is not interrupted without notification or warning systems it causes a major fire risk at the factory and put people's lives at stake.

[15] Sonae alleges that on 9 June 2023 and without any communication or prior warning or notification, the municipality applied full load shedding on the factory.[5] Sonae alleges that the municipality is in breach of the agreement and that Sonae would approach the court for relief.

Relief sought by Sonae

[16] Sonae approached this court on notice of motion on an urgent basis. Sonae's notice of motion consists of two parts, being a

Part A and a Part B. Part A of Sonae's notice of motion (excluding prayer 1 which is the urgency prayer) reads:

‘2. That a mandatory interim interdict, with immediate effect, be granted against the first respondent (“the Municipality”) to comply with its obligations in terms of the Controlled Curtailment Agreement concluded between the applicant (“Sonae”) and the municipality by refraining from implementing load shedding and to grant a continuous electricity supply in the area where the grid of Sonae’s factory is located, pending the finalisation of Part B of the notice of motion.

3. In the alternative to prayer 2 supra, that a prohibitively interdict, with immediate effect, be granted against the Municipality from implementing load shedding in the area where the relevant grid of the Sonae factory is located, pending the finalization of Part B of the Notice of Motion.

4. That the second respondent (“Eskom”) be interdicted and restrained from implementing load shedding in the area where the relevant grid of the Sonae factory is located, pending the finalization of Part B of the Notice of Motion.’

[17] Sonae seeks costs against the municipality and Eskom and any other party who opposes the application.

[18] In Part B of the notice of motion Sonae seeks far-ranging relief including judicial review and mandamuses. The mandamuses include

orders that the municipality and Eskom's decisions not to supply electricity and its failure to do so be set aside, be declared

unlawful and averse to the municipality and Eskom constitutional obligations. [6]

[19] I am only seized with Part A of the notice of Motion.

[20] Only the municipality and Eskom opposed Part A of the application and only they filed papers.

URGENCY

[21] Sonae alleges that it instituted the application on a semi-urgent basis in order to afford the municipality and Eskom a fair and reasonable opportunity to respond. The application was issued on 17 July 2023 and served on 18 July 2023. The respondents

were given until 21 of July 2023 to file and deliver their notice of intention to oppose the application and given until 25 July 2023 to deliver their answering affidavits. The time periods afforded to the respondents to respond to the application demonstrates that the application was not brought on a semi-urgent basis.

[22] The municipality delivered its answering affidavit on 25 July

2023. Eskom delivered its answering affidavit on 31 July 2023 and is

seeking condonation in this regard. Sonae filed its “short” replying affidavit on 1 August 2023, i.e. on the date of the hearing of the application. This court first had sight of Eskom’s answering affidavit on the morning of initial set down and Sonae’s replying affidavit the day after the hearing was first set down. The court heard the application on 2 August 2023.

[23] Sonae advances as grounds for urgency: The unilateral and illegal deprivation of a continuous electricity supply to the factory without due process; the fire risks at the factory (and surrounds) associated with load shedding; load shedding poses a continuous risk for the operations of the factory; the municipality stands to lose the substantial income it receives from Sonae, and that the economy of Mbombela stands to suffer great harm if load shedding to the factory continues; Sonae will not be afforded substantial redress at hearing in due course because the inevitable will occur namely Sonae’s demise with the resultant harm to Sonae’s

employees, contractors, suppliers and the public; Sonae will not be able to recover from continuous load shedding; and, Sonae did not unduly delay the bringing of this application as it has made various pleas to the municipality to resolve the impasse which was ignored by the municipality and Eskom, the latest attempt being on 5 July 2023.

[24] Both the municipality and Eskom take issue with urgency. The municipality is of the view that Sonae has failed to set out explicitly the circumstances which renders the application urgent and the reasons why it believes it cannot be afforded substantial redress at hearing in due course. Eskom’s view is that the matter is not urgent because the applicant can install a generator at its premises. In addition, Eskom alleges that at least since December 2022, Sonae knew that it might be subjected to load

shedding.

[25] I reject the municipality and Eskom’s challenge to urgency. Sonae sets out the consequences of load shedding and what effect the continuation thereof has on its operations and the broader community. Eskom’s defence that Sonae can install a generator

is not substantial redress in due course. It may be a practical solution Sonae might consider to follow. It is not for Eskom to say what Sonae must do in order to mitigate the effect of load shedding. The electricity supply to the Rockey Drift sub-station was indeed cut in December 2022 but the electricity was restored to the sub-station in January 2023 until Eskom cut the electricity supply to the sub-station on 9 June 2023. Eskom’s challenge of urgency on the score that Sonae knew that it may be subjected to load shedding already in December 2022 comes to naught because the electricity supply was restored in January 2023 only to be finally interrupted on 9 June 2023.

[26] The nature of the urgency is always an important consideration for purposes of deciding whether or not to hear an application on an urgent basis. In this matter, the nature of the urgency is that Sonae is severely prejudiced by the application of load shedding to its factory despite the alleged agreement. In my view, the sooner Sonae knows where stands with

regard to the continuation of load shedding the better - not only for Sonae but also for the larger imbedded community that is affected by the load shedding at the Rockey Drift substation.

[27] I dispense with the forms and service provided for in the Uniform Rule rules and dispose of the application on an urgent basis

MERITS

Sonae's case

[28] Sonae's case is squarely founded upon the alleged agreement with the municipality and the municipality's alleged breach thereof. Sonae also pleaded the legislative regime in terms of which electricity is generated and distributed in South Africa. Sonae alleges that sections 152 and 153[7] of the Constitution imposes upon the municipality an obligation to, within its available means, ensure the provision of basic municipal

services (including electricity) to communities in a sustainable manner. In addition, Sonae alleges that in terms of section 73 (1) of the Local Government: Municipal Systems Act 32 of 2000[8], the municipality must give effect to the provisions contained in the Constitution and that Eskom must support and strengthen the capacity of municipalities to manage their own affairs, to exercise the powers and to perform their functions. As such, Eskom is not empowered to usurp the municipality's constitutional and statutory obligations. In this regard, Sonae specifically includes the municipality's obligation to distribute and provide electricity to the residents within its area of jurisdiction and relies on a legitimate expectation it held that the municipality would keep to the terms of the agreement.

[29] Sonae pleads that the agreement provided that the municipality undertook to refrain from implementing load-shedding at Sonae's

factory and in turn Sonae agreed that it would during load shedding periods limit / curtail its electricity usage to approximately 70% or less of its usual electricity usage. Sonae pleads that it duly complied with the terms of the agreement in general and specifically

by decreasing its its total electricity usage to approximately 70% or less from the inception of the agreement and annexes a presentation

made by Sonae to the municipality showing the actual electricity consumption graphs since the inception of the agreement. The graph,

so Sonae alleges, demonstrates that Sonae has at some instances decreased its power usage to 50% of its normal usage. Sonae also

pleads that it had a legitimate expectation that the municipality would keep to the agreement.

The municipality's defence

- [30] The municipality's view is that the relief that is sought by Sonae is incompetent and that Sonae has failed to satisfy the requirements for an interdict.
- [31] The municipality concedes that it is responsible for the provision of the services, which includes electricity that is provided through an agreement with Eskom within its area of jurisdiction. The municipality simply implements the stages and schedule of load shedding as determined by Eskom in terms of the agreement between the municipality and Eskom. In this regard, the municipality is under an obligation to cooperate with Eskom and it is not allowed to encroach on the "functional and institutional integrity" of Eskom. The municipality and other organs of state must devise measures to avoid a total grid collapse even to the extent of applying measures such as load shedding which has an effect of limiting the rights of members of the community. Only essential services, such as health and security of services may be exempted from load shedding. The implementation of load-shedding is a policy decision, informed by the availability of supply in the national grid. Load shedding is applied in terms of the law. Therefore, Sonae cannot interdict the municipality and Eskom from performing their statutory functions.
- [32] The municipality further alleges that only the municipal manager has authority to conclude binding agreements on behalf of the municipality and that the municipality cannot enter into oral agreements. As such, the agreement upon which Sonae relies is unlawful, invalid and unenforceable against the municipality. With regards to Part B of the notice of motion, the municipality reserved its right to fully respond thereto in due course.
- [33] Besides denying the conclusion of the agreement, the municipality offers no challenge to Sonae's allegation that it had decreased its electricity usage in terms of the agreement as evidenced by the electricity usage graphs Sonae attached to its founding affidavit.

Eskom's defence

- [34] Eskom alleges that: Eskom is expressly authorised, and indeed mandated, to implement load shedding in a municipality where

the relevant municipality fails to adequately reduce its load; the dispute over the existence of the purported agreement is entirely

irrelevant as the agreement is unlawful because it precludes Eskom from implementing load shedding in the municipality,

whatever the state of the grid and whether or not the municipality has reduced load by the required amount; there cannot be any

legitimate expectation that state entities will act in flagrant breach of the law and that a state entity will comply with a contract

which is it is not a party to and which would require it to abdicate its duties; Sonae has not satisfied the requirements for the granting of an interim interdict in that Sonae has not shown any prima facie right, Sonae will not suffer irreparable harm if instant relief is not granted, Sonae has an alternative remedy; and, the balance of convenience mitigates against the granting of relief to Sonae.

DISCUSSION

Legislation

[35] There is no real dispute between the parties that the generation, distribution and use of electricity is governed by statute and policy. Properly considered, what is in dispute is the implementation of the legislation and the policy. On the one hand, Sonae says that the municipality has a statutory, constitutional and contractual obligation to supply its factory with electricity. On the other hand, the municipality and Eskom say that they have the right to restrict the supply of electricity to the factory and a failure to do so would be unlawful.

[36] The statutory and legislative regime in terms whereof electricity is generated, distributed and consumed have been set out in various

judgments, including in judgments of the Constitutional Court. I borrow from Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others[9] and the authorities referred to below. Eskom Holdings SOC sets out:

‘[72] The Eskom Conversion Act (Conversion Act) converted Eskom into a public company, incorporated in terms of the Companies Act. The Conversion Act did not privatise Eskom. Upon conversion, the state was Eskom’s sole shareholder. Its conversion required Eskom and the Minister of Public Enterprises to enter a Shareholder compact. The

Shareholder compact is defined in section 1 of the Conversion Act to mean “the performance agreement to be entered into between Eskom and the government of the Republic of South Africa”. In doing so, the Minister was required to take account of the “developmental role of Eskom” and “the promotion of universal access to, and the provision of, affordable electricity, taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom”.

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

- [74] The provision of electricity is an essential resource. Eskom has historically enjoyed a near monopoly over the generation, transmission and distribution of electricity in the country. Unsurprisingly, therefore, the electricity industry has been made subject to extensive regulation. The regulatory framework is to be found in ERA. ERA empowers NERSA as the independent regulator of this framework.
- [75] The essential features of the framework are as follows:
- (a) No person may, without a licence, operate any generation, transmission or distribution facility.
 - (b) A person may apply to NERSA for a licence. NERSA must decide upon an application for a licence and may make any licence subject to conditions relating to defined but broadly framed areas of regulation. Among these are prices and tariffs, performance targets and service quality; the regulation of a licensee's revenue; the obligations of a licensee to generate, transmit or distribute electricity; the termination of electricity supply to customers and end users; and the classes of customers and end users to whom electricity may or must be supplied.
- [76] NERSA may also vary, suspend or remove any licence condition, and include any additional licence conditions. This may be done on application by a licensee but also, if necessary, for the purposes of ERA, upon application by an affected party. Thus, for example, an end user may not only hold Eskom to the conditions of its licence, but if Eskom's licence conditions fail to give effect to some aspect of supply that affects an end user, they may seek an amendment to Eskom's licence.
- [77] The scope of NERSA's regulatory competence is wide. NERSA may regulate much of what a firm would otherwise be free to decide if it operated in an unregulated market. What may be produced, how much may be produced, at what price, to whom and under what conditions, all fall within the scope of NERSA's regulatory powers.
- [78] NERSA's powers go further still. It adjudicates contraventions of licences. NERSA must settle disputes between a customer or end user and a licensee. NERSA's decisions are, in turn, governed by the National Energy Regulator Act, which specifies how NERSA is to take decisions and provides for rights of appeal and review.
- [79] Furthermore, ERA outlines a number of objects it was created to fulfill. In terms of section 2 of ERA, the objects of the Act are to—
- “(a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa;*

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

...

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

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

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

- (a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;
- (c) must give end users proper information regarding the costs that their consumption imposes on the licensee’s business;
- (2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the Regulator as part of its licensing conditions.”

[81] It is thus evident that any duty imposed on Eskom to provide electricity, cannot be separated from its fiscal responsibilities. These fiscal duties are not only aimed at protecting Eskom as a licensee, but also serve the purpose of protecting it as the nation’s electricity provider. Of significance is NERSA’s Multi Year Price Determination Methodology (MYPDM). The MYPDM is developed for the regulation of Eskom’s required revenues. It forms the basis upon which NERSA evaluates the price adjustment applications received from Eskom. It is a cost-of-service based methodology, with incentives for cost savings and efficient and prudent procurement by the licensee (Eskom). Thus, Eskom is meant to function as a viable licensee.’

[37] With regards to municipalities roles, Vaal River proceeds as follows:

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

[84] In terms of section 27, each municipality is required to exercise its executive authority to perform a list of stated duties. These duties include: ensuring sustainable reticulation;

progressively ensuring access to at least basic reticulation services through appropriate investment in electricity infrastructure;

providing reticulation services at no cost or at minimum cost to certain classes of end users within its available resources; and preparing and implementing relevant plans and budgets.

[85] Under the provisions of ERA, municipalities are the customers of Eskom when they purchase bulk electricity. Those to whom the municipalities, in turn, supply electricity are end users, under the definition in ERA. The Local Government Municipal Finance Act (Municipal Finance Act) provides for the budgetary control of municipalities, including revenue collection in accordance with the municipal budget; treasury oversight of the pricing of bulk electricity and the payments made by municipalities for bulk electricity; and the regulation of proposed price increases by an organ of state for the supply of bulk electricity to a municipality.

[86] The following may be said of the regulatory scheme that I have sketched.

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

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

[88] In fact, so far do a municipality's powers to collect revenue

extend that this Court, in *Rademan*, confirmed that a municipality may disconnect a resident's electricity supply where that resident failed to pay for other municipal services, but still paid for electricity supply. There, this Court held that where a resident, as a customer of the municipality, contravened the municipality's conditions of payment, as set out in the municipal by-laws read with the Local Government: Municipal Systems Act (Systems Act) and the agreement between the

parties, then section 21(5)(c) of ERA was met. Accordingly, a municipality is then entitled to cut off the resident's electricity supply. On what basis then can Eskom, an organ of state that does not bear the responsibility of providing municipal services directly to the residents, be held liable for the supply of electricity if the conditions of its electricity supply agreements have been breached?

[89] Third, the relationships between Eskom, as supplier; the municipalities as customers; and the residents as end users of electricity, are regulated under ERA. ERA, as I have observed, gives NERSA

extensive powers to do so. Those powers include the resolution of disputes that end users may have against Eskom.' [Endnotes omitted].

[38] In *Joseph and Others v City of Johannesburg and Others*[10], the Constitutional Court focussed its attention on municipalities' functions in respect of the provision of basic municipal services of which the provision of electricity is one:

'[34] The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In *Mkontwana, Yacoob J* held that "municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty." Electricity is one of the most common and important

basic municipal services and has become virtually indispensable, particularly in urban society.

[35] The obligations borne by local government to provide basic municipal services are sourced in both the Constitution and legislation.

Section 152(1) of the Constitution sets out the objects of local government in general terms, and creates an overarching set of

constitutional obligations that are to be achieved in accordance with section 152(2).

Section 152 of the Constitution provides:

"(1) The objects of local government are—

- (a) to provide democratic and accountable government for local communities;
- (b) to ensure the provision of services to communities in a sustainable manner;
- (c) to promote social and economic development;

- (d) to promote a safe and healthy environment; and
- (e) to encourage the involvement of communities and community organisations in the matters of local government.

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

[36] In addition to these objects of local government, the Constitution specifically entrenches the developmental duties of municipalities.

Under section 153, a municipality is obliged to prioritise the basic needs of the community and to promote the social and economic development of the community.

[37] The Local Government: Municipal Systems Act 32 of 2000 (Municipal Systems Act) gives legislative content to the various constitutional

duties of local government. Section 4(2) of the Municipal Systems Act sets out the duties of municipal councils, which exercise the executive and legislative authority at municipal level. In particular, section 4(2)(f) provides as follows:

"(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical

considerations, has the duty to—

. . . .

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

[38] Further content is given to the general duty of a municipality to provide municipal services under section 73 of the Municipal Systems Act, which provides:

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

- (a) give priority to the basic needs of the local community;
 - (b) promote the development of the local community; and
 - (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.
- (2) Municipal services must—
- (a) be equitable and accessible;
 - (b) be provided in a manner that is conducive to—

- (i) the prudent, economic, efficient and effective use of available resources; and
- (ii) the improvement of standards of quality over time;
- (c) be financially sustainable;
- (d) be environmentally sustainable; and
- (e) be regularly reviewed with a view to upgrading, extension and improvement.”

[39] Finally, the Housing Act 107 of 1997 imposes a specific obligation on municipalities to provide basic municipal services, including electricity. Section

9(1)(a)(iii) provides:

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

(a) ensure that—

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

[40] Taken together, these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it...[Footnotes omitted]

[39] In *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others* [11] where load shedding was at issue, a Full Court of the Gauteng Division said:

‘[16] The applicants also relied on our courts having recognized that, even if there may not be a right to electricity mentioned in the Constitution in so many words, other fundamental rights such as those mentioned above, can only be exercised or manifested by way of an uninterrupted supply of electricity. It has also been held that the state has a positive duty to take reasonable steps to realise those rights.

- [17] The obligations of the State have further been statutorily prescribed and detailed. In terms of section 5(1) read with section 5(2)(ii) of the National Energy Act 34 of 2008 (NEA) the Minister for Mineral Resources and Energy (the DMRE Minister) is obliged to take all reasonable steps to ensure that the State provides “energy services” to “all the people” in the country. In terms of this statutory obligation the key to unlocking electricity generation is held by the DMRE Minister.
- [18] In terms of the National Energy Regulator Act 40 of 2004, NERSA was established with the duty to regulate the supply of electricity, piped gas and petroleum pipeline structures.
- [19] Eskom is, in turn, licensed by NERSA in terms of sections 7, 14 and 21 of the Electricity Regulation Act 4 of 2006 (the ERA) to supply and distribute electricity.
- [20] Eskom, even though licensed by NERSA, may not generate and distribute electricity off its own bat, it may only do so in terms of a “shareholders compact” entered into between the DPE Minister and its board in terms of section 6(4) of the Eskom Conversion Act 13 of 2001 (the Conversion Act). In *Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd (Vaal River)* at par 73 the Constitutional Court has described the relationship between Eskom as a State Owned Corporation and its shareholder, the State, represented by the DPE Minister as follows: “The Conversion Act did not privatize Eskom. Upon conversion, the state was Eskom’s sole shareholder. Its conversion required Eskom and the Minister of Public Enterprises to enter a Shareholder compact. The Shareholder compact is defined in section 1 of the Conversion Act to mean “the performance agreement to be entered into between Eskom and the Government of the Republic of South Africa”. In doing so, the Minister was required to take account of the “developmental role of Eskom”
- and “the promotion of universal access to and the provision of affordable electricity, taking into account the cost of electricity,
- financial sustainability and the competitiveness of Eskom”.
- [21] In summary then, the collective framework for the generation, supply and distribution of electricity and the upkeep of the infrastructure to do so, is as follows: The DMRE Minister authorizes the generation of electricity including plans for the expansion thereof and dictates policy in respect of thereof. Eskom performs the actual acts of generation, supply and distribution in terms of its performance agreement with the State, represented by the DPE Minister and does so in terms of licences issued to it by NERSA, who in turn prescribes conditions or limitations to these licences by way of published codes. It is within these parameters that the various stages of loadshedding are determined. We shall refer to these more fully when dealing with the reasons why loadshedding is experienced.
- [22] It is by way of this collective framework that the respondents are to comply with their respective statutory and Constitutional obligations.’
- [40] Specifically dealing with load shedding, UDM sets out as follows:

[23] The evidence placed before the court by Eskom Group Chief Executive Officer, Mr De Ruyter, indicated the following: load shedding is the controlled reduction of electricity demand. It is implemented by disconnecting “certain points” on the transmission and distribution networks on the national electricity grid. Load shedding is employed when electricity demand exceeds the supply of electricity to avoid a collapse of the electricity grid. Such a collapse would result in a complete lack of supply across the whole country (referred to as a “blackout”). Restoration of the supply of electricity after a blackout could take days or even weeks. During the period of a complete blackout, the country as a whole would suffer immense human suffering and economic harm. It would result in the shutdown of water supply and sewerage treatment, the shutdown of telephone and internet services, payment services, fuel and diesel distribution and impact on food supply and the rendering of medical services.

[24] As already mentioned, Eskom operates under licenses granted to it by NERSA. The transmission and distribution licenses oblige Eskom to apply the South African Grid Code System Operation Code (the Grid Code). Apart from the licensing requirement, the ERA also statutorily obliges Eskom to adhere to the Grid Code as well as another code, the NRS 048-09 Code (the NRS Code). This last mentioned code prescribes the Practice for Energy Load Reduction. These codes oblige Eskom to maintain a minimum critical load. A minimum critical load is that required to maintain the operational integrity of the grid “to avoid a direct and significant impact on the safety of people, the environment and ... plants ...

as agreed in writing by the licensee”. Eskom complies with these codes in maintaining a minimum critical load by way of various means, of which it says load shedding is used as a means of last resort.

[25] Why then is load shedding implemented if it is only to be used as a last resort? Eskom explains, through a series of affidavits from its Acting Group Executive-Generation, its Chief Financial Officer, its General Manager of Transmission, its Senior Manager of Climate Change and Sustainable Development in Eskom’s Risk and sustainability Division, its Emerging Response Manager: Eskom Distribution Solutions, Research Testing and Development in the Office of the Chief Operation for Excellence in Eskom’s Distribution Division, that the need for loadshedding exists because the demand for electricity currently exceeds Eskom’s ability to supply electricity by anything between 4 000 to 6 000 megawatts (mw) at virtually any given time.

[26] Why is there insufficient supply of electricity? To answer this question Eskom began its explanation in 1990. It claims that since then there has been insufficient investment in new energy capacity, a responsibility vested in DMRE Minister, in terms of the sections of the ERA already referred to above. Eskom pointed out that in 1990 only 35% of South African households had access to electricity. As part of a Reconstruction and Development Program, the electrification of an additional 2.5 million households by 2000, was achieved, resulting in South Africa achieving the highest annual electrification rate in the world.

- [27] To maintain this, it was established that Eskom's generation capacity surplus would be fully utilized by 2007. To clarify: by that time the demand for electricity would equal the maximum available supply. New generation capacity would therefore be needed. This was explained to cabinet (and approved by it) in terms of the "1998 White Paper". This set out intended structural reforms for Eskom, including the unbundling of its generation, transmission and distribution divisions as well as the commissioning of generation capacity.
- [28] Despite its acceptance, the 1998 White Paper was not implemented for some years and in 2001 Cabinet took the decision that Eskom was not allowed to invest in new generation capacity "in the domestic market". This resulted in Eskom's surplus generation decreasing over the years to about 8.2% in 2004. Later in that year Eskom was finally permitted to initiate plans for the construction of two new generation units, being Kusile and Medupi.
- [29] A typical power station constructed in the 1980's took about 5 – 8 years to construct. This was typically for a two-unit power station. Medupi and Kusile were 6 unit stations. In the 16 years since the last power station had been constructed, Eskom had significantly lost its skills and capacity to build large scale power stations. Due to this, the use of "virtual designs" in the tendering process, the appointment of the Tokyo based conglomerate Hitachi Ltd in 2007, who had no experience working with South African coal and a vast number of design errors, resulted in the first unit at Medupi only being commissioned in 2015 and the last unit only last year (2022). The first unit for Kusile was only commissioned in 2017 and the power station is to this day not yet fully commissioned.
- [30] In simple terms, the Government had been warned (and had accepted) that it would run out of a generating capacity by 2008 (which had happened) and in the 15 years since then, has failed to remedy the situation. Added to this, is the detailed evidence of Eskom's Acting Group Executive: Generation regarding catastrophic failures suffered by both Kusile and Medupi which contributed substantially to the overall lack of generation capacity.
- [31] In addition to the above, Eskom has admitted that, in order to attempt to supply electricity at a continuous level, it ran its coal-powered plants harder than was advisable and deferred maintenance programs during which plants would be taken off-line. It is only fairly recently that maintenance programs have been re-implemented. The result is, however, frequent break-downs in non-maintained equipment and unavailability of units during repairs and maintenance.
- [32] In summary, Eskom explained that, in addition to the historic failure to maintain its power generating fleet and the governmental failure to create new generation capacity, its inability to render sufficient electricity to the country was further hampered by the lack of cost-effective tariffs, the low reliability of the aging generation fleet, the previous management's refusal to conclude renewable energy independent power producer contracts, regulatory obstacles, high municipal debt and alleged state capture, corruption and sabotage damage.

- [33] Having stated all the above, Eskom conceded that “load shedding causes human suffering and has a detrimental impact on a variety of constitutionally protected rights, including those the applicants identify”.
- [41] The aforesaid authorities confirm the following principles in respect of Eskom, municipalities and residents in the supply of electricity. It is according to these principles (and background provided in the authorities) that I decide Part A of this application.

Eskom

- [42] Eskom is ultimately required to give universal access to and provide affordable access to electricity while taking into account the cost of electricity and the financial sustainability and competitiveness of Eskom; the Shareholder compact gives statutory force to the role of Eskom as a provider of electricity; the Shareholder compact is enforceable as between Eskom and its shareholder, the State; and, Eskom performs public functions in terms of legislation and thus qualifies as an organ of state under the definition in section 239 of the Constitution.

ERA and NERSA

- [43] The provision of electricity is an essential resource governed by a regulatory framework found in the Electricity Regulation Act 4 of 2006 (ERA); ERA empowers NERSA[12] as the independent regulator of the regulatory framework; NERSA, amongst other powers has the power to determine the obligations of a licensee to generate, transmit or distribute electricity; the termination of electricity supply to customers and end users; and the classes of customers and end users to whom electricity may or must be supplied; two of the objects of ERA are to ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic and to facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public; NERSA has wide powers which include the power to resolve disputes between Eskom, municipalities and its residents; and, NERSA must settle disputes between a customer or end user and a licensee;

Municipalities and its residents

- [44] Municipalities have a public duty to provide electricity to its residents; Municipalities procure bulk supplies of electricity from Eskom and must then discharge their duties to supply end consumers; under the provisions of ERA, municipalities are the customers of Eskom when they purchase bulk electricity; those to whom the municipalities, in turn, supply electricity to end users,

under the definition in ERA; municipalities are bound by section 152 of the Constitution in exercising their functions and duties; ERA recognises the importance of municipalities. It contains provisions that give effect to the constitutional duty of municipalities to supply

electricity to their residents; in terms of ERA, municipalities are Eskom's customers and the municipalities' residents to whom they distribute electricity are end users; the relationship between municipalities as customers and its residents as end users are regulated by ERA; and, an end user may not only hold Eskom to the conditions of its licence, but if Eskom's licence conditions fail to give effect to some aspect of supply that affects an end user, they may seek an amendment to Eskom's licence.

Load- shedding

[45] Load shedding is employed when electricity demand exceeds the supply of electricity to avoid a collapse of the electricity grid.

Such a collapse would result in a complete lack of supply across the whole country (referred to as a "blackout"); as Eskom operates under licenses granted to it by NERSA, the transmission and distribution licenses oblige Eskom to apply the South African Grid Code System Operation Code (the Grid Code); In addition, Eskom must comply with the NRS 048-09 Code (the NRS Code). The NRS code prescribes the Practice for Energy Load Reduction.

[46] I return to the issues in this application.

[47] For its defence, Eskom relies on the NRS Code which it alleges gave it the power to disconnect the Rokey Drift sub-station on 9 June

2023. What follows is what Eskom alleges in this regard. Eskom traverses the NRS Code in some detail in its papers. Eskom says the following:

'Importantly, as annexure "ESK3" details, Load shedding is a difficult task to execute, requiring as it does, precise measurements of load being consumed, and capacity to rapidly decrease demand. The NRS048-9 Code thus expressly provides that a municipality can elect to be shed by Eskom.

The Grid Code and NRS048-9 provide a carefully designed regulatory scheme which attempts to address the problem of embeddedness as best as possible by creating narrowly tailored instances where customers can be partly or wholly insulated from load shedding, without compromising grid security.

In this way, the Grid Code and NRS048-9 Code strike a balance between two fundamental objects. a [sic] reasonable and equitable

distribution of the burdens caused by an electricity shortage and the imperative of avoiding the catastrophic consequences of a blackout.

.... the Codes

23.1 Require Eskom to instruct municipalities on how much load must be

reduced to ensure the safety of the Grid, and to monitor municipalities' capacity to do so; and

23.2 Where a Municipality fails to sufficiently reduce its load, require Eskom to intervene to ensure the security of the grid.’

[48] In respect of load curtailment, Eskom says the following:

‘Other customers [commuter rail and sewerage facilities] are likewise presumably included on load shedding schedules. Relevant for present purposes, such customers might be eligible for load curtailment, rather than load shedding that is, customers can elect to reduce load on demand, by amount specified by Eskom, rather than being subjected to load shedding.’

[49] Eskom sets out the circumstances under which load curtailment may be implemented. Eskom alleges that it is unaware of the agreement

and therefore denies the existence of the agreement. In its papers, and regarding the agreement, Eskom chose not disclose that it was indeed possible that the agreement, to the extent that the agreement provides for load curtailment, could have been entered into because the NRS Code specifically provides for load curtailment by customers. Eskom focuses its response that no load shedding was implemented at the Rocky Drift sub-station due to an error, therefore not in terms of the agreement. This response is irreconcilable with the fact that that load shedding was not implemented over the period contemplated in the agreement.

Eskom alleges that it cut the power to the Rocky Drift sub-station because the municipality has failed to comply with its obligations to shed the amount of load required. This happened on 9 June 2023.

[50] In a letter dated 29 July 2022[13], Eskom granted permission to “...do its own load shedding for the Southern Region effective from 01st of August 2022.” On 29 May 2023, in an email[14], Eskom advised the municipality that it had no option but to revoke the approval for self-loadshedding to Rocky’s Drift/White River and Barberton. In the same email. Eskom’s instruction was to inform the municipality’s “Stakeholders”

accordingly.

[51] In my view, Eskom did not apply load shedding to the Rocky Drift sub-station because the substation was excluded in error but rather because municipality did not comply with its obligations to shed the required load at that sub-station. It is therefore impossible to determine exactly what Eskom's defence is. Although the municipality put the blame on Eskom for cutting the power to the Rocky Drift sub-station, it is silent on why Eskom did so. More so, the municipality could have given the same explanation as Eskom did. After all, the municipality is Eskom’s customer and one would have expected the municipality to have said more.

[52] I find in favour of Sonae. Firstly, it and the municipality had indeed entered into the agreement and, secondly, nothing prevented the municipality from entering into the agreement. The NRS Code specifically provides for such an agreement to be entered into a

licensee and a large consumer.

[53] My first finding is premised on the fact that the municipality kept to the terms of the agreement until December 2022 and again from

January 2023 until 9 June 2023, when Eskom disconnected the supply to the Rockey Drift sub-station. There is no other reason preferred by the municipality for not implementing load-shedding to the Rockey Drift sub-station in the absence of any agreement as the municipality alleges. The municipality's failure to deny the existence of the agreement at the time the electricity was cut to the Rockey Drif sub-station, further supports this finding.

[54] My second finding is premised on the fact that the municipality cannot say that only the Municipal Manager would have been authorised to enter into the agreement in line with the Municipal Systems Act and that the municipality, as an organ of state, cannot enter into oral agreements. The NRS Code specifically provides for load curtailment agreements[15] and no formal requirements are set for its validity.

[55] On these papers, I therefore reject the municipality and Eskom's denial of the existence of the agreement. Upon this finding, I also reject Eskom's defence that Sonae could not have had a legitimate expectation the municipality would comply with the

provisions of the agreement. To have a legitimate expectation, as Sonae pleads, the expectation must be reasonable and, in public law, the expectation must be legitimate. See: *South African Veterinary Council and Another v Szymanski* 2003 (4) SA 42 (SCA). As to the first requirement for Sonae's reliance upon a legitimate expectation to be sustained, it simply means that the

expectation that Sonae had was reasonable in the sense that Sonae expected, due to the municipality's compliance with the terms of the agreement not to shed load to the Rockey Drift sub-station, that the municipality considered itself bound by the agreement. As to the requirement of public law legitimacy requirement, as I have previously said, the NRS Code expressly provides for load

curtailment. Also, from an administrative law perspective, surely Sonae would be entitled to prior knowledge that the power to the Rokey Drift sub-station would be cut before Eskom did so. The NRS Code specifically provides for the communication of load shedding schedules to customers (such as Sonae) by notice licensees (municipalities).[16]

[56] It is trite that Sonae had to establish four requirements for an interim interdict. I find that Sonae has established all of the

requirements for an interim interdict: Sonae has established that it has a *prima facie* right to uninterrupted power to its factory by virtue of the agreement; Sonae has shown irreparable harm not only to itself but to the wider community within which it operates if the municipality fails to comply with the provisions of the agreement; Sonae has no other effective remedy to alleviate its immediate and dire plight; and the balance of convenience favours Sonae as the municipality had been able to comply with the provisions of the agreement for more than three years (save for the

interruption in December 2022). If Eskom indeed cut the power to the Rockey Drift sub-station because the municipality has failed to shed the load Eskom requires, the municipality must have other ways to reduce its load for it was apparently able to do so in terms of its agreement with Eskom at least for some time prior to 29 May 2023.

CONDONATION

[57] Eskom applied for condonation for the late filing of its answering affidavit. I see no reason why condonation should not be granted. Eskom's answering affidavit filled the gaps which the municipality's answering affidavit left open.

COSTS

[58] I see no reason why costs should not follow the result.

[59] In the premises, I made the following order:

- (a) The first respondent is hereby interdicted and restrained from implementing load shedding in the area where the relevant grid of the applicant's factory (the factory) is located.
- (b) The first and second respondents are hereby interdicted and restrained from implementing load shedding in the area where the relevant grid of the factory is located.
- (c) The order in paragraphs (a) above shall serve as an interim interdict with immediate effect pending the finalization of Part B of the Notice of Motion.
- (d) The first and second respondents are ordered to pay the applicant's costs jointly and severally, the one paying the other to be absolved.
- (e) The parties are hereby directed to complete Form B of this court's Practice Directive and to approach the registrar of this court by no later than 31 August 2023 for purposes of case managing Part B of the application.

Roelofse AJ

Acting Judge of the High Court

DATE OF HEARING: 2 August 2023 DATE OF JUDGMENT: 16 August 2023

APPEARANCES

FOR THE APPLICANT:

Mr J de Beer instructed by Kruse Attorneys

FOR THE FIRST RESPONDENT:

Mr. Matebele and Mr Zwane on instructions of WS Nkosi Attorneys Inc.

FOR THE SECOND RESPONDENT

Mr Mr Shangisa SC and Ms Rakgoale instructed by ENS Africa.

- [1] So much appears in the UDM authority, where the reason for load shedding is attributed to Government and Eskom's failure to comply with their legislative mandate.
- [2] The first respondent.
- [3] Sonae is an end-user as the discussion about the legislative framework governing electricity generation and distribution will
- show below.
- [4] Such an arrangement which is made provision for in the Code upon which Eskom relies in its opposition to this application. More about the relevant Code later in this judgment.
- [5] This situation continues to 2 August 2023, when I ordered the electricity to the factory be restored pending judgment in Part A of the notice of motion.
- [6] Part B of the Notice of Motion reads: 'PART B - REVIEW MANDAMUS 1. Declaring that the Municipality's conduct to impose

load-shedding in area where the relevant grid of the Sonae factory is located constitutes a repudiation of the Controlled Curtailment

Agreement ("the Agreement") which repudiation Sonae elected to refuse and in consequence to claim specific performance. 2. That an order be granted declaring the Agreement to be in full force and effect between Sonae and the Municipality. 3. That the Municipality be finally interdicted and restrained from implementing load-shedding in the grid area where the Sonae factory is located in contradiction with the provisions of the Agreement. 4. That an order be granted declaring the delegation by the Municipality of its Constitutional and statutory obligations to Eskom (i.e., to provide/distribute electricity to the community

within the Municipality's jurisdiction). If any, is ultra vires and unlawful, and accordingly set aside. 5. In the alternative to prayer 4 (of Part B), the the Municipality's

decision to delegate its Constitutional and statutory duty to provide electricity to the community within the Municipality's

jurisdiction, to be reviewed and set aside in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000

("PAJA"), and that the aforesaid decision be substituted, in terms of section 8(1)(c)(ii)(aa) of PAJA with a decision to refuse such delegation of the Municipality's Constitutional and statutory obligations. 6. In the alternative to prayers 4 and 5 (of Part B) that the Municipality's decision to delegate its Constitutional and statutory duty to provide electricity to the Community within the Municipality's jurisdiction, be reviewed and set aside in terms of the provisions of the PAJA, and that the matter be remitted back to the Municipality to retake the decision, which decision must be taken within 2 months from date of this order. 7. In the alternative to prayers 4 to 6 (of Part B), and insofar as it is found that Eskom unlawfully usurped the Constitutional and statutory obligation of the Municipality to provide electricity to the community Within the jurisdiction of

the Municipality, that: 7.1 A declaratory order be granted that such conduct by Eskom is unlawful; 7.2 Final interdictory relief be granted against Eskom interdicting and restraining Eskom from usurping and/or attempting to usurp the Municipality's constitutional and statutory duty to provide

electricity to the community within the jurisdiction of the Municipality. 8. That a mandamus be granted against the Premier to act in accordance with section 139 of the Constitution by intervening and taking the appropriate steps to ensure the fulfilment of Municipality's Constitutional and statutory obligation to provide electricity to the community within the jurisdiction of the Municipality, and order that the Premier must report back to this court, within 2 months, on the steps taken in terms of section 139 of the Constitution. 9. In the alternative to prayer 8 (of Part B), and insofar as it is found that the Premier cannot or does not or does not adequately perform in terms of section 139 of the Constitution, that mandamus be granted against the fourth and/or fifth respondent (depending which Minister has the constitutional duty terms of section 139), to act in accordance with section 139(7) of the Constitution to intervene and act in accordance with section 139 (4) and (5) of the Constitution, and all that the Minister must report back to this court, within two months, on the steps taken in terms of section 139 of the constitution. 10. That the Municipality and Eskom, together with all opposing respondents, pay the costs of Part B jointly and severally, the one to pay the other to be absolved.'

[6] Part B of the Notice of Motion reads:

'PART B - REVIEW MANDAMUS

1. Declaring that the Municipality's conduct to impose

load-shedding in area where the relevant grid of the Sonae factory is located constitutes a repudiation of the Controlled Curtailment

Agreement ("the Agreement") which repudiation Sonae elected to refuse and in consequence to claim specific performance.

2. That an order be granted declaring the Agreement to be in full force and effect between Sonae and the Municipality.

3. That the Municipality be finally interdicted and restrained from implementing load-shedding in the grid area where the Sonae factory is located in contradiction with the provisions of the Agreement.

4. That an order be granted declaring the delegation by the Municipality of its Constitutional and statutory obligations to Eskom (i.e., to provide/distribute electricity to the community within the Municipality's jurisdiction). If any, is ultra vires and unlawful, and accordingly set aside.

5. In the alternative to prayer 4 (of Part B), the the Municipality's

decision to delegate its Constitutional and statutory duty to provide electricity to the community within the Municipality's

jurisdiction, to be reviewed and set aside in terms of the provisions of the Promotion of Administrative Justice Act, 3 of 2000

("PAJA"), and that the aforesaid decision be substituted, in terms of section 8(1)(c)(ii)(aa) of PAJA with a decision to refuse such delegation of the Municipality's Constitutional and statutory obligations.

6. In the alternative to prayers 4 and 5 (of Part B) that the Municipality's decision to delegate its Constitutional and statutory duty to provide electricity to the Community within the Municipality's jurisdiction, be reviewed and set aside in terms of the provisions of the PAJA, and that the matter be remitted back to the Municipality to retake the decision, which decision must be taken within 2 months from date of this order.
7. In the alternative to prayers 4 to 6 (of Part B), and insofar as it is found that Eskom unlawfully usurped the Constitutional and statutory obligation of the Municipality to provide electricity to the community Within the jurisdiction of the Municipality, that:

7.1 A declaratory order be granted that such conduct by Eskom is unlawful;

7.2 Final interdictory relief be granted against Eskom interdicting and

restraining Eskom from usurping and/or attempting to usurp the Municipality's constitutional and statutory duty to provide

electricity to the community within the jurisdiction of the Municipality.

8. That a mandamus be granted against the Premier to act in accordance with section 139 of the Constitution by intervening and taking the appropriate steps to ensure the fulfilment of Municipality's Constitutional and statutory obligation to provide electricity to the community within the jurisdiction of the Municipality, and order that the Premier must report back to this court, within 2 months, on the steps taken in terms of section 139 of the Constitution.
9. In the alternative to prayer 8 (of Part B), and insofar as it is found that the Premier cannot or does not or does not adequately perform in terms of section 139 of the Constitution, that mandamus be granted against the fourth and/or fifth respondent (depending which Minister has the constitutional duty terms of section 139), to act in accordance with section 139(7) of the Constitution to intervene and act in accordance with section 139 (4) and (5) of the Constitution, and all that the Minister must report back to this court, within two months, on the steps taken in terms of section 139 of the constitution.
10. That the Municipality and Eskom, together with all opposing respondents, pay the costs of Part B jointly and severally, the one to pay the other to be absolved.'

[7]

152. Objects of local government.—(1) The objects of local government are— (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment; and (e) to encourage the involvement of communities and community organisations in the matters of local government.

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

(1).

153. Developmental duties of municipalities.—A municipality must— (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and (b) participate in national and provincial development programmes.

[7]

152. Objects of local government.—(1) The objects of local government are—

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(a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and

(b) participate in national and provincial development programmes.

[8]

73. General duty.—(1) A municipality must give effect to the provisions of the Constitution and—
(a) give priority to the basic needs of the local community; (b) promote the development of the local community; and (c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

[8]

73. General duty.—(1) A municipality must give effect to the provisions of the Constitution and—
(a) give priority to the basic needs of the local community;
(b) promote the development of the local community; and
(c) ensure that all members of the local community have access to at least the minimum level of basic municipal services.

[9]

[1] 2023 (4) SA 325 (CC).

[10] 2010 (4) SA 55 (CC).

[11] (005779/2023;003615/2023;B38/2023) [2023] ZAGPPHC 280 (5 May 2023).

[12] The National Energy Regulator established in terms of section 3 of the National Energy Regulator Act 40 of 2004.

[13] Annexure “ESK4” to Eskom’s answering affidavit.

[14] Annexure “ESK5” to Eskom’s answering affidavit.

[15][15] See paragraph [45] above. Clause 4.5.3 of the NRS Code provides: ‘Notified mandatory load curtailment (Stages 1 to 4) 4.5.3.1 A licensee (the municipality) may identify specific customers (such as Sonae) who, instead of being shed, can provide a pre-defined amount of load to be curtailed within a maximum of 2 h on instruction of the licensee.’ Clause 4.5.3.2 sets certain percentages of load reduction during different load shedding stages as further requirements for such customers in order to benefit from load curtailment which aim is to protect such customer from full load shedding.

[15][15] See paragraph [45] above. Clause 4.5.3 of the NRS Code provides:

‘Notified mandatory load curtailment (Stages 1 to 4)

4.5.3.1 A licensee (the municipality) may identify specific customers (such as Sonae) who, instead of being shed, can provide a pre-defined amount of load to be curtailed within a maximum of 2 h on instruction of the licensee.’

Clause 4.5.3.2 sets certain percentages of load reduction during different load shedding stages as further requirements for such customers in order to benefit from load curtailment which aim is to protect such customer from full load shedding.

[16] Sub-paragraph

(b) under sub-clause 4.1 of the NRS Code.

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Prepared on 12 October 2026 · Esheria