IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 83581/2017

In the matter between:

RESILIENT PROPERTIES PROPRIETARY LIMITED	First Applicant
CHANGING TIDES 91 PROPRIETARY LIMITED	Second Applicant
RETRACTION PROPS 7 PROPRIETARY LIMITED	Third Applicant
MOGWELE TRADING 278 PROPRIETARY LIMITED	Fourth Applicant

and

ESKOM HOLDINGS SOC LIMITED	First Respondent
EMALAHLENI MUNICIPALITY	Second Respondent
MEC: CO-OPERATIVE GOVERNANCE & TRADITIONAL AFFAIRS (MPUMALANGA)	Third Respondent
MINISTER OF ENERGY	Fourth Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Fifth Respondent

FILING SHEET – APPLICANTS' SUPPLEMENTARY AFFIDAVIT

DATED AT **PRETORIA** ON THIS THE 15TH DAY OF **MARCH 2018**.

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THE REGISTRAR OF THE
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AND TO:
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For: 3rd & 4th RESPONDENTS' ATTORNEYS

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

CASE NO: 83581/2017

In the matter between:

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MINISTER OF ENERGY	Fourth Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Fifth Respondent

APPLICANT'S SUPPLEMENTARY AFFIDAVIT

I, the undersigned,

SANDRA LEE VAN DER WALT

do hereby make oath and say that:

1. I depose to this affidavit in the same capacity as in the founding affidavit.

2. The facts herein contained are within my personal knowledge, save where it otherwise appears from the context, and to the best of my knowledge and belief the contents are both true and correct.

3. I depose to this affidavit in response to the record of decision that was made available (herein the "ROD" or the "record"). The parties will be referred to as in the founding affidavit.

4. Having perused the record it has become clear that the Eskom interruption decision reflects a complete failure to appreciate or consider its consequences or rationale.

5. The consequences of the intended disruptions to the electricity supply must be distinguished from *"load shedding"*.

6. It appears as if Eskom is simply proceeding on the basis that the intended disruptions are merely another instance of load shedding with the added benefit of forcing an individual consumer to comply with its obligations. The truth is diametrically the opposite.

7. Load shedding is designed to reduce peak consumption with minimal adverse consequences to individual electricity consumers. The time periods are infrequent and of short duration so that essential services (such as the water supply and sewerage works) can survive the interruption.

8. Moreover, load shedding is contained to limited areas and alternate between areas.

9. This means that for instance a hospital or clinic can refer patients to a neighbouring area during a period of load shedding.

10. The infrequency of the disruption results in the adverse effects being capable of mitigation.

11. For instance, certain municipal water pumps may be shut down in an affected area, but other pumps will still be operating and thus the total impact on the sewerage and water reticulation system is not fatal. Urgent and essential services such as security and paramedical services can plan around load shedding interruptions.

12. However, the proposed termination of supply under consideration, affects the ENTIRE municipality and will almost certainly result in the total shut down of the water supply; the complete destruction of the sewerage network and various other irredeemable deleterious consequences.

13. As I will demonstrate below, Eskom completely ignored the destructive consequences of the proposed electricity interruption.

14. Although the destructive effects on the water supply was known to Eskom, it appears that it intended to make an arrangement with the municipality that would have enabled it to ringfence the water supply electricity points and would have enabled the municipality to effect normal electricity supply to the water reticulation and sewerage system.

15. However, in so far as this may have been proposed, the record makes clear that no such arrangement was made and/or steps taken to achieve this proposed solution before the decision was taken. Moreover, the expert

evidence demonstrates that such a solution cannot practically be achieved – it is an engineering impossibility.

16. In the event, the Eskom decision comprises a direct violation of the constitutional rights of both Highveld Mall and all the citizens of Emalahleni being *inter alia* the right to health, education, water, dignity and a clean environment. Eskom's proposed termination of electricity supply is the harbinger of the complete socio- economic destruction of the City.

17. I will briefly illustrate the aforegoing with reference to the record of decision.

HIGHVELD MALL REPRESENTATIONS

18. Although these representations primarily focused on the adverse commercial impact of the interruption decision it is clear that the representations narrate undisputed facts establishing *inter alia*:

18.1. A threat to the livelihoods to many individuals and families who depend on the continued operation of Highveld Mall;

18.2. The possible closure of businesses;

18.3. An adverse impact on the entire community; and

18.4. Catastrophic consequences for tenants and shoppers in the mall.

[ROD, page 162]

REPRESENTATIONS: SAVE EMALAHLENI ACTION GROUP (*"SAVE EMALAHLENI"*)

19. It is notable that the scenario depicted by Save Emalahleni is not merely hypothetical but based on empirical reality – during February 2017 a similar electricity disruption as contemplated by Eskom's current interruption decision gave rise to catastrophic socio-economic consequences and a near humanitarian disaster.

[See ROD, pages 23-29]

20. Over and above the catastrophic consequences to Emalahleni's water reticulation and sewerage systems (which have already been dealt with in the respective main applications), the representations set out the everyday experiences of ordinary citizens during the previous electricity interruption.

21. In so doing the representations catalogue a litany of constitutional violations – during the first (or "February 2017") interruption, ordinary citizens experienced a direct violation of their rights to water, health, environmental safety and basic dignity.

22. The main narrative of the Save Emalahleni representations was bolstered by a written bundle of extensive observations and submissions based on the actual consequences observed, experienced and witnessed by members of the Emalahleni Community.

[these submissions appear at pages 37 to 160 of the ROD].

23. It is clear from these submissions that the proposed interruption decision may in fact have fatal consequences and certainly will adversely impact on the health of individual human beings and the safety of the environment.

24. Not only businesses will be affected but in particular health care practitioners, schools, community facilities, households, school learners, feeding schemes and ordinary homemakers.

25. It is clear that especially the vulnerable sectors of society will be particularly adversely affected especially old age homes, hospitals and other needy members of the community who do not have access to the resources permitting ready access to any alternative means of survival.

26. The February 2017 interruption resulted in severe disruptions to schooling and school programmes; many schools ran completely out of water; schools lost access to ablution facilities; educational programmes were interrupted; feeding schemes had to be discontinued and the effects of the electricity interruption reached such drastic proportions that many schools ended up closing down. [ROD page 23]

27. The Save Emalahleni representations record life threatening consequences that ensued at specified old-age facilities as the shutdown disrupted the preparation of food, health care, refrigeration facilities, medication, provision of oxygen and other essential items.

[ROD, page 24]

28. An after-care facility which provided a feeding scheme (and many other feeding schemes) had to terminate their services.

[ROD, page 24]

29. Two major oil companies indicated that should the interruptions continue for some extended time its local fuel depots would have failed to be able to maintain a constant flow of fuel products to mines, retail outlets and other commercial entities. They anticipated major fuel shortages.

[ROD, page 24]

30. A number of major companies indicated that an extended interruption will lead to the cessation of operations and the possible if not probable closure of their businesses.

[ROD, page 25]

31. Civil unrest similar to the disturbances pursuant to the February 2017 interruption appears almost inevitable.

32. The eye witness accounts attached to the Save Emalahleni submissions provide a vivid picture of the depravations suffered by ordinary people during the February 2017 interruptions. A few examples will suffice to establish the general trend.

33. The headmaster of a primary school observed:

33.1. No learning could take place in dark classrooms;

33.2. No electronic learning aids could be employed;

33.3. The alarm could not be sounded to signify the end of class periods and thus disorder ensued;

33.4. The intercom system was out of order interrupting all communication from the school to the learners;

33.5. The telephone exchange was out of order so there was no communication between the school and parents or *visa versa*;

33.6. No work or administrative functions could be fulfilled;

33.7. Photo copiers, fax machines and computers were out of order;

33.8. Power surges when electricity was reconnected damaged electronic equipment; and

33.9. A serious security risk ensued because electronic security gates and cameras were out of order.

34. Moreover soon after the introduction of the electricity cuts, a water supply shut down inflicted even more misery and the school found itself in a desperate situation:

34.1. There was no drinking water;

34.2. Toilets and urinals could not be flushed and thus overflowed with sewerage waste;

34.3. The tuck shop runs a feeding scheme which provides two meals a day but it had to be shut down; and

34.4. After approximately five days of electricity interruptions the school had to be completely shut down and 1267 learners were sent home.

[ROD, pages 37/38]

35. Similar problems were widely reported; many schools appear to have closed down; many feeding schemes had to be terminated and hostel facilities were overwhelmed. Learners found it very difficult to get to school on time as a result of the wide spread deleterious effects of the power interruptions.

[ROD, pages 39 to 40]

36. Tasbet Park Primary School describes itself as a black medium school with approximately 1000 learners:

36.1. The school had to incur huge expenses to put up water tanks, install water pumps and purchase generators.

36.2. Repeated power outages damaged much of its electrical equipment and computers; and

36.3. Once water had run out a health hazard developed in addition to all the other problems.

[ROD, page 41]

37. Similar problems were reported from tertiary institutions and a number of institutions caring for vulnerable members of society.

38. The Witbank Society for the Aged points out that in addition to the Eskom power interruptions, the Emalahleni community suffered from frequent (and additional) power cuts caused by the ineptitude of the municipality:

38.1. This lead to even longer periods of power outages than expected.

38.2. Surviving in darkness for hours entails a host of risks and dangers for the elderly.

38.3. Without reliable water and electricity, it is not possible to properly care for elderly people and especially difficult to keep clean the linen of bedridden elderly patients.

38.4. It proved to be very onerous to elderly people to have their regular routines disrupted in order to accommodate the power interruptions. It resulted in these people taking it on themselves (and often in an untimely fashion) to eat unwashed fresh food and/or to utilise unwashed crockery and the like. This placed them at risk of diarrhoea and infection.

38.5. Many elderly people use medicines that require ongoing refrigeration posing serious health risks in the event of an electricity interruption.

38.6. Additionally, many suffer from emphysema or asthma and obviously could not keep portable respirators and nebulisers in continuous electrical operation and/or properly charged.

38.7. Many older people use oxygen and associated equipment that runs of electricity; and, finally

38.8. The unexpected resumption in electricity proved to be a huge fire risk in addition to the risk posed by older people using candles, paraffin lamps, gas lamps and other equipment during periods or electricity interruption.



39. It is clear that the electricity interruptions posed a major health and safety threat to elderly people.

[ROD, pages 51 to 53]

40. The same was reported by many community organisations including orphanages, counsellors, security response firms and obviously all government departments, the SAPS and public hospitals - all equally effected.

41. The effect on human dignity was also profound.

42. Retirement and Old Age Homes reported difficulties verging on crisis in providing for, caring and housing the elderly and infirm. Many of these residents are in their 80's and many are disabled and unable to move about freely. A resident reports:

"It is heart-breaking to see these old people, [struggling] *along, using various walking aids, trying to fill containers at the tankers that are occasionally and sporadically provided and struggling to make their way back to their units or rooms with heavy packs. They are then forced to either wash in cold water or boil water using gas etc which they then need to carry into the bathroom in order to wash themselves. This is downright dangerous and this could result in serious burns and life-threatening injury due to falls. Is Eskom prepared to take the consequences of possible lawsuits if this is proved to be as a direct result of the interruption of power supply? These institutions care for people that are dependent on Social Grants and are therefore unable to carry the high cost of a generator."*

[ROD p 99]

43. It thus stands uncontested that ordinary law abiding fully paid up rate payers and citizens of Emalahleni were subjected to an undignified existence with increased health risks and the prospect of their education system being destroyed as a result of the unconstitutional and irrational actions of Eskom and the municipality.

44. The irrationality of Eskom's actions can be illustrated with reference to the underlying commercial and economic realities which drive the electricity supply to Emalahleni:

    44.1. The electricity interruptions will cost Eskom a revenue loss of between R27 million to R40 million per month;

    44.2. At the same time, it will cause a loss to the municipality (being the margin between the municipalities selling price and the Eskom purchase price) in excess of R18 million per month; and yet

    44.3. It will save Eskom not a cent in production costs as Eskom has a largely fixed cost structure resulting in it being unable to realise any saving from a small (given the size of the national grid) interruption of supply.

45. Moreover, the true cost of the interruption to the Emalahleni economy includes the cost of unserved energy (ie the destruction in value as a result of the failure to supply the economic demand for electrical energy); long term destruction of the electrical infrastructure and the destruction of the water reticulation and sewerage system.

46. To make matters worse, it is quite clear that the municipality is completely unable to make any inroads into its accumulated debt position with Eskom. The municipality will remain financially unresponsive.

47. So, the accumulated debt reflected in Eskom's balance sheet has long since ceased to be an asset of any sort. It is merely a book entry – and an incorrectly accounted entry at that. Rather than reflecting it as an asset (a debt due) it is clear that Eskom should adopt ordinary prudent accounting methods and simply write off this debt. There exists no chance of recovery and thus the entire interruption exercise is one of practical futility and commercial irrationality. A new way has to be forged going forward.

48. Moreover, Emalahleni's ability to discharge <u>any</u> of its obligations is adversely affected by the power interruptions – it is obvious that the interruptions REDUCE the municipality's ability to pay.

49. Eskom's interruption decision therefore has the following consequences:

    49.1. It reduces its own revenue; and

    49.2. Since its costs remain constant it also reduces its own profitability and cash flow; and

    49.3. It reduces its debtor's current ability to discharge ongoing obligations; and

    49.4. In so far as the exercise is aimed at previously accrued indebtedness, it will be completely futile as the distressed debtor (Emalahleni) simply

does not have the means to discharge past debt (to which Eskom even had added interest).

THE 8 NOVEMBER 2017 MEETING

50. On 8 November 2017 Eskom's Messrs Mabila, Lukheleni and Fakude met with the purpose *"to consider the public representations made in response to the PAJA notice issued against Emalahleni Municipality and to consider the submissions received"*.

[The minutes of the meeting appears in the ROD at page 165 to 175]

51. The minutes record the municipality's burgeoning debt over time - more than half a billion rand in May 2016 reaching R1.1 billion by July 2017. Despite repeated undertakings to settle its indebtedness, default followed default.

52. Finally, it is stated that *"Eskom was left with no option but to initiate PAJA proceedings in September 2017"*.

53. Regarding the applicants' representations, the members of the meeting opined that the applicants' concerns were merely of a commercial nature and not unlike those of Eskom itself.

54. This reasoning is fallacious.

55. The applicants' commercial concerns entail a real loss of revenue; a real loss of income; a real loss of goodwill and clientele, and in circumstances where its

employees and clients are exposed to an ongoing risk to health, environmental degradation, deterioration in quality of life and a dignified existence.

56. At the same time Eskom will gain no commercial advantage but will in fact inflict substantial commercial prejudice on itself. The only objective seems to be collective punishment for the sins of the City Fathers.

57. Dealing with the Save Emalahleni representations the members of the meeting duly recorded that it dealt with *"the effect of interruptions for water and sewer networks"* (sic).

58. Additionally, it appears that the members also recorded the financial argument raised by Save Emalahleni relating to turn over and losses.

59. A somewhat cryptic entry reads *"loss of Eskom to Eskom and ELM"*.

60. In relation to the impending water interruption it was resolved that Eskom would verify some of the information contained in the Save Emalahleni submission; it would further consult with different stake holders; it would consult with the municipality and its own engineers regarding the *"water point"* and it would require from Save Emalahleni to provide *inter alia "medical proof of* [those] *people* [whose] *life will be in danger as stated in the submission"*.

61. However, under the column indicating *"decision and action items"* no entries reflect any attempt to implement these measures beyond sending letters and notices to the municipality, all stakeholders, Save Emalahleni and the media, informing them of the postponement of the final decision.

62. The column headed *"Responsibility"* makes clear that responsibility was only assigned for the despatch of these letters/notices.

63. The column headed *"Target Date"* contains only one date (9 November 2017) by which date the letters/notices have had to be despatched.

64. Moreover, the members appear not to have appreciated that the threat to health, life, dignity and the right to education were self-evident. The supporting letters and documents attached to the Save Emalahleni submissions constitute eye witness accounts of factual events. No *"medical proof"* was required in order to assess the import of the Save Emalahleni submissions relating to dignity, health, the rights to education, water and life.

THE INTERRUPTION DECISION

65. This decision was taken at a meeting dated 29 November 2017.

[ROD, page 176 for the minute]

66. The purpose was said to be a consideration of *"the outcome of the meeting ... with the Save Emalahleni group in Witbank and to consider the decision based on the discussion/explanation received from the group"*.

67. The action items from previous minutes were left blank. It is clear that the previous meeting simply concerned the issue of notices and letters as stated therein.

68. The minutes then reflect a concern that a previous Eskom letter sent by its lawyer to Save Emalahleni (it appears that this letter is dated 8 November 2017) had not been responded to but only a verbal response was given during the

course of meeting between Save Emalahleni representatives and Eskom dated 21 November 2018. This (it is stated) made it difficult for Eskom since certain allegations ostensibly required the production of proof.

69. It is not clear what required proof but Save Emalahleni responded fully in a letter dated 22 November 2017 (the very next day after the meeting).

[See ROD, page 1 and see para 1.2 for reference to the Eskom letter dated 8 November 2017]

70. This letter made the obvious point that the contents of the letter supporting the Save Emalahleni submissions *"are self-explanatory and are typical day to day occurrences in every community in South Africa"*. No medical "proof' was required.

71. It is specifically stated that *"Eskom's technical inability to isolate the supply to paying customers, were not discussed at the aforesaid meeting* [i.e. the meeting of 21 November 2017]".

72. The letter goes on to make clear the fact that the municipality conducts its business in insolvent circumstances and that it does not have the financial means to make the payments demanded by Eskom.

73. Consequently, these payment demands were stated to be irrational and impossible to achieve in the short term.

74. Moreover, the letter refers to an independent report by an auditor which indicated that the municipality's total operational deficit had exceeded R1.2 billion and that part of it was financed by NOT paying Eskom.

75. The letter proceeds to set out a potential financial recovery plan based on ring fencing historical debt and arranging for bulk consumers to pay Eskom directly.

76. The contents of this letter are crucial to a rational assessment of the commercial considerations underlying an interruption decision. Moreover, its contents are crucial in drawing attention to the potential impact on human dignity, health and life.

77. It is clear that the members of the meeting neither considered the issues arising from the letter or had access to the letter itself.

78. The minutes recorded no decision or action or responsibility or a target date.

79. The minutes merely considered Eskom's concerns about the unpaid debt and it clearly contemplates both a short-term and a long-term solution.

80. The long-term solution was said to be the steps taken by Save Emalahleni in pursuing its Section 139 application.

81. But, the Eskom committee members concluded, the interruption decision was a short-term solution.

82. In this regard it is clear that the members completely failed to consider the commercial rationality of such a decision (this has already been dealt with in this affidavit as well as in the main papers).

83. Most importantly however, it is quite clear that the members failed entirely to consider the impact of Eskom's constitutional duties as an organ of state inflicting an electricity interruption on the water supply of Emalahleni.

Additionally, it failed to consider the other deleterious effects which would manifest themselves as directly as a result of the interruption decision.

84. The potential termination of water supply appears to be addressed by the members of the meeting simply noting that:

> *"18. Eskom will consider the possibility of interrupting the water point once in the afternoon. In order to separate the water from the other supply point, Eskom will need the cooperation of the municipality to separate the water point in question".*

[ROD, page 181]

85. It was further noted that:

> *"21. There must be an agreement* [with] *the municipality to separate the water point from the other point and interrupt on behalf of Eskom those points which are connected to the water point must be done by the municipality"* (sic)

86. There is no evidence in the Rule 53 Record of any investigation into the feasibility of these proposed measures and the interruption decision was clearly taken without their implementation.

87. It was then noted:

> *"22. Eskom engineering team to engage with municipality engineering team.*

23. Should the municipality fail to interrupt as agreed after they meet with Eskom engineering team, Eskom will be left with no option but to interrupt the entire point".

88. Next to these entries relating to the termination of water supply there is no reference to any decision or action item, nor is any responsibility allocated or a target date set.

89. It appears that the termination decision was simply a *fait-accompli* and the possibility of saving the city's water supply a mere afterthought.

SECTION 150 OF THE MUNICIPAL FINANCE MANAGEMENT ACT AND THE RULE 53 RECORD

90. The representations from Save Emalahleni attached a copy of an application brought by Save Emalahleni to direct the Premier to intervene in the Emalahleni municipality in terms of section 139. That application detailed the long history of financial and operational delinquency of the municipality. The representations also made the point (in paragraph 17 at ROD page 15) that the national executive had failed to discharge its duty to intervene in the municipality.

91. Accordingly, at the time that Eskom took the interruption decision it was aware of the fact that the ongoing crisis in the municipality was due, at least in part, to the failure of the national executive, through the Minister of Finance, to discharge its duties to intervene in the municipality in terms of section 150 of the Municipal Finance Management Act 56 of 2003 ("the MFMA") in the face of

the ongoing crisis in the municipality and the failure of the province to resolve that crisis through section 139 intervention.

LEGAL SUBMISSIONS

92. I refer to what I have set out above and respectfully submit that the Rule 53 record reinforces the causes of action advanced in the founding affidavit in relation to

92.1. the unconstitutionality of the interruption decision (paragraph 74 of the founding affidavit), and

92.2. the reviewability of the interruption decision in terms of paragraphs (c) and (e)(iii) of section 6(2) of PAJA (paragraph 79 of the founding affidavit)

93. In relation to the inconsistency of the interruption decision with section 152(1)(b) and section 156(1)(a) of the Constitution, I respectfully submit further that it is unconstitutional for one organ of state in the national sphere of government (Eskom) to interfere with innocent parties' constitutional rights to municipal services with the purpose of remedying a situation that has been caused by the failure of another organ of state in the national sphere of government (the Minister of Finance) to perform his duties under section 150 of the MFMA.

94. In addition to the causes of action already set out in the founding affidavit, I refer to the passages in the Rule 53 Record relied upon above and respectfully submit that the interruption decision is additionally unconstitutional because it was calculated to interfere with the fundamental rights to dignity (s 10 of the

Constitution), health care (s 27(1)(a) of the Constitution) and education (s 29 of the Constitution).

ANCILLARY ISSUES – CLASS ACTION

95. The applicant seeks certification to represent a class of citizens as postulated in the founding affidavit.

96. This will be an *"opt in"* class and consequently only people who actively join issue with the applicant will be exposed to the risk of being bound by any judgment.

97. The issues in the proposed class action, namely the right of class members to discharge their municipal electricity account liability by paying the relevant amounts to Eskom until such time as the municipality no longer has an arrear liability to Eskom will turn on the same questions of fact and law for all members of the class.

98. I submit that the applicant is an appropriate representative of this class.

99. In this regard I point out:

99.1. During the threatened electricity interruption set to commence on 8 December 2017, a population of almost 500 000 Emalahleni citizens would have been affected, was it not for the timely intercession of the applicant and the Save Emalahleni Group;

99.2. The applicant is commercially in a position to actively prosecute the litigation and all other steps ancillary thereto;

99.3. The applicants' interests in this litigation are completely co-extensive with the interests of the proposed class members; and

99.4. The applicant has engaged experienced attorneys and counsel to represent the interests of the applicant and the class.

100. In the premises the applicant stands by its request for an order in the terms set out in Part B of the Notice of Motion.

DEPONENT

I certify that on the 15 day of March 2018 in my presence the deponent signed the affidavit and declared that he/she:

a. Knows and understands the contents thereof;

b. Has no objection to taking this oath;

c. Considers the oath to be binding on his/her conscience; and uttered the words "I swear that the contents of this affidavit are true, so help me God".

COMMISSIONER OF OATHS

Certified a true copy of the original:
Date: 15/3/2018
Ex Officio COMMISSIONER OF OATHS (RSA)
Jacob Coetzer
CERTIFIED FINANCIAL PLANNER
Branch Manager: Liberty Life
6th Floor Pinnacle Building
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