IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 83581 **/2017**

In the application 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 AND TRADITIONAL AFFAIRS (MPUMALANGA)	Third Respondent
MINISTER OF ENERGY	Fourth Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Fifth Respondent

ANSWERING AFFIDAVIT

I, the undersigned,

MUSA MABILA

do hereby make oath and state as follows:

1. I am the Acting Senior Manager: Customer Services employed as such by the first respondent. I am duly authorised to depose to this affidavit on

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behalf of the first respondent. For ease of reference, I adopt the term "*Eskom*" wherever I refer to the first respondent.

2. The facts deposed to herein are to the best of my belief both true and correct. They are within my personal knowledge unless the context thereof indicates otherwise or I expressly state so.

3. Where I make submissions of a legal nature in this affidavit, I do so on the strength of the advice that I have received from Eskom's legal representatives which I accept as being correct and I do not necessarily repeat this fact in every instance.

4. Eskom opposes the relief sought by the applicants herein. I have read the application (notice of motion and founding affidavit) of the applicants and I wish to answer to it as follows:

4.1. First, I will deal with urgency and non-compliance with the practice directive;

4.2. Second, I give an overview of Eskom's broad defences to the relief sought;

4.3. Third, I deal with the relevant background facts in order to place the application in its proper context.

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4.4. Fourth, I will demonstrate to the court that the application does not meet the requirements for interim relief in that:-

4.3.1 the applicants have failed to establish a right, *prima facie* or otherwise;

4.3.2 the applicants have failed to demonstrate that they have no alternative remedy

4.3.3 the applicants have failed to demonstrate that the balance of convenience favours the granting of the relief sought.

4.5. Fifth, I will deal *ad seriatim* with allegations in the founding affidavit of the applicants.

4.6. Each of the issues raised above, will be dealt with under separate headings below.

5. URGENCY AND NON-COMPLIANCE WITH THE PRACTICE DIRECTIVE

5.1 I am advised that urgent applications in their nature are not appropriate to deal with complex legal issues. This is one such application. For this reason alone, interdict should be refused.

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5.2 In addition to the above, I am advised that government department and organs of state by extension, should be afforded a reasonable time to put their answering affidavit(s). The truncation of the time period in this circumstances is hopelessly unreasonable and falls foul of this principle.

5.3 In the premises, Eskom prays that in the event the above Honourable Court finds that a proper case has been made out for an interdict, which is not admitted, the court should exercise its negative discretion to refuse an interdict.

5.4 I deny that this matter is urgent. The urgency, if any, was self-created. The applicants knew as early as September 2017 that Eskom is contemplating to interrupt the electricity. That notwithstanding, the applicants failed to take any step.

5.5 Even worse the applicants have failed to make out a case for the acceleration of the hearing of this matter. In their founding affidavit the applicants have failed to deal with the following:

5.5.1 the prejudice that they will suffer or may suffer by having to wait for hearing in the ordinary cause;

5.5.2 the prejudice that other litigants might suffer if the application was given preference;

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5.5.3 the prejudice that Eskom might suffer by the abridgement of the prescribed times and the early hearing.

5.6 Further, the applicants have failed to comply with the practice directive. They have not made out a case as to why the matter could not be enrolled in terms of the practice directive of the above Honourable Court and no condonation is sought in that regard.

6. OVERVIEW OF THE RELIEF SOUGHT AND ESKOM'S DEFENCE

6.1. The Applicants seek interim relief pending a review of the decision by Eskom to interrupt the electricity supply to the eMalahleni Local Municipality ("ELM").

6.2. Eskom intends to interrupt supply, first, because of the failure of ELM to pay for the electricity it received from Eskom over a long period of time. Second, the scheduled interruptions are intended to reduce the bulk supply of electricity with the result that the consumption is reduced so that the ELM does not use more electricity than it may afford. Third, to minimise the rate of escalation of the ELM's debt.

6.3. The amount for electric charges that ELM owes to Eskom is currently in the sum of R1,3 Billion. In September 2017 when the notice of intention to interrupt electricity was issue, outstanding amount was R1, 190, 746,

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629.00 (one billion one hundred and ninety million seven hundred and forty six thousand six hundred and twenty nine rand).

6.4. Despite promises and debt repayment undertakings which ELM had previously made, it has failed to pay the amount owed to Eskom and the debt is escalating and will continue to escalate as long as there supply is not reduced.

6.5. Consequently Eskom has given due notice of the reduction and interruption of electricity supply to ELM.

6.6. In terms of Section 21 (5) of the Electricity Regulation Act, Act 4 of 2006 ("ERA") Eskom is empowered to reduce or interrupt or terminate the electricity supply under certain circumstances.

6.7. The applicants have proposed in their affidavit to seek an interim order whereby they pay over directly to Eskom, their portion of the electricity payments which are otherwise due and owed to ELM in return for which, Eskom should continue to supply electricity to ELM uninterruptedly.

6.8. Eskom is opposed to the direct payment relief proposed by the applicants. The average monthly electricity consumption of ELM during summer is R 65, 000,000.00 (sixty five million rand). In winter it rises to approximately R 90, 000, 000.00 (ninety million rand). On the other hand it appears from Annexure FA2 to the founding affidavit that the average monthly account of

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the applicants is R 1, 000,000.00 (one million rand). This is less than 2% of the monthly consumption of ELM. It will not serve any purpose therefore to accept direct payment from the applicants and supply electricity whilst recovering far less than the monthly consumption.

6.9. In any event based on past experience, Eskom has a genuine fear that once an order in the terms as proposed by the applicants is granted to the effect that the applicants may pay Eskom directly, ELM will stop paying Eskom all together.

6.10. Past experience has shown that once an interim order is granted compelling Eskom to supply electricity against direct payment as proposed by the applicants herein, the effected municipalities stop making further payments or make short payments in respect of monthly electricity usage. In this regard, I specifically from Eskoms experience in the matters of Maluti-A-Phofung, Matjhabeng municipalities and Lekwa municipality. After the interim and final orders were granted in those matters, the debts of the said municipalities spiralled out of control.

6.11. Eskom opposes any order in terms of which it is stopped from interrupting electricity supply while it does not receive full payment of current account and portion of the arrear amount.

6.12. Eskom does not want to interrupt the electricity supply of the applicants and other end users unnecessarily or cause harm to their businesses. Eskom

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has however, been left with no other option because of ELM's refusal to pay Eskom what it owes to it, and considering that the debt continues to escalate if the supply of electricity is not reduced it is necessary to take the action so taken.

6.13. Eskom does not have any contractual relationship with the applicants. In particular, there is no contractual relationship or any kind of relationship that creates an obligation for Eskom to provide electricity to the applicant.

6.14. The applicants on the other hand have contracts with ELM. They allege that they have dutifully paid ELM what it charges them for electricity usage. This is the money ELM ought to have used to pay Eskom at least for the applicants' electricity consumption.

6.15. Eskom supplies electricity to ELM in terms of an electricity supply agreement entered into between Eskom and ELM. Eskom complied with all its obligations in terms of the electricity supply agreement as well as the relevant legislation. Eskom supplied ELM with bulk electricity, issued it with statements or invoices for electricity usage, and delivered notices and/or letters of demand when there was none or insufficient payments.

6.16. Eskom was left with no other option but to interrupt the electricity supply to ELM during peak hours in an effort to halt the unbridled escalation of its electricity debt.

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6.17. As at November 2017 the municipal debt, across the country, was in the amount of R 12, 973 billion having increased from R 11. 45 billion as at June 2017. The debt is escalating on a monthly basis as municipalities such as ELM default in their monthly payments. In the last five years the overdue debts have increased more than tenfold.

6.18. As at June 2017, Eskom had already entered into payment arrangements with sixty two (62) defaulting municipalities of which the ELM was one. Notwithstanding the payment arrangements ELM defaulted in the payments of its electricity account.

6.19. ELM is in the Mpumalanga province. The combined debt of the municipalities in Mpumalanga was R2.536 billion as at June 2017.

6.20. Eskom is responsible for the generation of all electricity within South Africa. It is of uttermost important to always ensure that Eskom remains financially viable and sustainable so that it can generate and supply electricity for the benefit of all South Africans. The failure by the various municipalities such as ELM to pay their debts poses a serious threat to Eskom's financial viability and that may bring about its demise.

6.21. In view of the costs involved, Eskom is forced to borrow money to fund capital projects like power stations to ensure that it has sufficient capacity to generate electricity for the benefit of all South Africans.

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6.22. The money recovered for the supply of electricity to municipalities and other bulk users who purchase it directly from Eskom is used to fund operational costs including paying off the capital costs debt. When these entities fail to pay Eskom, Eskom has to borrow additional money, at a huge premium, to fund operational costs like paying salaries and debts.

6.23. Operational costs should ideally be funded by revenue from electricity charges, not borrowings. Borrowing money to fund operational requirements is not sustainable in the short, medium and long-term because it increases the costs of generating electricity exponentially.

6.24. Should Eskom be unable to recover monies, which it is owed, it would jeopardise Eskom's ability to supply sustainable and affordable electricity to the nation as a whole. This includes putting a lot of business throughout the country at risk of going out of business.

6.25. Eskom has made numerous attempts to collect the money owed to it by ELM and other defaulting municipalities. ELM does not dispute its debt to Eskom hence it has made numerous promises to pay. To this end ELM previously concluded payment arrangement agreements with Eskom, which it has failed, to honour.

6.26. Eskom has afforded ELM and all other persons who may be adversely affected by its decision an opportunity to make representations before it could implement the temporary electricity restrictions at scheduled intervals.

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6.27. After careful consideration of all the representations and the overall impact of the escalating municipal debt especially on Eskom's liability to deliver on its mandate, Eskom took a decision to proceed with interruption of bulk electricity supply to ELM at predetermined times in the mornings and the afternoons.

6.28. Eskom chose to follow this course because all other attempts to collect the money owed to it have failed and the debt keeps on escalating.

6.29. Eskom is of the view that it would serve no purpose to take judgment and execution steps against ELM. Such a course would simply jeopardize innocent end users further because the ELM's services would grind to a complete halt within a day in the event of Eskom taking execution steps and selling movable and immovable property belonging to ELM.

6.30. Moreover, ELM does not have sufficient easily reliable assets to pay off its debt owed to Eskom. The infrastructure that is used and necessary for the supply of electricity to the applicants belongs to ELM. The only entity that can purchase it is another licensee operating in terms of a license granted by NERSA for that specific area.

6.31. Eskom has a statutory obligation in terms of the PFMA to take steps to enforce payment of the debts owed to it.

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7. **THE RELEVANT BACKGROUND FACTS**

7.1. The relationship between Eskom and ELM is governed by the electricity supply agreement annexed hereto and marked "**ES1**".

7.2. It is a material term of the electricity supply agreement that should ELM breach any of its terms and conditions, Eskom would notify it of such breach and if the breach is not remedied by ELM within a period of fourteen days from date of such notification, Eskom may forthwith disconnect in part or in full, the electricity supply to ELM.

7.3. ELM defaulted in its payments by either not paying at all or short paying. Eskom has struggled for a while now to get ELM to settle its debt and to pay for its current electricity consumption.

7.4. During May 2016, ELM and Eskom concluded a written acknowledgement of debt and repayment plan in terms of which ELM acknowledged its indebtedness to Eskom in the total sum of R544, 066, 777. 67, payable over an agreed period of time.

7.5. Again ELM defaulted in its obligations in terms of the acknowledgement of debt. It was this non-compliance with its repayment obligations that resulted in Eskom implementing scheduled interruptions during February/March2017 as referred to in the applicants' founding affidavit.

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7.6. I attach hereto marked **"ES2"** a copy of a letter from ELM to Eskom in which is acknowledged a meeting that took place between Eskom, ELM, the Minister of Cooperative Governance and Traditional Affairs and the Premier of Mpumalanga Province.

7.7. This letter also confirms the terms of the settlement agreement which precipitated the disposal of a litigation that had been instituted. The terms of the settlement agreement that ELM would:

7.7.1 pay its current account for March 2017 in full when it fell due;

7.7.2 upon receipt, pay over to Eskom the full amount of its equitable share;

7.7.3 cede to Eskom the proceeds of what it expected to receive from the sale of immoveable property;

7.7.4 pay the full amount of the balance of the arrears no later than December 2017.

7.8 On 22 June 2017, Eskom addressed a letter to ELM recording that the latter was in breach of its obligations in terms of the acknowledgement of debt and repayment plan. A copy thereof is attached marked **"ES3"**. There was no response to this letter.

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7.9 On 17 July 2017, Eskom addressed another letter of demand to ELM in which it demanded payment of the amount of approximately R1.1 billion, failing which it would initiate a PAJA process with a view to implement scheduled interruptions. A copy thereof is attached marked **"ES4"**. There was no response to this letter either.

7.10 In the light of ELM's persistent breach of its payment obligations, Eskom initiated the PAJA process during September 2017, which culminated in the decisions now sought to be reviewed and set aside.

7.11 Businesses in the area such as the applicants were at all material times aware of those demands and that despite their payment for electricity in accordance with their end user supply or consumption agreements with ELM, Eskom was not paid for electricity supplied to ELM.

7.12 Because of ELM's breach of the agreement the entire outstanding balance owing in terms of the first payment agreement became due and payable. Eskom was thus entitled to disconnect the electricity supply of ELM in terms of the agreement.

7.13 More importantly, ELM never disputed the debt it owed to Eskom during the aforesaid meetings.

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7.14 As a result of ELM's breach of the repayments agreement Eskom became entitled in terms of that agreement, read with section 21 (5) of the ERA and clause 10 of the supply agreement to disconnect or reduce or interrupt the electricity supply to ELM forthwith.

7.15 On 09 September 2017, Eskom published a notice of its intention to interrupt the supply of bulk electricity to ELM at scheduled times from starting from 20 November 2017. It called upon residents of ELM to make representations, if any, on or before 19 October 2017. A copy of the notice referred to is annexed and marked "**ES5**".

7.16 As it appears from **ES5**, at the time of publication of the notice aforesaid the ELM owed Eskom an amount of R 1, 190, 746, 629.00 (One billion one hundred and ninety million seven hundred and forty six thousand six hundred and twenty nine rand).

7.17 It was Eskom's intention, initially, to implement what it terms scheduled interruptions of electricity supply to ELM between the times Monday to Friday 06h00 – 10h00 in the morning and 17h00 – 21h00 in the evening on weekdays; and 07h00 – 10h00 in the mornings and 17h00 – 20h00 in the evening on weekends.

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7.18 Following public participative process, the hours have now been reduced to 06h00 – 08h00 in the mornings and between 17h00 – 19h30 afternoons, whilst the times for weekends will be 08h30 – 11h00 in the mornings and 15h00 – 17h30 in the afternoons.

7.19 The proposed planned interruptions of electricity, despite Eskom's rights to completely terminate the supply, is, in my view, less burdensome to the communities of ELM;

7.20 It was further planned in such a way that people affected would schedule their lives taking into account the five hours out of 24 when there would be no electricity, whilst minimizing the rate at which the debt of ELM escalates without making it impossible for ELM to meet their obligations in the future. In so saying, Eskom has not abandoned its rights to terminate the supply of electricity supply totally, were circumstances so to require.

7.21 On 30 November 2017, Eskom issued a media statement confirming its decision to interrupt electricity at ELM and same was followed by a notice in the local newspaper confirming its decision to interrupt the supply of bulk electricity to ELM at scheduled times.

7.22 Eskom is continuing to supply ELM with electricity without receiving payment of the monies, which are owed to it. It only intends to limit or

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reduce the supply. ELM's debt is increasing exponentially. This hampers Eskom's ability to supply electricity to the rest of the country at affordable rates.

7.23 Eskom afforded ELM and all stakeholders ample opportunity to make representations. Eskom considered the representations and also considered other avenues as opposed to interrupting the electricity supply to ELM. Having done the aforesaid, Eskom decided to proceed with the interruptions scheduled.

7.24 To add to the aforesaid, Eskom considered the impact the interruptions would have on end users. Besides what the applicants allege in their founding papers, Eskom does not know the identities of the electricity users in the district of ELM and has had no direct dealings with them. Eskom has a contract with ELM and supplies it with electricity through one point. Eskom is unable to separate any of ELM's customers from its grid.

7.25 Eskom initially decided that it would be better to conclude payment arrangement agreements with ELM as opposed to interrupting the electricity supply. But, as I have explained above, ELM simply failed to comply with its obligations under the repayment agreements.

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7.26 Insofar as the honourable court might find that Eskom had to comply with the requirements stipulated under the Promotion of Administrative Justice Act, 3 of 2000 ("*PAJA*"), Eskom submits that it has done so.

7.27 ELM's failure to honour its promises to pay have forced Eskom to interrupt the electricity supply during peak hours. The course suggested by Eskom is the least intrusive and most reasonable having regard to the interest of all the parties involved.

7.28 Eskom is authorised by the Electricity Regulations Act, Act 4 of 2006 ("*ERA*") to reduce and/or terminate the supply of electricity to a customer such as ELM, if that customer contravenes its payment conditions with Eskom.

7.29 The payment conditions of ELM as contained in the electricity supply agreement and the various payment arrangement agreements echo the provisions of Section 21(5) of ERA and also authorise Eskom to terminate the supply of electricity should a party contravene the payment conditions.

7.30 It is an express term of each of the agreements that, in the event of non-payment of electricity charges by ELM, Eskom would acquire the right to terminate the supply of electricity. Any order that will compel Eskom not to take any steps to recover money it is owed for the supply of electricity by

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making use of the legal authorisation it derives from the legislation will not only be undermining the authority of Parliament but will also be placing an undue burden on Eskom.

7.31 The planned interruptions were structured in such a manner that people who are affected thereby would be able to schedule their lives accordingly taking into account the availability or non-availability of electricity.

7.32 The interruptions would at the same time minimise the rate at which the debt of ELM escalates without making it impossible for it to meet its obligations in the future. In so saying, Eskom has not abandoned its rights to terminate the supply of electricity totally, where circumstances so require.

7.33 The applicants' constitutional rights to access to electricity are only enforceable against ELM. Eskom supplies electricity to ELM in terms of the agreements concluded between it and ELM.

7.34 The applicants knew of Eskom's intention to terminate the supply of electricity for non-payment for the last two years and yet they failed to take any action against ELM or to exercise any other alternative remedies available at their disposal.

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8. **AD ABSENCE OF A *PRIMA FACIE* RIGHT:**

8.1 To understand the content of the right in issue, a short conspectus of the law is necessary.

The National Energy Regulator of South Africa ("*Nersa*") and Its Competency

8.2 The ERA provides under Section 3 that NERSA is the custodian and enforcer of the National Electricity Regulatory Framework provided for in the ERA.

8.3 The objectives of NERSA are set out under Section 2 and are quoted herein *verbatim* as follows:

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

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

(c) facilitate investment in the electricity supply industry;

(d) facilitate universal access to electricity;

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

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

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

8.4 NERSA is also the authority that issues licences that allow entities such as Eskom and the municipalities such as ELM to generate, transmit and distribute electricity. I refer the court to Eskom's distribution licence, which is annexed and marked "**ES6**".

8.5 The court will note from Eskom's distribution licence that Condition 2 read with Schedule 1 thereof, provides for the right of Eskom to supply electricity to the areas listed in Schedule 1 and further stipulates that Eskom cannot supply electricity directly to any customer of a municipality.

8.6 In issuing licences, NERSA is empowered by Section 14 to determine applicable conditions which include, amongst others, the following:

8.6.1 The setting an approval of prices, charges, rates and tariffs to be charged by licensees;

8.6.2 Approving the format of and contents of agreements entered into by licensees;

8.6.3 Regulate revenue of licensees;

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8.6.4 The performance, improvement target by licensees, including the monitoring thereof through certificates of performance;

8.6.5 Regulating the quality of electricity supply and service;

8.6.6 Determining the class of customers and end users to whom electricity may or must be supplied;

8.6.7 Regulating the need to maintain facilities in a fully operational condition so as to obviate electricity leakages and provide for its security.

8.7 Section 15 of the ERA also requires of NERSA to set the electricity tariff for a licensee in a manner that formulates efficiency and ensures that the licensee is able to recover the full cost of its licence activities, including a reasonable margin or return.

8.8 Section 21(5) of the ERA provides as follows:

"A licensee may not reduce or terminate the supply of electricity to a customer, unless –

(a) The customer is insolvent;

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

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(c) *The customer has contravened the payment conditions of that licensee."*

8.9 Both Eskom and ELM have been issued with licences by NERSA to distribute electricity.

8.10 ELM is a customer of Eskom insofar as it purchases the electricity in bulk from Eskom in terms of the electricity supply agreement, which it then on sells or distributes to its customers. If ELM does not pay Eskom for the electricity that it buys, Eskom, in terms of Section 21(5) of the ERA and the electricity supply agreement, Eskom is entitled to reduce or terminate the supply of electricity of ELM.

9 Eskom and Its Role

9.1 Eskom is a major public entity and organ of state as provided for in Schedule 2 of the Public Finance Management Act, 1 of 1999 ("*PFMA*").

9.2 Its main source of business is the generation, transmission and distribution of electricity in bulk within the Republic of South Africa and neighbouring countries.

9.3 Eskom conducts its business under the authority of the licence granted to it by NERSA.

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9.4 The licence conditions stipulate that Eskom shall only supply electricity to the class of customers within a designated area and charge such customers and/or end users tariffs and prices that are approved and published by NERSA.

9.5 NERSA, in setting and/or approving the prices, charges and tariffs mentioned above, must make provision for the licensee to operate on an efficient basis so that it is able to cover the full costs of its licence activities, including a reasonable margin or return.

9.6 Eskom thereafter concludes electricity supply agreements with its customers, whose form and its content have been pre-approved by NERSA in terms of the ERA.

9.7 Eskom is also legally bound by Section 51(1)(b)(i) of the Public Finance Management Act, 1 of 1999 ("*the PFMA*") to take effective and appropriate steps to collect all revenue due to it.

9.8 In the event of non-payment of amounts due for electricity supply, Eskom has a residual right, in terms of the electricity supply agreement and/or the payment agreements and Section 21(5) of the ERA to terminate the supply of electricity.

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10 The ELM Municipality

10.1 ELM is a local municipality established in terms of Section 2 read with Section 3(d) of the Local Government, Municipal Systems Act, 32 of 2000 ("*the Systems Act*").

10.2 In terms of Section 152(1) of the Constitution, municipalities must ensure the provision of services to communities within the areas of jurisdiction in a sustainable manner.

10.3 Municipalities such as ELM must also strive, within their financial administrative capacity, to achieve the objective set out in Section 152(1) of the Constitution. This section provides that a municipality must:

10.3.1 Structure and manage its administration, budgeting and planning processes;

10.3.2 Give priority to the basic needs of the community and to promote the social and economic development of the community and to participate in the national and provincial development programmes.

10.4 Section 4(2) of the Systems Act gives legislative content to the various constitutional duties of the municipalities by setting out the duties of the municipal councils, which exercise the executive and legislative authority at municipal level.

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10.5 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 municipal services to which they are entitled."

10.6 Further content to this general duty to provide municipal services is found in terms of Section 73 of the Systems Act. The Section obliges ELM to give priority to the basic needs of the local community and to promote its development and to ensure that all members of the local community have access to at least the minimum level of basic municipal services, which include electricity.

10.7 Section 9(1)(a)(iii) of the Housing Act, 1 of 1997 imposes a specific obligation on ELM to provide basic municipal services including electricity in a manner that is economically efficient.

10.8 The Constitutional Court has said that municipalities like ELM also have an obligation to issue statements for electricity usage and recover money it is owed from its end users. Should an end user fail to meet its side of the bargain, the municipality has a right to terminate its supply of electricity even without a court order.

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10.9 ELM has dismally failed to meet any of its obligations in terms of the aforesaid legislation and Constitutional Court's decision.

10.10 The applicants were, according to their founding affidavit, fully aware of the fact that ELM was in default of its obligations to Eskom and of the decision taken by Eskom contemplating the interruption of electricity supply to ELM during January 2012 and in any event no later than January 2017.

10.11 The remedy for the applicants, if they felt aggrieved by Eskom's decision, was to apply for a *mandamus* to force ELM to pay Eskom to secure their right to basic municipal services which they are entitled to receive only from ELM. The applicants failed to do so.

10.12 Eskom is discharging its obligations in exercising its rights in terms of the provisions of Section 51(1)(b)(i) of the PFMA and Section 21(5) of the ERA under circumstances where the debt of ELM is not in dispute and has been due and payable for a period of more than two years (escalating and remaining unpaid) notwithstanding efforts to recover it.

10.13 Eskom's conduct is in terms of the aforesaid statutes and any rights that the applicants allege to have, are limited by the provisions of Section 36 of the Constitution.

10.14 Any rights that the applicants have exists and are enforceable only against ELM and not against Eskom.

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10.15 In these proceedings the applicants seek an interim order pending the judicial review of the decision of Eskom to interrupt the electricity supply to the ELM.

10.16 The Constitutional Court has, on occasion, stated that the right to judicially review a decision resides in everyone and does not require protection *pendete lite*. Accordingly, the applicants do not have a right to obtain an interim interdict simply to protect their right to judicially review the decision of Eskom.

10.17 Further, the applicants do not have any right to enforce against Eskom either statutory or contractually. There is no privity of contract between Eskom and the applicants for the supply of electricity and Eskom does not supply electricity directly to the applicants. The applicants' contracts, if any, would be with the ELM and their rights enforceable only against the ELM. It follows that obtaining relief against Eskom in these circumstances is impermissible.

10.18 Thus, the applicants can only enforce their contractual rights including their right to basic municipal services against the Municipality. Further, Eskom does not provide municipal services. The provision of these services is a domain of the ELM and it is a right that may be lawfully enforced only against the ELM.

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10.19 The Constitution does not create any constitutional right to electricity. At best, applicants would only have a right to basic municipal services. The right to basic municipal services is a right enforceable against the ELM.

10.20 To the extent that there may be such a right to access to electricity, which is part of basic municipal services and which is enforceable only against the ELM, such right is limited by the provisions of s21(5) of the ERA which is a law of general application.

10.21 The aforesaid section entitles Eskom to reduce or terminate the supply of electricity to a customer if the customer fails to honour an agreement for the supply of electricity or if the customer has contravened the payment conditions of Eskom in as much as the ELM may do the same should its customers default. It is common cause even on the version of the applicants that the ELM has failed to pay for the electricity charges and its debt has risen to unacceptable levels. In that way the ELM has breached its obligations.

10.22 Eskom has not deprived the applicants any of their rights either as alleged or at all. If any there is any infringement of any of their rights, which is denied, such infringement is not at the instance of Eskom. The actions of Eskom are statutorily authorised and Eskom has exercised its legislative right in the national interest. Applicants' rights, if any, do not tank above those that are in the national interest.

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10.23 Further, this application seeks to interdict Eskom from exercising its statutory powers. I am advised that in the absence of *mala fides* that has not been alleged in the founding affidavit, courts do not readily grant such an interdict. I am advised that the interdict of exercise of a statutory power is adjudicated against a higher test which the applicants have not satisfied. This on its own is dispositive of this application.

10.24 Under the circumstances it is submitted that the applicants have failed to demonstrate a right, *prima facie* or otherwise and that the application accordingly stands to be dismissed with costs.

11 ALTERNATIVE REMEDY

11.1 As state above, the applicants' constitutional right of access to electricity are enforceable against ELM only. They are not enforceable against Eskom. Eskom supplies electricity to ELM in terms of the electricity supply agreement concluded between itself and ELM. ELM concludes wholly independent contracts with its end users like the applicants.

11.2 The applicants have known of Eskom's intention to terminate the supply of electricity for non-payment at least no later than January 2017.

11.3 The applicants were, according to their founding affidavit, fully aware of the fact that ELM was in default of its obligations to Eskom and of the decision taken by Eskom contemplating the interruption of electricity supply to ELM.

MM

Yet they did nothing about ELM's failure to comply with its obligations which failure would obviously cause them harm.

11.4 There are and have always been remedies readily available to the applicants at all times. Those remedies include:-.

11.4.1 applying for a *mandamus* to force ELM to pay Eskom in order to secure and safeguard their right to basic municipal services;

11.4.2 applying to have ELM place under administration;

11.4.3 approaching NERSA under Section 18 of ERA for appropriate relief, especially in light of the continuing breach by ELM of its licence conditions and its constitutional obligations to it residents.

11.5 Besides, they have a right to sue ELM for whatever damages they might suffer as a result of its conduct when it failed to pay Eskom with the results that their rights to basic municipal service are affected.

11.6 This application is, in light of the delay in launching it and the statutory provisions that underpin Eskom's conduct, solely aimed at unlawfully frustrating Eskom from implementing its rights against ELM.

MM

11.7 Eskom and ultimately, the South African public and other businesses at large will be severely prejudiced if the defaulting municipalities are not curtailed in their use of electricity.

12. BALANCE OF CONVENIENCE

12.1 The founding affidavit is conspicuously silent on whether the class of consumers in ELM on behalf of whom the applicants purport to act have their accounts settled and are up-to-date and how much are they contributing in the revenue collection on electricity accounts of the ELM.

12.2 Further, the applicants do not make out a proper case for balance of convenience. For instance, the applicants do not deal with the inconvenience that Eskom will suffer should the interdict be granted.

12.3 In any event, in comparison to the inconvenience foreshadowed by the applicants, I wish to bring to the attention of the above Honourable Court that the overall municipal debt in the country had risen to R 13, 624 billion as at 30 November 2017.

MM

12.4 As at 30 November 2017 the outstanding amount owed by the ELM was an amount of R1,3 billion.

12.5 It is inconceivable that the applicants would demand Eskom to supply electricity to the ELM when the latter does not pay for services rendered. Clearly, in demanding that Eskom continues to supply electricity in circumstances where the ELM does not honour its obligations towards Eskom, the underlying intention of the applicants is to collapse Eskom.

12.6 It will be a great inconvenience not only to Eskom but to the entire population of the Republic of South Africa if Eskom is compelled to supply electricity to the ELM when it does not service its electricity account. I will demonstrate this hardship hereunder and submit that the applicants' right should be balanced against the interests of Eskom and those of the entire population that will be affected.

12.7 Eskom borrows money to fund capital projects necessary to ensure the realisation of the provision of the electricity at a huge cost. Were it to be unable to continue to recover electricity charges from its customers, there will be an on-going need to borrow additional money at an unaffordable cost to fund operational costs.

MM

12.8 Operational costs should ideally be funded by revenue from electricity charges, not borrowings. Borrowing money at that cost to fund operational costs would not be sustainable in the short, medium and long term and could increase the cost of generating electricity exponentially, to the detriment of the general populace.

12.9 Eskom's inability to recover electricity charges would also mean that Eskom is faced with the risk of having to write-off additional billions of rand estimated to more than billion rand by the end of this financial year. This, coupled with the current low recovery rate, will have a negative impact on Eskom's financial performance (EBITDA). EBITDA is a measure used by rating agencies to determine a stable credit standing. A good credit standing is a prerequisite to accessing much sought after financial markets for funding.

12.10 If Eskom is compelled by the court order to continue to supply electricity in circumstances where it is not collecting electricity charges from its customers, the debt shall increase, its credit rating will be negatively affected and shall drop such that it shall not be able to attract financial markets.

MM

12.11 Once the credit rating drops with the result that Eskom is unable to attract financial markets for funding, it will invariably be forced to turn to government for a bailout. That will affect the entire South African Citizenry in that such debt as a result of bailout will be transferred to them. That in turn will plunge the whole country into an economic crisis at a time when the economy of the country is strained.

12.12 I submit therefore, that the regulated interruptions of electricity are reasonable and less burdensome. They are such that the residents of the ELM shall be able to order their lives taking into account the scheduled electricity interruptions. Apart from that any lesser means would be catastrophic not only to Eskom but the country as a whole.

12.13 In all the circumstances I submit that Eskom's action is in the interest of the general public extending beyond the residents of ELM.

12.14 I am advised that, insofar as:

12.14.1 Eskom's conduct is lawful and in the national interest to ensure the sustainability of electricity supply, uphold the rule of law and good governance;

MM

12.14.2 the applicants have residual public law and contractual rights against the ELM, which they have failed to enforce, not even by way of an alternative claim in this application;

12.14.3 the interruption is scheduled for certain pre-notified few hours in a day. The inconvenience that may be suffered is no greater than that suffered by citizens during periods of scheduled load shedding, wherein it has become customary to plan activities around the absence of power;

12.14.4 the limited interruption has the added advantage that the debt owed to Eskom would not escalate to an extent that it becomes impossible for the ELM to pay;

12.14.5 the relief sought by the applicants, as replicated by similarly-placed municipalities, imperils Eskom's ability to provide sustainable service delivery across the country;

the balance of convenience favours the dismissal of the application.

13. I will now proceed to deal with *ad seriatim* with the allegations in the founding affidavit of the applicants. Any allegation not specifically admitted and/or dealt with herein should be taken as being denied.

MM

14. **AD PARAGRAPHS 1 AND 2 THEREOF**

I do not take issue with the contents of these paragraphs.

15. **AD PARAGRAPH 3 THEREOF**

To the extent that the allegations made therein differ with what I have stated herein, the truthfulness and the correctness thereof are denied.

16. **AD PARAGRAPH 4 TO 9 THEREOF**

I do not take issue with the allegations contained in these paragraphs.

17. **AD PARAGRAPH 10 THEREOF**

I deny that this application is instituted in the public interest and/or on behalf of a class of consumers. The applicants herein are acting purely to protect their commercial interests. By alleging that they are acting in the public interest and/or class of consumers, the applicant are attempting to hide behind the provisions of Section 38 of the Constitution of the Republic of South Africa, Act 2006 in order to avoid a cost order against them should it be necessary for such an order to be made. Clearly, the applicants have only their interest to protect. In any event the applicants have not made out a case for reliance on the public interest or class action.

MM

18. **AD PARAGRAPH 11 THEREOF**

I admit the contents of this paragraph.

19. **AD PARAGRAPH 12 TO 15 THEREOF**

I note the contents of these allegations.

20. **AD PARAGRAPH 16 THEREOF**

It is strange that the applicants do not seek any relief against the third respondent, the MEC, when in fact it the MEC who must ensure that the ELM complies with its constitutional obligations to provide basic municipal services. Save as aforesaid I note the allegations in this paragraph.

21. **AD PARAGRAPH 17 THEREOF**

I note the nature of the relief sought but I deny that the applicants are entitled thereto.

22. **AD PARAGRAPH 18 THEREOF**

22.1 I deny that Eskom's conduct to interrupt electricity is unlawful.

MM

22.2 Further, it bears repeating that there is no privity of contract between Eskom and the applicants for the supply of electricity. Eskom does not supply electricity directly to the applicants. The applicants' contracts, if any, would be with the ELM and their rights enforceable only against the ELM. It follows that obtaining relief against Eskom in these circumstances is impermissible.

22.3 If anything, far from acting in the public interest and on behalf of a class of consumers, the allegations made by the applicants in this regard are a clear indication that the applicants instituted these proceedings merely to protect their interests.

23. **AD PARAGRAPH 19 THEREOF**

23.1 I reiterate that Eskom does not supply electricity directly to the applicants. It is ELM that supplies electricity to the applicants. Eskom supplies electricity to ELM through a central grid. The latter on sells the electricity to the applicants in terms of their agreement, if any. That being the case, it is of no moment that the applicants' account is up to date. The fact is, the ELM's electricity account is in arrears by a huge margin.

23.2 Further, if the account of the applicants is indeed up to date as alleged, then the applicants do have an alternative remedy in that it is opened to them to seek a *mandamus* against the ELM to provide them with services.

MM

24. **AD PARAGRAPH 20 THEREOF**

I note these allegations.

25. **AD PARAGRAPH 21 THEREOF**

For reasons already set out above, Eskom is opposed to the direct payment relief proposed by the applicants. Applicants' direct payment will not make any meaningful impact on the monthly consumption of ELM. Instead it will cause the debt to rise exponentially. It will be irresponsible to accept R 1, 000, 000.00 (one million rand) every month when the amount due is actually approximately R 65, 000.000.00 (sixty five million)

26. **AD PARAGRAPH 22 THEREOF**

For reasons already set out above, Eskom is opposed to the direct payment relief proposed by the applicants.

27. **AD PARAGRAPH 23 THEREOF**

I note these allegations. Eskom will deal with Part B of the application fully when it is ripe at the relevant stage. Suffice to say I deny the allegations made on behalf of the applicants to the extent of their inconsistence with what I have stated herein.

MM

28. **AD PARAGRAPH 24 THEREOF**

I deny the allegations contained in this paragraph. I have already explained the purpose of interrupting electricity supply. Further, these allegations will be fully ventilated at the stage when Part B of the application is dealt with.

29. **AD PARAGRAPH 25 THEREOF**

I deny the allegations contained in this paragraph. These allegations will be fully ventilated at the stage when Part B of the application is dealt with.

30. **AD PARAGRAPHS 26 and 27 THEREOF**

I deny the allegations contained in these paragraphs. The interruption of electricity supply in the circumstances is permitted in terms of Section 21(5) of the ERA. I deny therefore that it amounts to self-help and that it is unconstitutional either as alleged or at all.

31. **AD PARAGRAPH 28 THEREOF**

I have no knowledge of the allegations contained in this paragraph.

MM

32. **AD PARAGRAPH 29 THEREOF**

I deny these allegations. Even if they are correct, the Emalahlani is the author of its own misfortune. Further, the applicants' remedy lies against the ELM. Eskom has no obligation towards applicants.

33. **AD PARAGRAPH 30 THEREOF**

I deny the allegations contained in this paragraph.

34. **AD PARAGRAPH 31 THEREOF**

34.1 The applicants became aware that the ELM was defaulting on its payments as early as 2012. Since then, though, they did not bring any application to seek a *mandamus* against the ELM whose conduct threatened the applicants' rights to basic municipal services.

34.2 I deny that Eskom failed to take steps to collect the outstanding amounts owed. Eskom has engaged the ELM regarding its debt to the extent that acknowledgement of debts were signed.

35. **AD PARAGRAPH 32 THEREOF**

35.1 I deny that the electricity interruptions triggered a collapse of the water reticulation and sewer network of ELM. There is no evidence in that regard.

MM

In any event, and even if it were so, ELM is the author of its own misfortune.

35.2 In any event, water pumps receive electricity from the Eskom's grid. It is not possible for Eskom to isolate electricity supply to water pumps and other essential service providers. In addition, those who operate water pumps in ELM have not raised any of the issues raised by the applicants as at the time of the closing date for receipt of representations.

35.3 Eskom has gone a step further, and undertaken to ensure electricity to keep water pumps running provided ELM in turn undertakes to ensure that such supply is not reticulated to other users and is limited to water pumps only.

35.4 I wish to point out that on 21 November 2017, the Department of Water and Sanitation issued notices to at least 30 municipalities, including ELM for the recovery of arrear debt, failing which it intends to restrict the flow of water in terms of applicable statute. As at that date, in terms of information published in the Department's website ELM allegedly owed R144 654 433-72. A copy of the notice is attached marked **"ES7"**.

36. **AD PARAGRAPH 33 THEREOF**

I admit the allegations in this paragraph.

MM

37. **AD PARAGRAPHS 34 AND 35 THEREOF**

Save to deny that the notice issued by Eskom constituted a threat, I note the allegations contained in this paragraph.

38. **AD PARAGRAPH 36 THEREOF**

I have no knowledge of the allegations contained in this paragraph.

39. **AD PARAGRAPH 37 THEREOF**

I admit the contents of these paragraph.

40. **AD PARAGRAPHS 38 AND 39 THEREOF**

I reiterate that the remedy available to the applicants lies against the ELM and not against Eskom.

41. **AD PARAGRAPHS 40 TO 47 THEREOF**

41.1 It bears repeating the applicants' remedy lies not against Eskom as there is no relationship between them contractual or otherwise.

41.2 Further, any harm or inconvenience, if any, suffered by the applicants does not outweigh that which is and will be suffered by Eskom.

MM

42. **AD PARAGRAPHS 48 TO 54 THEREOF**

For fear of belabouring these papers I reiterate what I stated above in response to paragraph 32 of the founding of the founding affidavit.

43. **AD PARAGRAPH 55 THEREOF**

43.1 I deny that the applicants have a right to an interdict pending the relief sought in Part B. It bears repeating that the Constitutional Court has stated that the right to judicially review a decision resides in everyone and does not require protection *pendete lite*. Accordingly, the applicants do not have a right to obtain an interim interdict simply to protect their right to judicially review the decision of Eskom as they seek to do.

43.2 In any event, I have already dealt with the issues pertaining to prima facie right herein above. I need not repeat same.

44. **AD PARAGRAPH 56 TO 58 THEREOF**

44.1 I have already stated herein above the alternative remedies available to the applicants.

44.2 I deny that the conduct of Eskom is unconstitutional and that it amounts to self-help.

MM

44.3 I reiterate that any remedy that applicants may have lies not against Eskom. Thus Eskom does not accept any liability of any nature.

45. **AD PARAGRAPH 59 TO 65 THEREOF**

45.1 All allegations herein that are inconsistent with what I have stated are denied.

45.2 I have already dealt with the balance of convenience herein above and I refer the above Honourable Court to what I have stated above.

45.3 Moreover, a civil court judgment is not necessarily the best option. It will be catastrophic to the ELM and its residents. First, as stated above, the attachment of the property of the ELM will simply make it impossible for it to function and to provide services. Second, it will not have an effect of reducing the escalation rate of the debt.

45.4 In any event, Eskom is authorised both in terms of the provisions of the ERA and the electricity supply agreement to reduce or interrupt or terminate the electricity supply under certain circumstances. Such circumstances have now arisen in this matter hence the decision to interrupt.

MM

46. **AD PARAGRAPH 66 THEREOF**

I have already dealt with the urgency herein above. I refer the Honourable Court to what has already been stated in that regard.

47. **AD PARAGRAPH 67 AND 68 THEREOF**

I note that the application to institute a class action is not before the court at this stage. Eskom will deal with such application once the application is instituted.

48. **AD PARAGRAPH 69THEREOF**

I deny the allegations contained in this paragraph.

49. **AD PARAGRAPH 70 THEREOF**

49.1 I have explained herein above that interruptions of electricity serve many purposes than only as a collection measure. The interruptions of electricity would, for instance, minimise the rate at which the debt of ELM escalates without making it impossible for it to meet its obligations in the future. It would also ensure that the ELM does not use more electricity than it can afford.

MM

49.2 In any event, Eskom is empowered in terms of the provisions of the ERA as well as the electricity supply agreement to terminate the electricity supply. Further, Eskom has obligation in terms of the PFMA as set out above.

49.3 In a nutshell, Eskom was acting within its powers when it took the decision to interrupt the electricity supply.

50. **AD PARAGRAPH 71 THEREOF**

I note the allegations contained in this paragraph.

51. **AD PARAGRAPH 72 THEREOF**

51.1 I deny that Eskom has resorted to self-help. It bears repeating that the steps or decision taken by Eskom is authorised in law.

51.2 I reiterate that execution of a civil court judgment would collapse the ELM in a matter of hours once a writ is executed. Once the property of the ELM is attached and removed for execution the latter will no longer be able to provide basic municipal services. It certainly requires its equipment which constitutes its property in order to provide basic municipal services to the community.

MM

52. **AD PARAGRAPH 73 THEREOF**

52.1 I deny the allegations contained in this paragraph and in particular the interpretation proposed by the applicants.

52.2 I point out that the Constitutional Court has already pronounced itself on the provisions of Section 21(5) of the ERA. I submit that if municipalities are permitted to disconnect the electricity supply to their defaulting customers, then equally, Eskom is permitted to disconnect or interrupt or reduce the electricity supply to its defaulting customers such as the ELM.

52.3 I submit further that all rights in the Bill of Right are subject to limitation. To the extent that applicants contend that they have rights enforceable against Eskom or any right to electricity including basic municipal services, Section 21(5), being a law of general application, justifiably limits such rights.

52.4 I deny specifically that the rights of the applicants are limited by Eskom's scheduled interruptions.

52.5 In any event such limitations would be very is justified in terms of section 36 of the Constitution of the republic of South Africa Act 2006. Section 21(5) of the ERA serves such purpose of limiting the rights.

MM

52.6 further, the limitation minimal in the circumstances, given the fact that the interruptions would be scheduled and carefully communicated by Eskom; and any such limitations are reasonable and justifiable in that:-

52.6.1 they are temporary and conditional in nature and only endures until the amounts owing by ELM are paid or a mutually agreed repayment plan is concluded;

52.6.2 they do not amount to a complete deprivation but would endure for not more than five hours daily;

52.6.3 they will not have a negative effect on the minimum guaranteed free electricity of 50kwH;

52.6.4 they will have the effect that the debt of ELM will not escalate to debilitating effect and thus have an impact on its ability to provide other services to its citizens, whilst enabling Eskom to manage its own harm, being the cost of the most expensive supply hours; and

52.6.5 it could have been and can still be avoided by the enforcement of other alternative legal remedies available at the disposal of the applicants against ELM, which, to date, has not been done.

MM

53. **AD PARAGRAPH 74 THEREOF**

I deny the allegations contained in this paragraph.

54. **AD PARAGRAPH 75 THEREOF**

I deny the allegations contained in this paragraph.

55. **AD PARAGRAPH 76 THEREOF**

I admit only that the decision to interrupt electricity is an administrative decision. Save as aforesaid I deny the remainder of the allegations contained in this paragraph.

56. **AD PARAGRAPH 77 THEREOF**

I deny each and every allegation contained in this paragraph. I add that Eskom is authorised in law to take the steps it took herein.

57. **AD PARAGRAPH 78 THEREOF**

I deny these allegation and in particular that there is any basis to review the decision to interrupt electricity.

MM

58. **AD PARAGRAPH 79 THEREOF**

I deny each and every allegation contained in this paragraph.

59. **AD PARAGRAPH 80 THEREOF**

I deny each and every allegation contained in this paragraph. Eskom went about taking the decision procedurally. The record, once filed, will should that a proper procedure was followed prior to taking the decision. No irrelevant considerations were taken into account and the decision is rational and justifiable.

60. **AD PARAGRAPH 81 THEREOF**

I note these allegations. Eskom reserves its rights to answer fully to these allegations and to the supplementary affidavit once it is served and filed.

61. **AD PARAGRAPHS 82TO 83 THEREOF**

I note these allegations. They relate to ELM.

62. **AD PARAGRAPHS 84 AND THEREOF**

To the extent that the allegation contained therein differ with what I have stated in this affidavit, they are denied.

MM

63. **AD PARAGRAPH 85 THEREOF**

I deny these allegations.

64. **WHEREFORE**, Eskom prays for an order in the following terms:

(a) That the application be dismissed;

(b) That the applicants, alternatively the second respondent, be ordered to pay Eskom's costs which costs includes the costs occasioned by the employment of two counsel;

(c) That Eskom be granted further and/or alternative relief.

MUSA MABILA

I certify that the deponent has in my presence acknowledged that he/she is familiar with the contents of this affidavit and understands it, that he/she has no objection to taking the prescribed oath and regards the oath as binding on his/her conscience where after the oath was administered and the affidavit sworn to by the deponent, he/she having uttered the phrase "*So Help Me God*".

COMMISSIONER OF OATHS

Ex officio:

Full names:

Address:

NAKEDI CHARLES MACHAKA
PRACTISING ATTORNEY GAUTENG RSA
COMMISSIONER OF OATHS
BLOCK C, BROOKLYN OFFICE PARK, 486 FEHRSEN STREET
BROOKLYN, 0181
P.O. BOX 11892, THE TRAMSHED, 0126
TEL: 087 150 1169 FAX: 012 346 1725