IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NUMBER: 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

and

SAKELIGA NPC (previously known as SAKELIGA NPC)	*Amicus Curiae*

HEADS OF ARGUMENT ON BEHALF OF *AMICUS CURIAE :* SAKELIGA NPC

1.

INTRODUCTION:

1.1 This Heads of Argument is filed on behalf of Sakeliga NPC (hereinafter referred to as 'Sakeliga'), which seeks to be admitted as *Amicus Curiae* in the present application, in terms of Rule 16A(2) of the Uniform Rules of the above Honourable Court, as, *inter alia*:

1.1.1 the application is of significant public importance;

1.1.2 various constitutional rights of the members of SakeLiga and the general public are at stake.

1.2 The following parties have consented to the admission of SakeLiga as *Amicus Curiae* in the application at hand:

1.2.1 First Applicant;

1.2.2 Second Applicant;

1.2.3 Third Applicant;

1.2.4 Fourth Applicant;

all of whom are represented by Kokinis Inc. Attorneys (See **Annexure "AC1"**, being confirmation of the consent provided on behalf of the respective Applicants).

1.2.5 First Respondent;

represented by Ngeno & Mteto Inc Attorneys (See **Annexure "AC2"**, being confirmation of the consent provided on behalf of the First Respondent).

1.2.6 Second Respondent;

represented by Neuhoff Khoza Attorneys (See **Annexure "AC3"**, being confirmation of the consent provided on behalf of the First Respondent).

1.2.7 Fourth Respondent;

represented by the State Attorney (See **Annexure "AC4"**, being confirmation of the consent provided on behalf of the Fourth Respondent).

1.3 The Fifth Respondent did not oppose the main application and as such, its consent in regard to the admission of SakeLiga as *Amicus Curiae* is not strictly required.

1.4 Insofar as the Third Respondent has neglected and/or refused to consent to the request of SakeLiga to be admitted as *Amicus Curiae,* an application requesting an order that SakeLiga be admitted as *Amicus Curiae* will be filed simultaneously with the Heads of Argument.

1.5 As such, the Heads of Argument serve a dual purpose:

1.5.1 Firstly: to provide the above Honourable Court with the submissions to be advanced in support of the application by SakeLiga to be admitted as *Amicus Curiae*;

1.5.2 Secondly: If the aforementioned application to be admitted as *Amicus Curiae* is granted, to provide the above Honourable Court with submissions that SakeLiga wish to advance, in its capacity as *Amicus Curiae*, which will be amplified by oral argument during the hearing of the application.

2.

SUBMISSIONS TO BE ADVANCED IN SUPPORT OF THE APPLICATION BY SAKELIGA TO BE ADMITTED AS *AMICUS CURIAE*:

2.1 SakeLiga (then known as AfriSake) was established in 2011 and formally incorporated and registered in terms of the Companies Act in 2012.

2.2 SakeLiga registered a change in its company name on 23 July 2018.

2.3 SakeLiga is a non-profit company registered as such in terms of the company laws of the Republic of South Africa with registered address and principal place of business at the corner of D.F. Malan Avenue and Union Street, Kloofsig, Centurion.

2.4 SakeLiga is a business interest organisation with more than 12 000 members countrywide, consisting of a variety of businesses and proprietors or employees of businesses in the form of corporate businesses and other forms. It also has several individual members supporting its cause.

2.5 SakeLiga's main objective is the protection of constitutional rights and property rights. It also lobbies and promotes the free market and economic prosperity in order to create a favourable business environment in the interest of its members, as well as in the interest of the common good. In order to give effect to its main object, it also provides support to its members, which includes legal support.

2.6 SakeLiga has approached the above Honourable Court, *inter alia*, on several occasions in the past in order to enforce and protect the rights of its members and the wider community where its members conduct business, but also in the broader public interest.

2.7 SakeLiga has an interest in the present application, by virtue of, *inter alia*, the following:

2.7.1 In addition to specific relief sought by the Applicants, general relief that seeks to interdict the First Respondent from implementing its decision to implement the bulk interruption of electricity supply to the Second Respondent, *inter ilia*, is also being sought by the Applicants.

2.7.2 SakeLiga and its members have an interest in the outcome of the application specifically by virtue of the fact that its members operate in the

municipal boundaries of the Second Respondent. As such, SakeLiga's members are dependent upon the supply of electricity by the Second Respondent.

2.7.3 SakeLiga has approximately 100 members in the jurisdictional area of the Second Respondent which consist of members in their indivual capacities and members representing businesses in which they have an interest.

2.7.4 Most of the diligently paying businesses in Emalahleni of their accounts for electricity to the municipality rely heavily on electricity and/or electronic equipment in order to manage their affairs and also to render, produce, manufacture and/or distribute goods and services within the community of Emalahleni, but also within the broader South African economy.

2.7.5 It is submitted that SakeLiga's members will be severely prejudiced by the intended action of the First Respondent in that they will suffer irreparable harm if the supply of electricity to their homes and/or businesses is interrupted notwithstanding the fact that they honour their payment obligations to the municipality. .

2.7.6 It is submitted that the intended interruption of the supply of electricity will have a crippling effect on the local economy of Emalahleni. The intended interruption of electricity supply to the business community will result in significant financial losses, which may lead to businesses having to either retrench employees and/or moving its business activities outside of the

boundaries of the Emalahleni Municipality. Many businesses may face the risk of having to close down.

2.7.7 The reduction in economic flow will not improve the Municipality's ability to pay its debts. To the contrary, the intended interruption, it is submitted, will serve to increase the Second Respondent's inability to pay its debt to the First Respondent.

2.7.8 There are important constitutional legal issues at stake of broader public interest in respect of which SakeLiga seeks to make a contribution and are supplementary and additional to those submitted by the parties and which it is submitted require due consideration in the interests of justice.

2.8 It is submitted that SakeLiga's application to be admitted as *Amicus Curiae* will be beneficial to the above Honourable Court, SakeLiga's members as well as the general public.

3.

SUBMISSIONS TO BE ADVANCED BY THE *AMICUS CURIAE:*

3.1 SakeLiga seeks to assist the above Honourable Court by providing submissions, encapsulated herein and amplified by oral submissions, which submissions are aimed at assisting the court with adjudicating the matter with due regard to the

viewpoint of the relevant business community affected by the intended interruption of electricity supply.

3.2 Furthermore, SakeLiga seeks to provide submissions in addition to and in amplification of what will be submitted on behalf of the respective Applicants.

3.3 In making its submissions, SakeLiga will confine itself to questions of law and on undisputed facts and does not intend to make submissions on disputes of fact or the cogency of any evidence in issue between the respective Applicants and Respondents.

The relevant statutory and constitutional provisions that ought to be considered are dealt with below.

4.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS:

Introduction[1]:

4.1 Electricity is distributed in South Africa in large measure by municipalities established in terms of section 2 of the Local Government: Municipal Systems Act, 32 of 2000 read with section 155 of the Constitution.

[1] *Certain portions quoted from Afriform NPC and Others v Eskom Holdings SOC Limited and Others 3 All SA 663 (GP) (24 May 2017)*

4.2 Sections 152 and 153 of the Constitution oblige municipalities to strive, within available resources, to ensure the provision of services to communities in a sustainable manner and to structure and manage their budgeting and planning to give priority to the basic needs of communities. “Services” and “basic needs” include electricity.[2]

4.3 These constitutional obligations are reinforced by various pieces of national legislation[3], dealt with in more detail herein below.

4.4 The Electricity Regulation Act[4] (“the ERA”) is the legislative scheme regulating the supply of electricity in South Africa. Its objects include the achievement of an efficient, effective, sustainable and orderly operation of the electricity supply infrastructure in South Africa and to facilitate a fair balance between the interests of customers and end-users, licensees, investors in the electricity supply industry and the public.[5]

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[2] *Joseph and Others v City of Johannesburg 2010 (4) SA 55 (CC) at para 40; Mkontwana v Nelson Mandela Metropolitan Municipality; Bissett v Buffalo City Municipality; Transfer Rights Action Campaign v MEC, Local Government and Housing, Gauteng (KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae) 2005 (1) SA 530 (CC) at para 38.*

[3] *Section 9(1)(a)(iii) of **the Housing Act 107 of 1997** provides that every municipality must, as part of the municipality’s process of integrated development planning, take all reasonable and necessary steps within the framework of national and provincial housing legislation and policy to ensure that services in respect of water, sanitation, electricity, roads, storm water drainage and transport are provided in a manner which is economically efficient.*

[4] *Act 4 of 2006*

[5] *Sections 2(a) and 2(g) of the ERA.*

4.5 The ERA establishes the National Energy Regulator of South Africa ("NERSA") as the independent body responsible as the custodian and enforcer of the regulatory framework.[6]

4.6 Section 7 of the ERA prohibits the generation, transmission or distribution of electricity without a license issued by NERSA, which is empowered to issue licenses to parties wishing to generate, transmit or distribute electricity, or be involved in the trading of electricity.[7]

4.7 In terms of section 15 of the ERA, NERSA is required to set an electricity tariff for a licensee such that the licensee is able to cover the costs of its licensed activities, and earn a reasonable rate of return.[8] NERSA may also impose conditions on the license as to *inter alia*, the area of electricity supply to which the licensee is bound; the classes of customers that may be supplied by a licensee; and the termination of electricity supply to customers and end-users under certain circumstances.[9]

4.8 The supply of electricity in South Africa is thus divided into three functional components, being:

4.8.1 generation, being the production of electricity by any means;

4.8.2 Transmission, the operating of power lines and substation equipment; and

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[6] *Section 3 of the ERA provide that the National Energy Regulator established by section 3 of the National Energy Regulator Act is the custodian and enforcer of the regulatory framework provided for in this Act.*
[7] *Section 7(1)(a) and (c) read with section 14 of the ERA.*
[8] *Section 15(1)(a) of the ERA*.
[9] *Sections 14(1)(o), (p) and (n) of the ERA.*

4.8.3 Distribution, being the function of owning, operating and distributing electricity through an electricity network.

4.9 The functions of generation and transmission of electricity in South Africa are carried out by Eskom. It is the only holder of a licence for the generation and transmission of electricity and exercises a licensed monopoly over the supply of electricity in South Africa.

4.10 Eskom is therefore responsible for the generation of all electricity within South Africa. Eskom is a major public entity in terms of Schedule 2 of the Public Finance Management Act[10], and an organ of state.[11] It is also an organ of State by virtue of Section 239 of the Constitution.

4.11 The distribution function is either carried out by Eskom directly to electricity consumers (customers or end –users) or it may be carried out by one of a number of licensees, whom NERSA has licensed to distribute electricity, the majority of whom are municipalities.

4.12 Municipalities licensed by NERSA distribute electricity to end-users such as the Applicants and the general public at tariffs approved by NERSA. In terms of sections 84(1)(c) of the Local Government: Municipal Structures Act[12], district municipalities are empowered to manage the bulk supply of electricity to end-consumers.

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[10] *Act 1 of 1999*
[11] *In terms of section 239 of the Constitution read with Schedule 2 to the PFMA.*
[12] *Act117 of 1998*

4.13 This means that once electricity is delivered by Eskom to the municipal switchgear, the municipality is responsible for performing the distribution function.

4.14 Thus the duties of municipalities to pay Eskom and to distribute to end-users within their area of jurisdiction are sourced in the Constitution and reinforced by the two legislative schemes, one for local government and the other regulating electricity supply.

Municipal Services and obligations of Local Government:

4.15 The local sphere of government consists of municipalities, as envisaged in Section 151 of the Constitution of the Republic of South Africa (hereinafter "the Constitution").

4.16 The reticulation and distribution of electricity by municipalities is one of the fundamental constitutional functions of local government in order to meet the basic needs of all the inhabitants of South Africa. It is a matter of public and constitutional duty.

4.17 The obligations and duties borne by a local government to provide basic municipal services are obtained in the Constitution and various legislations.

The Constitution of the Republic of South Africa, 1996 ("the Constitution")

4.18 Section 152(1) of the Constitution lists the objects of local government. They 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.

4.19 Section 152(2), of the Constitution, with reference to the aforementioned objects, imparts upon municipalities the duty to strive, within its financial and administrative capacity, to achieve the aforementioned objects.

4.20 Section 153(a) of the Constitution, furthermore, imparts an immutable duty upon municipalities to: "*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".*

4.21 Section 154 of the Constitution deals with municipalities in co-operative government, which will be dealt with in more detail herein further, and clearly stipulates that the national government and provincial governments, by legislative and other measures, "*must support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions*".

4.22 These powers and functions of municipalities are dealt with in Section 156 of the Constitution. In terms of this section, a municipality has executive authority in respect of and has the right to administer:

4.22.1 the local government matters listed in Part B of Schedule 4[13] and Part B of Schedule 5; and

4.22.2 any other matter assigned to it by national or provincial legislation.

The Local Government: Municipal Systems Act, No. 32 of 2000 ("Municipal Systems Act")

4.23 The Municipal Systems Act is a legislative measure intended to support and strengthen the capacity of municipalities to manage their own affairs, exercise their powers and perform their functions.[14]

4.24 Section 4(2) of the Municipal Systems Act imposes on the council of a municipality the duty[15] to:

4.24.1 exercise the municipality's executive and legislative authority and use the resources of the municipality in the best interests of the local community;

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[13] *Of relevance, the following:*

- *Electricity and gas reticulation*
- *Municipal planning*
- *Municipal public works only in respect of the needs of municipalities in the discharge of their responsibilities to administer functions specifically assigned to them under this Constitution or any other law*

[14] *Rademan v Moqhaka Local Municipality 2013 (4) SA 225 (CC)*

[15] *within the municipality's financial and administrative capacity and having regard to practical considerations*

4.24.2 provide, without favour or prejudice, democratic and accountable government;

4.24.3 encourage the involvement of the local community;

4.24.4 strive to ensure that municipal services are provided to the local community in a financially and environmentally sustainable manner;

4.24.5 consult the local community about-

i) the level, quality, range and impact of municipal services provided by the municipality, either directly or through another service provider; and

ii) the available options for service delivery;

4.24.6 give members of the local community equitable access to the municipal services to which they are entitled;

4.24.7 promote and undertake development in the municipality;

4.24.8 promote gender equity in the exercise of the municipality's executive and legislative authority;

4.24.9 promote a safe and healthy environment in the municipality; and

4.24.10 <u>contribute, together with other organs of state, to the progressive realisation of the fundamental rights contained in sections 24, 25, 26, 27 and 29 of the Constitution. (Emphasis inserted)</u>

4.25 A municipality is also obliged, by virtue of the provisions of Section 4(3) of the Municipal Systems Act, to respect the rights of citizens and those of other persons protected by the Bill of Rights in the exercise of its executive and legislative authority.

4.26 The duty of municipalities to give effect to the Constitution is reiterated in Section 73 of the Municipal Systems Act. This section further imposes the general duties upon municipalities, to-:

(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.

4.27 Section 73 provides that 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.

Local Government: Municipal Structures Act, No. 117 of 1998 ("the Structures Act")

4.28 Ancillary to the provisions of the Municipal Systems Act, *inter alia* is section 84(1)(c) of the Local Government: Municipal Structures Act, in terms of which it is a function and power of district municipalities to manage the bulk supply of electricity, which includes for the purposes of such supply, the transmission, distribution and, where applicable, the generation of electricity.

CO-OPERATIVE GOVERNMENT, INTERGOVERNMENTAL RELATIONS AND SETTLEMENT OF INTERGOVERNMENTAL DISPUTES:

Local Government: Municipal Finance Management Act No. 56 of 2003 ("MFMA")

4.29 Chapter 5[16] of the MFMA contains several provisions for purposes of promoting co-operative government between national and provincial governments with the view to support municipalities with proper financial management.

4.30 Section 34(2) of the MFMA provides that national and provincial governments must assist municipalities in building the capacity of municipalities for efficient, effective and transparent financial management and support the efforts of municipalities to identify and resolve their financial problems.

[16] *SS 33-44*

4.31 Section 34(3) provides that, in exercising this monitoring function, a provincial government must, in terms of Section 155(6) of the Constitution:

4.31.1 share with a municipality the results of its monitoring to the extent that those results may assist the municipality in improving its financial management;

4.31.2 upon detecting any emerging or impending financial problems in a municipality, alert the municipality to those problems; and

4.31.3 may assist the municipality to avert or resolve financial problems.

4.32 In terms of Section 37 of the MFMA, municipalities must promote co-operative government in accordance with Chapter 3 of the Constitution and the Intergovernmental Fiscal Relations Act in their financial relations with the national and provincial spheres of government and other municipalities.[17]

4.33 In terms of Section 41 of the MFMA the **National Treasury** must monitor pricing structures of organs of state for the supply of electricity, water and other bulk resources to municipalities and payments made by municipalities for such bulk resources.

4.34 Section 41(2) specifically provides that each organ of state providing such bulk resources to a municipality must, within 15 days after the end of each month furnish the National Treasury with a written statement setting out, for each

[17] *37(1)(a)*

municipality or for each municipal entity providing municipal services on behalf of such municipalities:

4.34.1 the amount to be paid by the municipality or municipal entity for such bulk resources for that month, and for the financial year up to the end of that month;

4.34.2 the arrears owing and the age profile of such arrears; and

4.34.3 any actions taken by that organ of state to recover arrears.

4.35 It is submitted that, when regard is had to the substantial accumulation of debt over a period of time, it is questionable that these steps have been taken by Eskom.

4.36 In line with the aforementioned, Section 44 of the MFMA dictates the resolution of disputes between organs of state. Section 44(1) provides that whenever a dispute of financial nature arises between organs of state, the parties concerned must as promptly as possible take all reasonable steps that may have been necessary to resolve the matter out of Court.

4.37 Section 44(2) further provides that if the National Treasury is not a party to the dispute, the parties must report the matter to the National Treasury and may request the National Treasury to mediate between the parties or to designate a person to mediate between them.

4.38 Clearly, these provisions have been circumvented by Eskom and the Municipality to the potential serious detriment to consumers of electricity.

4.39 Eskom's decision to interrupt the supply of electricity to the Municipality is not only premature, but grossly irregular.

4.40 Chapter 13 of the MFMA provides yet further recourse in the event of fiscal difficulties encountered by a municipality. In this regard, Section 135 explicitly provides that the primary responsibility for resolution of financial problems rests with the municipality itself[18]. If a municipality encounters a serious financial problem, or anticipates problems in meeting its financial commitments, Section 135(3) provides that it must immediately –

(a) seek solutions for the problem;

(b) notify the MEC for local government and the MEC for finance in the province; and

(c) notify organised local government.

4.41 In addition to the aforementioned, Section 136 of the MFMA lists the types of provincial interventions that ought to be implemented towards the resolution of financial problems of a municipality. *Inter alia*, an obligation is place on the MEC for local government in a province to promptly:

(a) consult the mayor of the municipality to determine the facts;

[18] *S135(1)*

(b) assess the seriousness of the situation and the municipality's response to the situation; and

(c) determine whether the situation justifies or requires an intervention in terms of section 139 of the Constitution[19].

4.42 Section 139 of the MFMA provides for certain mandatory provincial interventions arising from financial crisis. It provides that the involvement of the Municipal Financial Recovery Service ought to be sought to determine the reasons for the financial crisis, assess the municipality's financial state and prepare an appropriate recovery plan along with appropriate recommended changes to the municipality's budget, *inter alia*.

4.43 When determining whether the conditions for a mandatory intervention referred to above are met, the factors listed[20] in Section 140(2) ought to be taken into consideration when determining whether a municipality is in serious material breach of its obligations to meet its financial commitments. These factors are:

4.43.1 The municipality has failed to make any payment to a lender or investor as and when due;

4.43.2 the municipality has failed to meet a contractual obligation which provides security in terms of section 48;

[19] *Provincial intervention in local government*

[20] *Singly or in combination, with reference to Section 140(2)*

4.43.3 the municipality has failed to make any other payment as and when due, which individually or in the aggregate is more than an amount as may be prescribed or, if none is prescribed, more than two per cent of the municipality's budgeted operating expenditure; or

4.43.4 the municipality's failure to meet its financial commitments has impacted, or is likely to impact, on the availability or price of credit to other municipalities.

4.44 Section 140(3) goes on to state that any recurring or continuous failure by a municipality to meet its financial commitments which substantially impairs the municipality's ability to procure goods, services or credit on usual commercial terms, may indicate that the municipality is in persistent material breach of its obligations to meet its financial commitments.

4.45 There is no indication that an intervention has been sought or instigated in line with the aforementioned provisions.

4.46 Aside from an intervention by the Municipal Financial Recovery Service, Section 150 the MFMA also makes provision for national interventions by the National Executive in the event that the provincial executive cannot or does not or does not adequately exercise the powers and perform the functions in terms of section 139(4) or 139(5) of the Constitution.

4.47 It would appear that none of the dispute resolution mechanisms were embarked upon in the face of the apparent financial crisis faced by the Municipality.

4.48 Moreover, the financial rescue provisions of the MFMA were not resorted to in order to prevent the current situation whereby members of the public and users of electricity stands to be deprived of their constitutional right to receive basic municipal services from the Second Respondent and as a result of the unilateral action taken by Eskom as major state enterprise and organ of state.

The Constitution:

4.49 To this end, the Honourable Court is also referred to Section 41(1) of the Constitution which provides that all spheres of Government and all organs of state within its sphere must, *inter alia*, secure the well-being of the people of the Republic and cooperate with one another in mutual trust and good faith.

4.50 Section 41(2) of the Constitution provides for the enactment of legislation to establish and provide for structures and institutions to promote and facilitate intergovernmental relations and provide for appropriate mechanisms and procedures to facilitate settlement of intergovernmental disputes.

4.51 Section 41(3) of the Constitution further provides that an organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches the Court to resolve the dispute.

4.52 In terms of the provisions of Section 41(4) of the Constitution, a Court may refer a dispute back to the organs of state involved if the Court is not satisfied that the requirements of subsection (3) have been met.

4.53 It is abundantly clear that Eskom's decision to enforce payment by the Municipality through the intended interruption of electricity supply fails to take cognizance of the aforementioned provisions and amounts to a circumvention thereof. Eskom did not only avoid approaching a Court for relief, but failed to follow any alternative dispute resolution procedures. This has culminated in the consumers of electricity having to seek relief from the Court, which entirely subverts the spirit and purpose of the legislative provisions.

The Intergovernmental Relations Framework Act, No. 13 of 2000 ("IRFA") and Guidelines:

4.54 The Intergovernmental Relations Framework Act, No. 13 of 2000 was, *inter alia*, enacted in order to give effect to section 41(2) of the Constitution.

4.55 This Act specifically aims to establish a framework for the national government, provincial governments and local governments to promote and facilitate intergovernmental relations; to provide for mechanisms and procedures to facilitate the settlement of intergovernmental disputes; and to provide for matters connected therewith.

4.56 Section 40 of the IRFA imparts a duty on all organs of state to avoid intergovernmental disputes and to make every reasonable effort to settle intergovernmental disputes without resorting to judicial proceedings.

4.57 Section 40(2) specifically states that:

"Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute."

4.58 In terms of the Act, formal intergovernmental disputes may be declared[21], if reasonable efforts to settle a dispute were unsuccessful. In terms of Section 45 of the IRFA, Judicial proceedings may only be instituted in order to settle an intergovernmental dispute if same has been declared a formal intergovernmental dispute and all efforts to settle the dispute in terms of Chapter 4 of the Act were unsuccessful.

4.59 In terms of its powers under Section 47(1) of "IRFA", the Minister for Provincial and Local Government (now known as the Minister for Cooperative Governance and Traditional Affairs) has published guidelines for effective conflict management and to give effect to judgments of the Constitutional Court which

[21] *Section 41*

places a positive duty on organs of state to endeavor to resolve their disputes amicably.

4.60 These Guidelines downright address the constitutional mandate on all organs of state to co-operate with one another in mutual trust and good faith and to avoid legal proceedings against one another, with regard to Item 2 thereof.

4.61 The Guidelines were published with due regard to the Constitutional Court decision in the matter of **National Gambling Board v Premier of KwaZulu-Natal 2002 (2) SA 715 (CC)** where the Court stated as follows, *inter alia*:

"The obligation to settle disputes is an important aspect of co-operative government, which lies at the heart of chap 3 of the Constitution. If this Court is not satisfied that the obligation has been duly performed, it will rarely grant direct access to organs of State involved in litigation with one another."[22]

4.62 In order to give effect to Section 40(2) of the IRFA, the Guidelines make provision for standard clauses in agreements between organs of state in order to make provision for dispute settlement procedures which include, *inter alia*, mediation and arbitration.[23]

4.63 We see from the contents of the agreements between Eskom and the Second Respondent that they do not contain such clauses.

[22] *Par 33*
[23] *Part 4, Item 1.4*

4.64 The provisions aimed at ensuring alternative dispute resolution mechanisms are mandatory provisions. As such, Eskom is bound by same insofar as a dispute has arisen with the Municipality in regard to the supply of electricity and payment ancillary thereto.

4.65 The extent to which these dispute resolution mechanisms have been adopted between the respective Respondents, do not appear from the distribution of electricity agreement between Eskom and the Second Respondent.

4.66 The Second Respondent as an organ of state with the constitutional obligation to render electricity services cannot simply be regarded as a normal contracting party or "customer" in a private law sense. Such narrow approach by Eskom if given effect to in actual fact would deprive citizens from receiving basic municipal services with no other alternative as the regulator (NERSA) or the province in the interests of the public and cooperative governance all fail to comply with their constitutional and statutory duties.

Interpretation of the provisions of the Electricity Regulation Act, Act 4 of 2006 ("ERA") and the role of the National Energy Regulator ("NERSA"):

4.67 The ERA establishes a national regulatory framework for the electricity supply industry and governs the regulation of the supply of electricity in South Africa.

4.68 The ERA's objects are to[24]:

(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; (Emphasis inserted).

(c) facilitate investment in the electricity supply industry;

(d) facilitate universal access to electricity;

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

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

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

4.69 The National Energy Regulator ("NERSA") is established by virtue of Section 3 of ERA, to act as the custodian and enforcer of the regulatory framework provided for in the ERA.

4.70 In terms of section 4 of the ERA, NERSA is obliged to consider applications and issue licenses for the operation of generation, transmission or distribution

[24] *Section 2 of ERA*

facilities;[25] and may mediate disputes between generators, transmitters, distributors, customers or end-users, and undertake investigations and inquiries into the activities of any licensee.[26]

4.71 The ERA contains several provisions aimed at regulating the issuing of licenses and the operation, generation, transmission and distribution of electricity and affords NERSA various functions and powers in order to give effect to this purpose.

4.72 With regard to the aforementioned, it is submitted that a municipality, such as the Second Respondent, is a licensed distributor and trader in electricity which relies to a large extent on the generation of revenue from the selling of electricity to customers and end-users.

4.73 Customers and end-users within the area of jurisdiction of the municipality are wholly dependent upon the distribution of electricity to them via the relevant municipality, who in turn receives its supply of electricity from Eskom as co - licensee.

4.74 The duties of municipalities are set out in Section 27 of ERA which provides, *inter alia,* that each municipality must exercise its executive authority and perform its duty by:

(a) complying with all the technical and operational requirements for electricity networks determined by the Regulator;

[25] *Section 4(a) of the ERA.*
[26] *Section 4(b) of the ERA.*

(b) integrating its reticulation services with its integrated development plans;

(c) preparing, implementing and requiring relevant plans and budgets;

(d) progressively ensuring access to at least basic reticulation services through appropriate investments in its electricity infrastructure;

(e) providing basic reticulation services free of charge or at a minimum cost to certain classes of end users within its available resources;

(f) ensuring sustainable reticulation services through effective and efficient management and adherence to the national norms and standards contemplated in section 35;

(g) regularly reporting and providing information to the Department of Provincial and Local Government, the National Treasury, the Regulator and customers;

(h) executing its reticulation function in accordance with relevant national energy policies; and

(i) keeping separate financial statements, including a balance sheet of the reticulation business.

4.75 When regard is had to the provisions of ERA, read with the provisions of the MFMA and the principles of co-operative government, it is the joint function of Eskom, municipalities, NERSA, provincial government, the Minister of Cooperative Governance and to some extent National Treasury (under the control of the Minister of Finance) to fulfill the constitutional and statutory duty

imposed upon them by ensuring that all these constitutional and legislative objectives are properly fulfilled in the interest of the broader public and consumers and end-users of electricity.

The interpretation of Section 21(5) of ERA:

4.76 Insofar as Eskom is responsible for the generation and transmission of electricity, the municipality is tasked, as a licensee and as an organ of state, with the distribution of electricity.

4.77 The relationship between Eskom and the Municipality, as such, is one of a licensee / licensee and/or licensee / distributor (duly licensed) relationship.

4.78 It is submitted on behalf of the *Amicus Curiae* that municipalities are not 'customers' as envisaged in Section 21(5) of the ERA on a proper, contextual and purpose interpretation of the ERA.

4.79 The provisions of ERA clearly distinguish between customers, distributors and licensees, *inter alia*.

4.80 **Customer** is defined in the ERA to mean "*a person who purchases electricity or a service relating to the supply of electricity*."[27]

4.81 This definition, it is submitted, cannot be interpreted to include a distributor, licensee or trader.

[27] *Section 1*

4.82 **Distributor** means "*a person who distributes electricity*";

4.83 **Person** includes "*any organ of state as defined in section 239 of the Constitution*";

4.84 **Licensee** means "*the holder of a license granted or deemed to have been granted by the Regulator under this Act";*

4.85 **Trading** means "*the buying or selling of electricity as a commercial activity*";

4.86 **Municipality** means "*a category of municipality that has executive authority over and the right to reticulate electricity within its area of jurisdiction in terms of the Municipal Structures Act*";

4.87 **Reticulation** means "*trading or distribution of electricity and includes services associated therewith*";

4.88 Eskom erroneously interprets the municipality as being a 'customer'. In amplification thereof, Eskom takes the stance that it is, by virtue of the provisions of Section 21(5) of the ERA, "*empowered to reduce or interrupt or terminate the electricity supply under certain circumstances*".[28]

4.89 Section 21 of the ERA sets out the powers and duties of licensees vis-à-vis their customers.

[28] *Volume 2 : page 138, par 6.6*

4.90 Section 21 of the ERA provides as follows:

(1) A licence issued in terms of this Act empowers and obliges a licensee to exercise the powers and perform the duties set out in such licence and this Act, and no licensee may cede, transfer any such power or duty to any other person without the prior consent of the Regulator.

(2) A licensee may not discriminate between customers or classes of customers regarding access, tariffs, prices and conditions of service, except for objectively justifiable and identifiable differences approved by the Regulator.

(3) A transmission or distribution licensee must, to the extent provided for in the licence, provide non-discriminatory access to the transmission and distribution power systems to third parties.

(4) Access in terms of subsection (3) must be provided on the conditions set out in the licence of such transmitter or distributor, that may relate to-

a. the circumstances under which access must be allowed;

b. the circumstances under which access may be refused;

c. the strengthening or upgrading of the transmission or distribution power system in order to provide for access, including contributions towards such upgrading by the potential users of such systems, if applicable;

d. *the rights and obligations of other existing or new users regarding the use of such power systems;*

e. *compliance with any rule, code or practice made by the Regulator; or*

f. *the fees that may be charged by a licensee for the use of such power system.*

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

a. *the customer is insolvent;*

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

c. *the customer has contravened the payment conditions of that licensee.*

4.91 Section 21(5) explicitly distinguishes between licensees and customers. When regard is had to the provisions of the ERA, *inter alia*, the municipality is by no means a customer. Section 21 and 21 (5) seek to regulate the relationship between licensee and customer and not the relationship between licensees where the one licensee (Eskom as generator and distributor) supplies bulk electricity to another organ of state as licensee or trader for on –selling to customers and end –users. The municipality in this instance is conduit or a state extension

4.92 Viewed against the full context and purpose of ERA, the municipality itself is a licensee and trader and distributor of the electricity and not a customer.

4.93 The relationship between Eskom and the Municipality is akin to an intermediary or sub–contractor. The municipality acts as an extension of Eskom to certain customers and end–users.

4.94 With a complete disregard for the context and purpose of ERA, and the broader scope of other legislation such as the MFMA and principles of co-operative governance, Eskom relies on a narrow interpretation of the legislation.

4.95 A municipality cannot be both a licensee and a customer considering a broader purpose and scheme of the Act.

4.96 If, for example, consideration is given to Section 6 of ERA, which provides for the establishment of customer and end-user forums, it envisages such forums to have amongst members of the forums also licensees and customers. This provision is clearly aimed to protect the interests of customers and end –users in their relationships towards licensees. The meaning of "customer" in section 21(5) of ERA must therefore also be contextually interpreted against this provision to understand its meaning.

4.97 The ERA sets out the powers of NERSA in Section 4 thereof. NERSA must:

(i) consider applications for licenses and may issue licences for-

(aa) the operation of generation, transmission or distribution facilities;

(bb) the import and export of electricity;

(cc) trading;

(ii) regulate prices and tariffs;

(iii) register persons who are required to register with the Regulator where they are not required to hold a licence;

(iv) issue rules designed to implement the national government's electricity policy framework, the integrated resource plan and this Act;

(v) establish and manage monitoring and information systems and a national information system, and co-ordinate the integration thereof with other relevant information systems;

(vii) enforce performance and compliance, and take appropriate steps in the case of non-performance;

4.98 Section 4(a)(vii), as set out above relates to non-performance and non-compliance by, *inter alia*, licensees.

4.99 It is submitted that even if the interpretation of Eskom on section 21(5) is found to be correct in the sense that it regards the Second Respondent as a customer, Eskom failed to avail itself of the dispute resolution provisions contained in Section 30 of ERA, specifically sub-section (b) thereof, which provides for dispute resolution between licensees and customers.

4.100 Section 30 of the ERA, provides that, in dealing with the resolution of disputes by NERSA, the Regulator must, in relations to any dispute arising out of ERA:-

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

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

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

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

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

4.101 It is submitted that even if Eskom's interpretation is correct, it clearly lost sight of the provisions of Section 30(b) of the ERA.

4.102 On the other hand Section 30 is a further indication that the legislature intended to distinguish between relationships between licensees on the one hand and the relationships between licensees and customers on the other hand. Eskom in its interpretation of section 21(5) conflates the two.

4.103 On behalf of the *Amicus Curiae*, the submission is maintained that a municipality is not a customer and that Eskom reliance on the provisions of Section 21(5) to justify its intend to discontinue electricity supply to the municipality is ill-conceived.

4.104 It is a fundamental principle of our law that every statute must be interpreted in a manner that is consistent with the Constitution, insofar as the language of the construed provision reasonably permits.

4.105 Since both Eskom and the municipality are organs of state, Eskom can avail itself of the remedies contained in the respective statutes, which includes, *inter alia*, approaching NERSA and other organs of state to assist in the case of non-compliance by another licensee and organ of state.

4.106 It is by no means clear that Eskom has sought the assistance of NERSA as a regulator or availed itself of alternative dispute resolution mechanisms either provided in terms of ERA or in terms of the principles of cooperative governance. For this reason, it is submitted that the main relief in Part B of this application, seeking relief to ensure compliance and performance of the functions of NERSA in terms of the ERA, ought to succeed.

4.107 It is, for instance, also within the scope of the duties and powers of the Regulator, NERSA, to ensure that municipalities comply with their duties as licensees in terms of Section 27 of ERA, which includes compliance with Section 27(g)[29], where a clear distinction between municipalities, within the context of the ERA, and customers are drawn.

4.108 It is submitted that even if the interpretation of Eskom is found to be correct, a decision to discontinue electricity supply to the municipality lies at the level of co-operative governance and Eskom may not do so unless the principles of co-operative governance has first been exhausted.

4.109 Furthermore, the decision by Eskom infringes constitutional rights under the Bill of Rights as referred to above. To this end, it is submitted that ERA, including Section 21(5)(b) is not a law of general application as envisaged in Section 36(1) of the Constitution[30] or alternatively that it is reasonable and justifiable, having regard to the factors listed in section 36(1) of the Constitution.

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[29] *Each municipality must exercise its executive authority and perform its duty by-*
(g)regularly reporting and providing information to the Department of Provincial and Local Government, the National Treasury, the Regulator and customers;

[30] *Limitation of Rights:*
1. The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

a. the nature of the right;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

4.110 Without traversing all the factors individually as provided for in Section 36 of the Constitution, it is submitted that there are less restrictive means that can be adopted by Eskom to achieve the purpose of obtaining payment for the supply of its electricity from another organ of state such as the Second Respondent, especially where it knows that its decision will adversely affect businesses and individual members of the public who are paying customers and end-users of electricity, by no means involved with the fiscal dispute between the two organs of state, *inter alia*:

4.110.1 resorting to the regulator (NERSA);

4.110.2 applying the principles of co-operative governance;

4.110.3 resorting to the provisions of the MFMA and seek assistance from the Provincial Government or even National Treasury.

4.111 The Honourable Court is referred to **Federation of Governing Bodies v MEC for Education 2016 (4) SA 546 CC** where Moseneke DCJ held:[31]

"It remains important to recognise that school governing bodies are a vital lifeblood to proper and fulsome learning and teaching. Parents must be meaningfully engaged in the teaching and learning of their children. The

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e. less restrictive means to achieve the purpose.

2. Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

[31] *Par 47*

Schools Act carves out an important role for parents and other stakeholders in the governance of public schools. School governing bodies are made up in a democratic and participatory manner and ordinarily would advance the legitimate interests of learners at a school. The Constitution and the Schools Act also entrust vital tasks related to the education of our children to the MEC and HOD. In the past, this Court has correctly cautioned against undue dominance of school governing bodies by the provincial Executive. We have called for cooperative governance between statutory creatures – school governing bodies and the MEC and HOD – entrusted with effective and universal access to basic education. Of this, Froneman J and Skweyiya J wrote in Welkom High School:

> *"The school governing bodies and HOD are organs of state. In terms of section 41(1)(h) [of the Constitution] they have an unequivocal obligation to co operate with each other in mutual trust and good faith by assisting and supporting one another, informing one another of, and consulting one another on, matters of common interest, co-ordinating their actions, and avoiding legal proceedings against one another.""*[32]

4.112 It is submitted that, on the strength of the correct interpretation of the provisions of ERA, including section 21(5)(b) thereof, the decision of Eskom, as published by notice, is unlawful.

[32] Par 47

4.113 The unlawfulness is amplified by the blatant disregard for and circumvention of the constitutional imperative of co-operative governance.

4.114 The Honourable Court is referred to the judgment handed down by Murphy J in the matter **of Afriform NPC and Others v Eskom Holdings SOC Limited and Others**[33] where the Applicants challenged Eskom's decision to implement scheduled interruptions of the supply of electricity to three municipalities, being Madibeng, Lekwa and Kamiesberg.

4.115 The matter has tangible issues in common with the application at hand and was decided on the basis that Eskom's interpretation as a municipality being a customer was correct:

"Eskom supplies the licensed municipalities in bulk at a pre-determined tariff, and the municipalities then re-sell electricity to end-users within their municipal borders at a mark-up. The terms on which electricity is supplied by Eskom to municipalities are recorded in electricity supply agreements ("ESAs"). In this arrangement municipalities are "customers" of Eskom for purposes of the ERA[34], and the parties (such as the applicants) who purchase electricity from municipalities are end-users.[35] Eskom invoices municipalities monthly for the supply of electricity in terms of the ESAs concluded with each municipality. Municipalities are obliged to effect payment of all amounts owing in terms of

[33] *(99984/2015) [2017] ZAGPPHC 199; [2017] 3 All SA 663 (GP) (24 May 2017)*
[34] *The ERA defines a customer as a person who purchases electricity or a service relating to the supply of electricity.*
[35] *The ERA defines an end-user as a user of electricity or a service relating to the supply of electricity.*

section 41 of the Local Government: Municipal Finance Management Act[36] *("the Municipal Finance Act")."*[37]

4.116 It appears from a reading of the aforementioned case that all parties involved accepted that the municipalities were customers, as contemplated in Section 21 of the ERA. This cannot be correct considering the submissions made herein. This, however, stands in contrast to the findings on the part of the Honourable Judge that the municipalities are tasked with the distribution of electricity in their capacity as licensees, authorised as such by NERSA.

4.117 When regard is had to the provisions of the ERA and the clear distinction between customers, licensees and distributors, it is submitted that the municipality is not a customer and as such, Eskom's reliance on the provisions of Section 21(5) is misplaced and with respect, the reasoning in AfriForum v Eskom (supra) not correct and require reconsideration.

5.

GROUNDS OF REVIEW IN TERMS OF PAJA:

5.1 It is submitted that insofar as Eskom's decision was in all likelihood:

5.1.1 materially influenced by an error of law;

5.1.2 contravenes the law;

[36] *Act 56 of 2003*
[37] *Par 11*

5.1.3 not authorised by the empowering provision -

the action of the First Respondent is rendered reviewable in terms of section 6(2)(b), 6(2)(d) and 6(2)(f)(i) of PAJA.

5.2 The failure to pursue alternative remedies, as already mentioned, amounts to a failure to take relevant considerations into account or amounts to a lack of consideration of relevant consideration, which renders the action reviewable in terms of section 6(2)(e)(iii) of PAJA.

5.3 The exercise of power in terms of the wrong interpretation of Section 21(5)(b) of ERA infringes the principle of proportionality and is unreasonable, unless less restrictive remedies and alternative remedies, as already mentioned before with reference to alternative dispute resolution or application of the principles of co-operative governance are resorted to and therefore renders the action reviewable under Section 6(2)(h) of PAJA.

6.

CONCLUSION:

6.1 There can be no doubt that the termination or interruption of electricity supply by Eskom to a municipal licensee constitutes a significant constraint on the rights and duties of municipalities and residents and will impact on and infringe amongst others the constitutional rights to dignity (Section 10), practice a trade,

occupation or profession (Section 22), property (Section 25) and housing (Section 26).

6.2 All organs of state are bound by the Constitution, and specifically by the principles of co-operative government, to assist each other to perform their constitutional duties and to give effect to rights in the bill of rights. All the spheres are interdependent and interrelated in the sense that the functional areas allocated to each sphere cannot be seen in isolation of each other.[38]

6.3 As an organ of state in the national government, Eskom is bound in terms of Section 154(1) of the Constitution to support and strengthen the capacity of municipalities to manage their own affairs, to exercise their powers and to perform their functions and thus may not impede a municipality's ability to perform those functions.

6.4 If Eskom disconnects the supply of electricity to municipalities, it is inevitable that they will be unable to discharge their constitutional obligation to supply electricity to their residents[39].

6.5 The decision of Eskom amounts to administrative action by an organ of state which adversely affects the rights of persons and which has a direct external legal effect.

[38] *IEC v Langeberg Municipality 2001 (3) SA 925 (CC) at para 26*
[39] *Afriform NPC and Others v Eskom Holdings SOC Limited and Others*

6.6 The municipality is not a customer as contemplated in terms of the provisions of Section 21(5). As such, Eskom's reliance on this provision to justify its intention to discontinue electricity supply to the municipality is ill-conceived and misplaced.

6.7 If the Honourable Court accepts Eskom's interpretation of the municipality as a customer, the failure by Eskom to follow other alternatives and less restrictive and less draconian measures in preference to the exercise of a decision in terms of Section 21(5) of ERA which is draconian measure supports the conclusion that the limitation of the Bill of Rights is not reasonable and justifiable considering Section 36(1) of the Constitution and also infringes the principles of cooperative governance.

6.8 Moreover, Eskom has lost sight of the provisions of Section 30(b) of the ERA, *inter alia*.

6.9 It is submitted that the decision of Eskom to interrupt the supply of electricity to the Second Respondent is unconstitutional and unlawful viewed against the constitutional principles of co-operative governance and related legislation:

6.9.1 taking into account Eskom's failure to avail itself to mandatory and material procedures and conditions prescribed by legislation;

6.9.2 viewed against the broader context and purpose of the ERA.

6.10 Individual rights of end-users and consumers of electricity are limited by the scheduled interruptions. This limitation is not justifiable under ection 36 of the Constitution.

AT LAMEY

C VAN SCHALKWYK

On behalf of the *Amicus Curiae*

Circle Chambers

30 July 2018