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**Interim interdicts and their effect on the governance of electricity supply: The role of section 30 of the South African Electricity Regulation Act in dispute resolution**

by

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## DEDICATION

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To my church and my God that have never led me astray, I say thank you and “peace be unto you”. To my father and my brother who refused to let me give up, I appreciate every ounce of effort you have poured into me. Finally, to my sister who listened to me work through chapters and prayed with me each evening, this dissertation is as much mine as it is yours.

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## ABSTRACT

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The South African Constitution, over and above providing for rights and obligations, makes provision for the relevant organs of state against which these rights and obligations may be enforced (the constitutional scheme). There have been instances where the duties of the spheres of government are conflated because of the proximity of their functions. However, organs of state are still obligated to give effect to the constitutional scheme in the exercise of their duties.

The aim of this study is to investigate whether interim interdicts instituted by the residents of municipalities (residents) against Eskom Holdings SOC Ltd (Eskom) for the supply of electricity, have as a result of the interim relief granted by the courts resulted in the Judiciary subverting the constitutional scheme and regulatory framework. To achieve this aim, the study examines the constitutional and regulatory scheme governing the supply of electricity. The study then investigates how interim interdicts, instituted against Eskom for the supply of electricity to the residents of municipalities, are decided by the courts. This is followed by an assessment to determine whether the Regulator can play a role in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom. Finally, the study examines whether section 30 of the Electricity Regulation Act (ERA) provides an alternative mechanism for dispute resolution where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

The research was conducted because there isn't currently a comprehensive analysis investigating whether such interim interdicts potentially subvert the relevant regulatory framework. Additionally, the dispute resolution mechanism provided in section 30 of the ERA does not seem to be fully utilised by the residents of defaulting municipalities.

Using a qualitative method in the form of pure desktop study, the research revealed that any "right to electricity" arises out of a municipal constitutional obligation to provide municipal services. The research further revealed that, even at the interim relief stage in applications for an interim interdict, there is no *prima facie* right to electricity that is directly enforceable against Eskom. Thus the courts deciding that there is in fact such a right, results in an interpretation of a *prima facie* right outside the bounds of legality.

The research further revealed that section 30 of the ERA provides a dispute resolution mechanism that allows the Energy Regulator to provide relief to parties requiring a temporary dispute resolution in electricity supply disputes. The research also revealed that it is compulsory for aggrieved parties to first refer a dispute to NERSA in terms of this provision for them to meet the last requirement for an interim interdict, namely there must be no other remedy.

## KEY WORDS

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Constitutional scheme;

Dispute Resolution;

Electricity supply;

Interim interdicts;

Interim relief;

Legality;

Municipal obligation;

*Prima facie* right;

Regulator;

Regulatory framework;

Residents;

Subsidiarity.

## LIST OF ACRONYMS AND ABBREVIATIONS

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ADR:	Alternative Dispute Resolution
Conversion Act:	Eskom Conversion Act 13 of 2001
IRFA:	Intergovernmental Relations Framework Act 13 of 2005
ERA:	Electricity Regulation Act 4 of 2006
NERA:	National Energy Regulation Act 40 of 2004
NERSA:	National Energy Regulator of South Africa
NMD:	Notified Maximum Demand
NMD Rules:	The Notified Maximum Demand (NMD) and Maximum Export Capacity (MEC) Rules
PFMA:	Public Finance Management Act 1 of 1999
Systems Act:	Local Government: Municipal Systems Act 32 Of 2000



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## CHAPTER ONE – RESEARCH OVERVIEW

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### 1.1 Background and introduction

The Constitution,<sup>1</sup> over and above providing for rights and obligations, makes provision for the organs of state against which these rights and obligations may be enforced (the constitutional scheme).<sup>2</sup> It has often happened that the duties of the spheres of government are conflated as a result of the proximity of their functions.<sup>3</sup> However, organs of state are still required to give effect to the constitutional scheme in the exercise of their duties.<sup>4</sup> The constitutional scheme goes hand in hand with the national regulatory framework governing South Africa’s electricity supply industry. In terms of the regulatory framework, specific spheres of government have obligations to fulfil in the electricity supply industry.<sup>5</sup> The recipients of the electricity, in turn, may enforce rights arising out of this regulatory framework against specific spheres of government.<sup>6</sup>

Against this backdrop, this study investigates whether interim interdicts instituted by the residents of municipalities (residents) against Eskom Holdings SOC Ltd (Eskom) for the supply of electricity, have as a result of the interim relief granted by the courts resulted in the Judiciary subverting the constitutional scheme and regulatory framework.<sup>7</sup>

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<sup>1</sup> Constitution of the Republic of South Africa, 1996 (hereafter referred to as the “Constitution”).

<sup>2</sup> H. Klug, *The Constitution of South Africa: a contextual analysis*, (Hart Publishing Limited, 2010), at 107 and 251-284.

<sup>3</sup> P. Labuschagne, “The doctrine of separation of powers and its application in South Africa”, 23 *Politeia* (2004), at 93. One of the examples provided by Labuschagne is how there’s a thin line between the Judiciary interpreting the law versus the Judiciary formulating public policy for socio-economic rights. The latter falls within the functions of the Executive and should be avoided by the Judiciary.

<sup>4</sup> K. O’Regan, “Checks and Balances Reflections on the Development of the Doctrine of Separation of Powers under the South African Constitution”, 8 *Potchefstroom Electronic Law Journal* (2005), at 121 explains that the principle of the separation of powers focuses on ensuring that the constitutional order prevents the different branches of government from usurping one another’s powers and functions.

<sup>5</sup> See the national regulatory framework in chapter two of this study.

<sup>6</sup> Section 152 of the Constitution above n 1 places a constitutional obligation on a specific branch of government, local government, to provide services to communities. In terms of Schedule 4 (Part B) of the Constitution, municipal services include electricity supply.

<sup>7</sup> National Government of South Africa, *ESKOM Holdings SOC Ltd*. Available at: <https://nationalgovernment.co.za/units/view/94/eskom-holdings-soc-ltd> (last accessed 9 June 2022). Eskom is a public limited liability company that is wholly owned by the South African government. It generates approximately 90% of the electricity in South Africa.

Where residents have sought final relief, the courts have accepted that the provision of electricity to the residents arises out of the constitutional mandate of municipalities to provide municipal services.<sup>8</sup> Notwithstanding, at the interim relief stage, where the right to be established is a *prima facie* right, the residents advance a different position.<sup>9</sup> In such matters, the residents invoke the rights in the Bill of Rights, such as the rights to dignity, housing and water. Even though the infringement of these rights originated from the municipalities' failure to fulfil their constitutional obligations, the residents have argued this establishes a basis for direct interim relief against Eskom for electricity supply.<sup>10</sup> This way, the residents attempt to use interim interdicts to contravene sections 152 and 153 of the Constitution.<sup>11</sup>

Eskom has indicated that the interim relief sought will destabilise the national grid. To counter this, the residents have argued that because Eskom was in any event providing electricity to the municipalities while large debts were owed to it, it should continue to provide electricity. This is the case even where Eskom says that its capacity to supply electricity has changed.<sup>12</sup> Furthermore, where Eskom asks that the dispute first be resolved by the National Energy Regulator in terms of the Electricity Regulation Act<sup>13</sup> (ERA), aggrieved residents insist on approaching the courts without recourse to the ERA.<sup>14</sup>

Styan says the two fundamental issues facing Eskom are its finances and its capacity to meet the electricity demand.<sup>15</sup> According to Styan, in November 2018 Eskom was increasingly

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<sup>8</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (*Joseph*), at para 34. See also *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (CC), at para 38.

<sup>9</sup> See the judgments of the Supreme Court of Appeal and High Court in *Eskom Holdings SOC Ltd v Lekwa Ratepayers Association*; *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2022 (4) SA 78 (SCA) and *Vaal River Development Association (Pty) Ltd v Eskom Holdings SOC Ltd*; *Lekwa Rate Payers Association NPC v Eskom Holdings SOC Ltd* 2020 JOL 48273 (GP). Hereafter referred to as the Eskom Supreme Court of Appeal judgment and Eskom High Court judgment respectively. See also the judgment of the Constitutional Court in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 (hereafter referred to the Eskom Constitutional Court judgment).

<sup>10</sup> *Idem*.

<sup>11</sup> These provisions set out the objects of local government and the developmental duties of municipalities. In terms of these sections, read together with Schedule 4 of the Constitution, municipal services such as electricity are the constitutional obligations of local government.

<sup>12</sup> Eskom High Court judgment, Supreme Court of Appeal judgment and Constitutional Court judgment above n 9.

<sup>13</sup> 4 of 2006.

<sup>14</sup> See the Eskom High Court judgment above n 9, at para 45.

<sup>15</sup> J. Styan, *Deconstructing Eskom* (finweek, 2019). Available at: <https://journals-co.za.uplib.idm.oclc.org/action/doSearch?AllField=Deconstructing+Eskom+%2AAND%2A+%22styan%22&AfterYear=2019&BeforeYear=2019> (last accessed 14 January 2022), at 33.

operating its emergency open-cycle gas (OCG) turbines in an effort to keep up with the nation’s electricity needs.<sup>16</sup> This emergency usage has been on the rise.<sup>17</sup> In respect of Eskom’s finances, in March 2018 municipal debts owed to Eskom had reached R13.6 billion. More recently, Eskom announced that fifteen Free State municipalities and Mangaung Metropolitan owed it R16 billion for services rendered as at the end of February 2022.<sup>18</sup> Crompton expresses the same sentiments and reports that Eskom’s energy availability factor<sup>19</sup> (EAF) has declined by approximately 20% over the past twenty years.<sup>20</sup>

Styan and Crompton’s concerns and Eskom’s submissions in court proceedings prompted this study to also examine whether the electricity supply regulatory framework provides an alternative mechanism for relief. Particularly, where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

The specific alternative mechanism investigated in the study is section 30 of the ERA titled “[r]esolution of disputes by Regulator”. This provision states:

- “(1) The Regulator must, in relation to any dispute arising out of this Act—
- (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,*

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<sup>16</sup> Open-cycle gas turbines power stations are powered by diesel. They are meant to be used during peak periods and in emergency situations to supply electricity to the national grid. See Eskom, *Fact Sheet: Ankerlig and Gourikwa Gas Turbine Power Stations* (2021). Available at: <https://www.eskom.co.za/wp-content/uploads/2022/04/GS-0003-Ankerlig-Gourikwa-Technical-Brochure-Rev-9.pdf> (last accessed 20 June 2022).

<sup>17</sup> Styan above n 15.

<sup>18</sup> Eskom, *Media Statements: Free State Municipal debt March 2022* (2022). Available at: <https://www.eskom.co.za/free-state-municipalities-debt/#:~:text=MONDAY%2C%2028%20MARCH%202022%3A%2015,the%20end%20of%20February%2022> (last accessed 16 April 2022).

<sup>19</sup> Eskom, *Glossary of terms*. Available at: <https://www.eskom.co.za/dataportal/glossary/> (last accessed 15 July 2022) defines EAF as the “[e]nergy [a]vailability [f]actor of [an] Eskom plant”. It is the difference between the maximum availability and all unavailabilities expressed as a percentage. This excludes renewables, IPPs (Independent Power Producers) and international imports. See also Council for Scientific and Industrial Research (CSIR), *Setting up for the 2020s: Addressing South Africa’s electricity crisis and getting ready for the next decade*, (2020). Available at: [https://arepenergy.co.za/wp-content/uploads/2020/02/81125\\_rs\\_setting\\_up\\_for\\_2020.pdf](https://arepenergy.co.za/wp-content/uploads/2020/02/81125_rs_setting_up_for_2020.pdf) (last accessed 14 April 2022). According to this report, the reliability of Eskom’s power system is worse than it’s ever been.

<sup>20</sup> R. Crompton, *South Africa’s electricity supply: what’s tripping the switch* (The Conversation, 2020). Available at: <https://theconversation.com/south-africas-electricity-supply-whats-tripping-the-switch-151331> (last accessed 29 July 2022).

*generates, transmits, or distributes electricity on the other hand, settle that dispute by such means and on such terms as the Regulator thinks fit.*

...

- (4) The mediation or arbitration in terms of this section is done at the request of the parties to the dispute . . .” (Emphasis added).

The study examines the powers granted to the National Energy Regulator of South Africa (NERSA/Regulator) in terms of section 30. This is done to determine whether the provision provides an alternative dispute resolution mechanism that the residents of municipalities may use in electricity supply disputes that require a temporary resolution.

## **1.2. Aims and objectives**

### *1.2.1 Research aim:*

To investigate whether interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity, have as a result of the interim relief granted by the courts resulted in the Judiciary subverting the constitutional scheme and regulatory framework.

### *1.2.2 Research objectives:*

The objectives of this research are to—

- (a) examine the constitutional and regulatory scheme governing the supply of electricity;
- (b) investigate how interim interdicts, instituted against Eskom for the supply of electricity to the residents of municipalities, are decided by the courts;
- (c) determine whether the Regulator can play a role in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom; and
- (d) assess whether section 30 of the ERA provides an alternative mechanism for dispute resolution where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

### **1.3 Research questions**

The primary research question is: Have interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity led to the Judiciary subverting the constitutional scheme and regulatory framework governing electricity supply?

To answer the primary research question, the following secondary research questions require answering:

- (a) What is the constitutional and regulatory scheme governing the supply of electricity?
- (b) How are interim interdicts instituted by residents against Eskom for electricity supply decided by the courts?
- (c) What role can the Regulator play in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom?
- (d) Is section 30 of the ERA able to provide an alternative mechanism for relief where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme?

### **1.4 Proposed methodology and limitations**

#### *1.4.1 Methodology*

The study investigates interim interdicts and the constitutional and regulatory framework governing the supply of electricity in South Africa. The research thus focuses on these issues insofar as they pertain to the South African environment.

The study utilises a qualitative research methodology in the form of a desktop legal analysis of predominantly domestic instruments to achieve the research aim. The instruments employed include case law, legislation, scholarly articles, policy documents and reports to answer the research questions.



#### 1.4.2 *Research parameters*

The research of this study is limited to interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity. Furthermore, the study is limited to South Africa.

The research does not undertake to assess implications arising out of final relief granted by the courts. In addition, the study focuses on the first and last requirements to grant an interim interdict, namely establishing a *prima facie* right and demonstrating that there were no other remedies available. The study also does not seek to assess the factors affecting Eskom's capacity to supply electricity. Furthermore, the study does not investigate the administration of municipalities. The study also does not seek to investigate the electricity supply agreements concluded between Eskom and municipalities. Finally, at the time of conducting this research, the Electricity Regulation Amendment Bill was still undergoing amendments.<sup>21</sup> The Bill is not investigated.

#### 1.4.3 *Research limitations*

There are limited sources available investigating the effect of interim interdicts on the constitutional and regulatory framework. To mitigate this limitation, the study examines court judgments where the residents of municipalities applied for interim interdicts against Eskom for the supply of electricity.

### **1.5 Relevance of study**

This research is of importance as there are limited sources available investigating the effect of interim interdicts on the constitutional and regulatory framework governing electricity supply. The study endeavours to shed some light on whether interim interdicts instituted by the residents of municipalities against Eskom, for the supply of electricity, comply with the constitutional and regulatory framework. Additionally, the study also seeks to investigate the use of section 30 of the ERA in matters where the residents of municipalities seek temporary relief in electricity supply disputes. Thus, it also investigates an alternative dispute resolution mechanism for such disputes.

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<sup>21</sup> [B2021] Gazette No.45898.

## 1.6 Chapter overview

The study comprises of five chapters. Chapter two examines the constitutional and regulatory scheme governing electricity supply in South Africa. This chapter assesses the state organ constitutionally responsible for the supply of electricity to residents. It also assesses Eskom's obligations under this regulatory scheme.

Chapter three inspects the requirements for granting interim interdicts, specifically the requirement to establish a *prima facie* right. The chapter also examines the grounds on which the courts have granted interim interdicts against Eskom for the supply of electricity directly to the residents of municipalities.

Chapter four investigates the powers and functions of NERSA as South Africa's electricity regulator. The chapter also examines whether section 30 provides an alternative dispute resolution mechanism where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme. Additionally, the chapter investigates the challenges that may be faced with a section 30 inquiry requiring a temporary dispute resolution.

Chapter five provides a summary and evaluation of the research findings and recommendations for addressing the research problem.

## CHAPTER TWO – CONSTITUTIONAL AND REGULATORY FRAMEWORK

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### 2.1 Introduction

The objective of this chapter is to examine the constitutional and regulatory scheme governing the supply of electricity. The chapter determines which state organ is constitutionally responsible for the supply of electricity to the residents of municipalities.

The chapter is divided into three sections. Section 2.2 will investigate the constitutional rights and obligations relevant to the supply of electricity. Section 2.3 will examine legislation enacted to give effect to the supply of electricity. Section 2.4 concludes the chapter.

### 2.2 The Constitution

Dube and Moyo<sup>22</sup> argue that there is a constitutional right to electricity. According to them, the right to access electricity flows from Eskom's constitutional and statutory obligations to provide a reliable electricity supply.<sup>23</sup> Their main argument is that the residents of municipalities are entitled to electricity as a basic municipal service. Having made this observation, they go on to argue that a right to electricity may be inferred as a prerequisite for the exercise of rights contained in the Bill of Rights. Therefore, although electricity supply is a municipal service, the right to electricity may still be enforced against Eskom.<sup>24</sup> This, so it is contended by Dube and Moyo, is because the residents have a public law right to electricity.<sup>25</sup> Dube and Moyo contend that the right to electricity is directly enforceable against Eskom for the following reasons:

- (a) Access to electricity is necessary for the realisation of certain rights in the Bill of Rights.<sup>26</sup>

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<sup>22</sup> F. Dube and C.G. Moyo, "Right to electricity in South Africa", 24 *Potchefstroom Electronic Law Journal* (2021), at 1.

<sup>23</sup> *Idem*, at 1.

<sup>24</sup> *Idem*, at 3.

<sup>25</sup> *Idem*, at 7.

<sup>26</sup> *Idem*, at 9.

- (b) The residents of municipalities may enforce a public law right to electricity directly against Eskom.<sup>27</sup>

These arguments are problematic for the following reasons: First, the Bill of Rights does not make way for the residents of a municipality to replace any right with the means through which that right may be realised.<sup>28</sup> For example, it cannot be argued that the right to dignity in terms of section 10 of the Bill of Rights, equals to the right to electricity because electricity may be required to give effect to that right.<sup>29</sup> Second, there is a hierarchy that determines which state organ is to be held accountable by the residents of a municipality for the supply of electricity.<sup>30</sup>

These reasons are further examined in this chapter. Below, an overview is provided of the constitutional framework governing the supply of electricity in South Africa.

### 2.2.1 *Chapter seven of the Constitution*

Chapter seven of the Constitution provides constitutional recognition of local government as a specific sphere of government and vests local government with constitutionally protected powers and obligations.<sup>31</sup> The recognition of local government's autonomy is one of the distinguishing aspects of the Final Constitution.<sup>32</sup> According to Steytler and de Visser, the provision of services by a municipality constitutes the very essence of municipalities as state

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<sup>27</sup> *Idem*, at 16.

<sup>28</sup> Eskom Constitutional Court judgment (minority judgment) above n 9, at para 113.

<sup>29</sup> This is because a means by which a right may be secured does not make that means the subject matter of the right. This is underpinned by the state's mandate, in respect of socio-economic rights, to take reasonable measures within its means to achieve the progressive realisation of the right. How a right is to be realised, the institutions to be utilised and the conditions under which such realisation is to take place, is reserved for the Executive to decide. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 (3) SA 454 (CC), at para 115. See also *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 (CC), at para 41 where the Constitutional Court held that "[t]he precise contours and content of the measures to be adopted [in respect of socio-economic rights] are primarily a matter for the Legislature and the Executive".

<sup>30</sup> See chapter seven of the Constitution above n 1. In terms of sections 151-154 of the Constitution, municipal services to communities originate from local government's constitutional mandate to provide such services.

<sup>31</sup> The relevant sections in chapter seven are sections 151, 152 and 153 of the Constitution above n 1. Section 151(1) stipulates that the local sphere of government consists of municipalities. Section 152(1) stipulates the objects of local government. Providing services to communities is included in these objects. Section 153(a) stipulates that municipalities must prioritise the basic needs of its communities.

<sup>32</sup> See *Fedsure Life Assurance Limited v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC), at para 38.

organs.<sup>33</sup> When explaining the importance of the scope of municipal services, they provide the following description:

“Of all the three spheres of government, the notion of a government in service of its community is perhaps most compelling with respect to local government.”<sup>34</sup>

Steytler and de Visser contend that central to any municipality are the services it delivers directly to residents on a day-to-day basis to cater to their necessities of life. These services include electricity.<sup>35</sup> The services are also listed in Schedule 4B of the Constitution under local government matters. Therefore, the constitutional purpose of local government is given effect through the delivery of municipal services.<sup>36</sup> This is also what was envisaged by the White Paper on Local Government.<sup>37</sup> Thus, the obligations outlined in sections 152 and 153 of the Constitution form the basis upon which the residents of municipalities are entitled to basic municipal services. Services, which include electricity from their respective municipalities.<sup>38</sup>

It is important to examine the notion of a constitutional right to electricity. This is because the argument may lead to a situation where the failure of municipalities to provide electricity as a municipal service, is accepted without repercussions.<sup>39</sup> Where the residents use interim

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<sup>33</sup> N. Steytler and J. de Visser, “Local Government”, in S. Woolman and M. Bishop (2<sup>nd</sup> eds), *Constitutional law of South Africa* (Revision Service 5, 2013), at 64.

<sup>34</sup> *Idem*.

<sup>35</sup> *Idem*, at 72.

<sup>36</sup> *Idem*, at 65-66.

<sup>37</sup> White Paper on Local Government, 1998. This document was crafted by the Ministry for Provincial Affairs and Constitutional Development to give effect to South Africa’s new vision of local government.

<sup>38</sup> Steytler and de Visser above n 33, at 71-72.

<sup>39</sup> South Africa Yearbook 2020/21, *Local Government*. Available at: <https://www.gov.za/about-government/government-system/local-government#:~:text=supporting%20service%20delivery,-Municipalities,and%20providing%20infrastructure%20and%20service> (last accessed 14 August 2022). See also Business Day, *Over half of municipalities are bankrupt or insolvent*. Available at: <https://www.businesslive.co.za/bd/national/2022-07-14-over-half-of-municipalities-are-bankrupt-or-insolvent/#:~:text=More%20than%20half%20of%20the,finance%20minister%20Enoch%20Godongwana%20sa> (last accessed 20 September 2022). According to the Business day article, more than half of South Africa’s municipalities are bankrupt. Despite these reports, only 31 out of 278 municipalities are currently under intervention by the Provincial government in terms of section 139(5) of the Constitution. See also Cooperative Governance Traditional Affairs, *Provincial Intervention in Local Government in terms of Section 139 of the Constitution and the Municipal Finance Management Act*. Available at: <https://www.cogta.gov.za/index.php/2022/03/29/provincial-intervention-in-local-government-in-terms-of-section-139-of-the-constitution-and-the-municipal-finance-management-act-as-of-february-2022/> (last accessed 31 August 2022). The latter states that municipalities are not being held accountable for their failures to fulfil the constitutional municipal duties owed to their residents.

interdicts to seek electricity supply directly from Eskom, the residents can omit to invoke their entitlement to the municipal service – an entitlement to be enforced against a municipality. Instead, another organ of state – Eskom – that is not part of local government, is approached to enforce a so-called “public law right to electricity”.<sup>40</sup> This (a) changes the nature of the municipal constitutional obligation into an obligation to be fulfilled by another state organ; (b) reads into the Bill of Rights a right that the Legislature did not make provision for and; (c) allows the residents of municipalities to knock directly on the door of a state organ that was not saddled with this municipal obligation.<sup>41</sup>

Dube and Moyo are thus incorrect to contend that there is a right to electricity that the residents of a municipality may enforce directly against Eskom.<sup>42</sup>

### 2.2.2 Section 7(2) of the Constitution

Section 7(2) says that the state must respect, protect, promote and fulfil the rights in the Bill of Rights. The section binds both Eskom and municipalities as organs of state.<sup>43</sup> The question is whether section 7(2) permits the residents of a municipality to enforce a chapter seven municipal obligation against Eskom because the word “state” in section 7(2) applies to all organs of state. The question is raised in light of the argument posited that there is an implied right to electricity because the supply of electricity is linked to the progressive realisation of socio-economic rights.<sup>44</sup> The question must be answered in the negative.

First, the Constitution provides for specific organs of state against which a specific obligation is to be enforced. This was confirmed in *Glenister*.<sup>45</sup> There, the Constitutional Court held that the Constitution imposes an obligation on the state to establish and maintain an independent body to combat corruption and organised crime. Having made this finding, the court held that

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<sup>40</sup> See the Eskom case above n 9 where the residents of the municipalities, in their pleadings, sought to invoke a public law right to electricity against Eskom. The pleadings are available at The Constitutional Court of South Africa, *Eskom v Vaal River Development Association (Pty) Ltd and Others*. Available at: <https://collections.concourt.org.za/handle/20.500.12144/37874> (last accessed 28 May 2022).

<sup>41</sup> Eskom Constitution Court judgment (minority judgment) above n 9, at paras 115-125.

<sup>42</sup> Dube and Moyo above n 22, at 7 and 16.

<sup>43</sup> Eskom is listed as a major entity in Schedule 2 of the Public Finance Management Act 1 of 1999 (PFMA). This statute regulates financial management in the national and provincial governments. Eskom is a state organ that falls under national government.

<sup>44</sup> Dube and Moyo above n 22. See also the pleadings of the residents of the municipalities in the Eskom cases above n 40.

<sup>45</sup> *Glenister v President of the Republic of South Africa* 2009 (1) SA 287 (CC).

legislation was required to fulfil the necessary constitutional obligations. *Glenister* demonstrates two crucial factors pertaining to state accountability: First, specific state bodies must be identified as the state institutions responsible for specific state obligations. Second, legislation is required / must be referred to, to give effect to the specific constitutional obligations. Drawing a parallel to *Glenister*, the word “state” in section 7(2) is to be considered within the entirety of the constitutional scheme that allocates specific constitutional obligations to specific organs of state.<sup>46</sup>

Accordingly, an aggrieved resident cannot say that section 7(2) gives them a right to enforce a municipal obligation against Eskom, a state organ that does not form part of local government.

Second, if electricity is a means through which a right in the Bill of Rights may be realised, it does not follow that electricity forms the content of such a right. This is because the progressive realisation of a right is subject to measures that are decided by the state.<sup>47</sup> It is for the state to determine the means through which for instance, the right to housing may be realised.<sup>48</sup> In *Glenister*, Ngcobo CJ held that there were multiple ways in which the state may fulfil its obligation to protect the rights in the Bill of Rights.<sup>49</sup> Thus, there is a considerable measure of deference owed to the relevant spheres of government. This means it is for the state to determine how to give effect to the right. How a right is to be realised is for the state to determine, provided the measures taken are reasonable.<sup>50</sup>

Accordingly, Dube and Moyo’s argument that there is a right to electricity because access to electricity is necessary for the realisation of certain rights contained in the Bill of Rights, is unsustainable. That is because it is for the state to determine how, and which state institution is to realise those rights.

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<sup>46</sup> Eskom Constitutional Court judgment (minority judgment) above n 9, at paras 145-146.

<sup>47</sup> *Idem*, at para 113.

<sup>48</sup> *Glenister* above n 45, at paras 77-89.

<sup>49</sup> *Idem*, at paras 109-111. Although he wrote the minority judgment, he did not oppose the majority’s interpretation of section 7(2) of the Constitution.

<sup>50</sup> The progressive realisation of a right is an obligation to develop a plan or programme setting out how, when and the means through which the fundamental right in question is to be given effect to in a progressive manner. It was the lack of a sufficiently comprehensive plan which caused the Constitutional Court in *Grootboom* above n 29 and *Minister of Health v Treatment Action Campaign* 2002 (5) SA 721 (CC) to rule that government had failed to comply with its constitutional duties.

## 2.3 Legislation enacted to give effect to the supply of electricity

Having demonstrated that electricity supply to the residents of municipalities arises out of a municipal constitutional obligation, it is necessary to assess the statutes enacted to give effect to this municipal obligation.

Section 2.3 examines the Local Government: Municipal Systems Act<sup>51</sup> (Systems Act) under the sub-heading of Section 2.3.1. This will be followed by section 2.3.2 which inspects the ERA, a statute that was enacted to regulate and establish a national regulatory framework for the electricity supply industry.

### 2.3.1 *Systems Act*

The Systems Act was enacted to ensure universal access to essential services and to provide a framework for the provision of municipal services.<sup>52</sup> The preamble of the Act stipulates that a fundamental aspect of the new local government system is service delivery.

Chapter one of the Act defines “basic municipal services”. The term is defined as “a municipal service that is necessary to *ensure an acceptable and reasonable quality of life*”. The term “municipal service” is defined as service that is provided by a municipality for the benefit of the local community. This is irrespective of whether the service is provided through internal<sup>53</sup> or external mechanisms.<sup>54</sup>

Chapter two of the Act clothes a municipal service with the status of a right that may be enforced against municipalities by the residents of the municipalities. In this respect, section 5 sets out the rights and duties of the members of local communities. Included in these rights, is the right to have access to municipal services which a municipality provides. On the other side of the coin of this right, is the section 73(1)(c) municipal obligation to give effect to the provisions of the Constitution. A municipality must do this by ensuring that its residents have access to basic municipal services.

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<sup>51</sup> 32 of 2000.

<sup>52</sup> *Idem*.

<sup>53</sup> Section 76(a) of the Systems Act above n 51 describes an internal mechanism as the provision of a municipal service, by a municipality, through an entity or unit within the municipality’s administration.

<sup>54</sup> Section 76(b) of the Systems Act above n 51 describes an external mechanism as a mechanism through which a municipality provides a municipal service by concluding a service delivery agreement with, for example, another organ of state.



The Systems Act reinforces the position that the right to municipal services, such as electricity, is linked to a municipality's constitutional and statutory duty to provide these services. It is a right that is enforceable against a municipality.

In *Mazibuko*.<sup>55</sup> the Constitutional Court stipulated that the question to be asked when determining the content and nature of a right is “what obligations does [the right] impose and *upon whom*”. This was the court's point of departure when determining the content of the right to water.<sup>56</sup> Applying this principle to electricity supply confirms that—

- (a) the Constitution and Systems Act place an obligation on municipalities to provide municipal services; and
- (b) the Systems Act creates the right to access municipal services, here electricity supply. This right is enforceable against municipalities.

From this assessment, it follows that Dube and Moyo's argument that the residents of municipalities may enforce a public law right to electricity directly against Eskom, is incorrect. That is because the right to municipal services, such as electricity, is linked to a municipality's constitutional and statutory duty to provide these services. It is a right that is enforceable against municipalities and not Eskom.

### 2.3.2 *Conversion Act and the ERA*

Having set out the municipal duty to supply electricity to residents, the next leg of the inquiry is to determine the role that Eskom plays in the electricity supply industry. The discussion begins by assessing the Eskom Conversion Act<sup>57</sup> (Conversion Act). This is followed by an examination of the ERA.

The Conversion Act binds Eskom to promoting access to, and providing affordable electricity, with due regard to its financial and sustainability objectives. Thus, Eskom plays the role of the provider of public goods/services, while balancing this against the cost of electricity and

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<sup>55</sup> *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC), at para 46.

<sup>56</sup> Of course, there is a material distinguishing factor in this research and the main issue before the court in *Mazibuko*. While there is a right to water in terms of section 27(1)(b) of the Constitution, there is no right to electricity in the Constitution.

<sup>57</sup> 13 of 2001.

financial sustainability.<sup>58</sup> This balance is important because Eskom enjoys near monopoly over the generation, transmission and distribution of electricity in South Africa.<sup>59</sup>

In addition to the Conversion Act, the ERA also stipulates Eskom's powers and obligations. The ERA was established to provide a national regulatory framework for the electricity supply industry. In terms of section 2 of the ERA, one of its objectives is to “*ensure that the interests and needs of present and future electricity customers<sup>60</sup> [municipalities] and end users<sup>61</sup> [residents] are safeguarded and met*” (Emphasis added). This is done with due consideration to the efficiency and effectiveness of the long-term longevity of the electricity supply industry. It aims to strike a balance between the needs of customers and ensuring sustainable electricity supply.<sup>62</sup> Chapter two of the ERA stipulates that NERSA serves as the enforcer of the electricity regulatory framework. NERSA's powers as Regulator are investigated in chapter four of this study.

The Conversion Act and ERA illustrate that any duty imposed upon Eskom to provide electricity, goes hand in hand with its fiscal and sustainability responsibilities.<sup>63</sup> Furthermore, the ERA demonstrates that Eskom's powers and functions are regulated by NERSA.<sup>64</sup> In terms of the ERA, municipalities are customers of Eskom who, by concluding service delivery agreements with Eskom, purchase bulk electricity from it.<sup>65</sup> The municipalities then on-supply the electricity to the residents (end users). The residents of municipalities are not party to these

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<sup>58</sup> *Idem*, at section 6(5).

<sup>59</sup> News24, *New law to end Eskom's monopoly drops as Ramaphosa delivers SONA*. Available at: <https://www.news24.com/fin24/economy/ramaphosa-announces-end-of-eskom-monopoly-20220210> (last accessed 24 August 2022).

<sup>60</sup> In terms of section 1 of the ERA above n 13 a “customer” is a person who purchases electricity or a service relating to the supply of electricity. Thus, a customer would be a municipality that purchases electricity or such services to supply the electricity as a municipal service to its residents.

<sup>61</sup> The residents of a municipality would, in terms of section 1 of the ERA above n 13, fall under the category of “end user”. They are the users of the electricity.

<sup>62</sup> In terms of the ERA above n 13, Eskom is classified as a licensee that is the holder of a license granted by NERSA under the Act. A license is required to operate any generation, transmission or distribution facility (section 7(1)(a)).

<sup>63</sup> NERSA, *Multi-Year Price Determination Methodology*, (NERSA, 2021). Available at: <https://www.nersa.org.za/wp-content/uploads/2021/01/Multi-Year-Price-Determination-Methodology.pdf> (last accessed 17 December 2023). This document stipulates the methodology to determine Eskom's required revenues.

<sup>64</sup> See the preamble of the ERA above 13.

<sup>65</sup> Section 1 of the ERA above n 13 says a “service delivery agreement” is an agreement concluded between a municipality and an institution providing electricity reticulation for its own account or on the municipality's behalf.

agreements. Therefore, they have no contractual claim that may be enforced against Eskom.<sup>66</sup> The question then is whether this means that because Eskom is the country's main electricity supplier,<sup>67</sup> there arises a public law right to electricity that is directly enforceable against Eskom. The answer is no.

First, sections 7(2) and 8(1) do not establish a basis for the creation of a right that is not in the Constitution. They do not create a "public law right" to electricity that may be enforced against any state organ<sup>68</sup> The right to electricity emanates from a constitutional municipal obligation.

Second, the principle of subsidiarity demands that state organs first resolve the dispute in accordance with the statutes that have been specifically enacted to regulate the particular dispute.<sup>69</sup> The ERA and Systems Act were enacted to govern electricity supply. These statutes place the obligation to supply electricity to the residents of municipalities, on the municipalities. Section 7(2) does not entitle aggrieved residents to side-step an entire regulatory regime that was created for the governance of electricity supply.

From this examination, it follows that Dube and Moyo are incorrect to argue that the residents of municipalities may enforce a public law right to electricity against Eskom. Furthermore, the principle of subsidiarity demands that recourse first be given to the Systems Act, Conversion Act and the ERA as the statutes enacted to regulate electricity supply. These statutes place municipalities under an obligation to supply electricity to residents.

## 2.4 Conclusion

The objective of this chapter was to examine the constitutional and regulatory scheme governing electricity supply in South Africa.

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<sup>66</sup> It is an established principle in contract law that only the parties stipulated in the agreement derive rights and obligations in accordance with the agreement. See D. Hutchison, C. Pretorius and Others, *The Law of Contract in South Africa* (Paperback, 2017), at 9.

<sup>67</sup> News24, *New law to end Eskom's monopoly drops as Ramaphosa delivers SONA* above n 59.

<sup>68</sup> See *Joseph* above n 8. See also the *Certification of the Constitution of the Republic of South Africa, 1996* (4) SA 744 (CC) (hereafter referred to as the Certification judgment), at para 43 where the Constitutional Court cautioned that courts should approach the provisions of the Constitution on the basis that the meaning assigned to them in the certification process is the correct interpretation. Reading provisions into the Constitution may lead to unintended consequence.

<sup>69</sup> See *My Vote Counts NPC v Speaker of the National Assembly* 2016 (1) SA 132 (CC), at para 46 where the Constitutional Court reaffirms the well-rooted application of this principle in South African law.

Section 2.2 provided an overview of the constitutional framework governing electricity supply. The section started by discussing Dube and Moyo's contention that there is a right to electricity that the residents of municipalities may enforce against Eskom.<sup>70</sup>

Section 2.2.1 demonstrated that there is a constitutional obligation that has been placed on municipalities in terms of chapter seven and Schedule 4B of the Constitution. In terms of this obligation, municipalities must provide electricity as a municipal service and obligation to their residents. Therefore, any entitlement to electricity is derived from a municipal constitutional mandate.<sup>71</sup> According to the research findings, Dube and Moyo are incorrect to contend that there is a right to electricity that the residents of a municipality may enforce against Eskom.<sup>72</sup>

Section 2.2.2 investigated the application of section 7(2) of the Constitution where the residents of municipalities seek to enforce a right to electricity against Eskom. It illustrated that the word "state" in section 7(2) must be considered within the entirety of the constitutional scheme. The constitutional scheme allocates specific constitutional obligations to specific organs of state.<sup>73</sup> Therefore, an aggrieved resident cannot say that section 7(2) allows them to enforce a municipal obligation against Eskom, a state organ that does not form part of local government.

Furthermore, section 2.2.2 demonstrated that if electricity is a means through which a right in the Bill of Rights may be realised, it does not follow that electricity forms the content of such a right. According to the research findings, Dube and Moyo's argument that there is a right to electricity because access to electricity is necessary for the realisation of certain rights in the Bill of Rights, is unsustainable. That is because it is for the state to determine how, and which state institution is to realise those rights.<sup>74</sup>

Section 2.3 assessed the statute enacted to give effect to the municipal obligation to supply electricity to the residents of municipalities. The section also examined statutes regulating electricity supply.

Section 2.3.1 examined the Systems Act. This Act clothes a municipal service with the status of a right that residents may enforce against their municipalities. Section 2.3.2 inspected the

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<sup>70</sup> Dube and Moyo above n 22.

<sup>71</sup> Sections 152-153 of the Constitution above n 1 and Schedule 4B of the Constitution.

<sup>72</sup> Dube and Moyo above n 22, at 7 and 16.

<sup>73</sup> Certification judgment above n 68.

<sup>74</sup> *Glenister* above n 45, at paras 77-89.

Conversion Act and the ERA. The Conversion Act requires Eskom to balance its duties as the provider of public goods/services (electricity) against the cost of electricity and its financial sustainability. This was followed by an examination of the ERA. This statute was established to provide a national regulatory framework for the electricity supply industry. An examination of the Conversion Act and the ERA illustrated that any duty imposed upon Eskom to provide electricity, goes hand in hand with its fiscal and sustainability responsibilities.<sup>75</sup>

According to the findings in section 2.3, the Systems Act reinforces the position that the right to municipal services, such as electricity, is linked to a municipality's constitutional and statutory duty to provide these services. It is a right that is enforceable against a municipality. Furthermore, when deciding disputes regarding electricity supply, the principle of subsidiarity demands that the statutes enacted to govern electricity supply be applied. Therefore, the Systems Act, Conversion Act and the ERA must be the point of departure. These statutes place municipalities under an obligation to supply electricity to residents.

The findings in this chapter illustrate the constitutional and regulatory scheme governing the supply of electricity. The constitutional scheme consists of chapter seven and Schedule 4B of the Constitution. The statutory scheme consists of the Systems Act, Conversion Act and the ERA. According to the constitutional and regulatory scheme, municipalities are the state organ constitutionally responsible for the supply of electricity to their residents.

In the next chapter, the study will consider how the courts apply this constitutional and regulatory framework at the interim interdict stage.

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<sup>75</sup> NERSA, *Multi-Year Price Determination Methodology*, above n 63.

## CHAPTER THREE – INTERIM INTERDICTS

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### 3.1 Introduction

Chapter two examined the constitutional and regulatory framework governing electricity supply in South Africa. The chapter demonstrated that electricity supply is intrinsically linked to municipal obligations. It is now necessary to determine how the courts have interpreted these obligations when aggrieved residents file interim interdicts for electricity supply against Eskom.

The objective of this chapter is to investigate how interim interdicts, instituted against Eskom for the supply of electricity to the residents of municipalities, are decided by the courts. There are four requirements to be met for an interim interdict to be granted. The study focuses on the first requirement, namely establishing a *prima facie* right, and the last requirement there must be no other remedy. This is because if an applicant fails to establish the first requirement, there is no need to proceed with the inquiry. With respect to the last requirement, it places an obligation on the parties to exhaust the remedies in the relevant statutes before approaching the courts.<sup>76</sup>

The chapter is divided into three sections. Section 3.2 will commence by evaluating what an interim interdict is, the requirements for the granting of an interim interdict and how the first and last requirements are established. Section 3.3 will provide a recent example of how the courts decided the first and last requirements when considering interim interdicts instituted against Eskom for electricity supply. The chapter will conclude in section 3.4 by summarising the chapter findings.

### 3.2 What is an interim interdict?

Buckle *et al* describe an interim interdict as a remedy in terms of which someone seeks to temporarily protect a legally enforceable right against unlawful interference, pending the final determination of the right. One of the forms an interdict may take is preventing a person from

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<sup>76</sup> *Setlogelo v Setlogelo* 1914 AD 221.

acting or taking a specific action (prohibitory).<sup>77</sup> This research focuses on interim (temporary) interdicts that have the effect of prohibiting Eskom from interrupting electricity supply to defaulting municipalities.

The common law requirements for an interim interdict were first authoritatively set out by the appellate division in *Setlogelo*.<sup>78</sup> This is now an established test that is used by the courts when determining whether to grant an interim interdict. More recently, the Constitutional Court in *National Treasury v Opposition to Urban Tolling Alliance*<sup>79</sup> (*OUTA*) confirmed that these established requirements for an interim interdict also apply to state organs exercising a public power. Thus, the requirements also apply where a state organ such as Eskom is a party to the dispute.<sup>80</sup> The requirements to be met by a party seeking an interim interdict are—

- (a) establish a *prima facie* right, though open to some doubt;
- (b) establish a reasonable apprehension of irreparable harm and imminent harm to the right if the interdict is not granted;
- (c) the balance of convenience must favour the grant of the interim interdict; and
- (d) the applicant must have no other remedy.<sup>81</sup>

Carr-Hartley cautions that although the requirements for an interim interdict must not be considered in isolation, each requirement must still be met.<sup>82</sup> Therefore, a court cannot grant an interim interdict if the applicant has failed to meet even one requirement.<sup>83</sup> As stated above, the focus area of this study is the first and last requirements.

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<sup>77</sup> H. O. Buckle, H. J. Erasmus, P. S. T. Jones and D. E. Van Loggerenberg, *The civil practice of the magistrates' courts in South Africa*, (Juta, 2016) at 152.

<sup>78</sup> *Setlogelo* above n 76, at 227.

<sup>79</sup> *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 223 (CC).

<sup>80</sup> N. Raboshakga, "The Separation of Powers in Interim Interdict Applications", 4 *South African Law Journal* (2014) at 367.

<sup>81</sup> *OUTA* above n 79, at para 41.

<sup>82</sup> J. Carr-Hartley, *Interim Interdicts: A Growing Trend*, (2016). Available at: <http://www.armstrongs.bw/wp-content/uploads/2016/08/Edition-18-Interim-Interdicts-A-Growing-Trend-John-Carr-Hartley-13-May-2016.pdf> (last accessed 19 September 2022).

<sup>83</sup> D. R. Harms, *Civil Procedure: Lower Courts*, (Butterworths, 2016), at 19.

### 3.2.1 *Prima facie* right

The first requirement for an interim interdict is establishing a *prima facie* right<sup>84</sup> that is *prima facie* proof of the facts that illustrate the existence of a right in terms of substantive law.<sup>85</sup>

Summers points out that when establishing a *prima facie* right, the principle of legality<sup>86</sup> remains applicable.<sup>87</sup> He explains that this is because even though the court is dealing with interim relief, legal certainty is the corner stone of any legal inquiry.<sup>88</sup> Summers' contention is supported by the decision of the High Court in *Cato Ridge Gas Company*.<sup>89</sup> There, in refusing the applicant's application for an interim interdict, the court held the following regarding establishing *prima facie* rights:

- (a) When an applicant experiences difficulty articulating a *prima facie* right, it is indicative that there is no right to establish the interim relief.<sup>90</sup>
- (b) A court considering whether to grant an interim interdict cannot, after considering the affidavits, adopt the position that there may be some other *prima facie* right available to the applicant even though its precise formulation is elusive. If the applicant is not able to articulate a legally cognisable right as a first step, then an interim interdict cannot be granted.<sup>91</sup>

Therefore, an applicant must be able to demonstrate the existence of a legally cognisable right. Additionally, the right must be established in accordance with the relevant regulatory scheme.<sup>92</sup> This is important because even at the interim relief stage, the *prima facie* right is used as the standard to evaluate an applicant's prospects of success in the final action. This was confirmed

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<sup>84</sup> *Idem*, at 20.

<sup>85</sup> *Idem*, at 16 and *Gool v Minister of Justice* 1955 2 SA 682 (C). See also *Webster v Mitchell* 1948 (1) SA 1186 (WLD).

<sup>86</sup> C. Hoexter, "The Principle of Legality in South African Administrative Law", 4 *Maquarie Law Journal* (2004), at 168 explains that the principle of legality expresses the idea that the exercise of public power is only legitimate where it is exercised lawfully. It means that the particular organ of state must have the necessary legal powers to act in a particular fashion. Furthermore, the exercise of those powers must fall within the ambit of the relevant regulatory framework.

<sup>87</sup> R. Summers, "When Certainty and Legality Collide: The Efficacy of Interdictory Relief for the Cessation of Building Works Pending Review Proceedings", 5 *Potchefstroom Electronic Law Journal* (2010), at 171.

<sup>88</sup> *Idem*, at 169.

<sup>89</sup> *Cato Ridge Gas Company (Pty) Limited v BP Southern Africa (Pty) Limited* [2021] JOL 53836 (GJ).

<sup>90</sup> *Idem*, at para 25.

<sup>91</sup> *Idem*, at paras 26 and 48.

<sup>92</sup> Summer above n 87.



by the Constitutional Court in *Economic Freedom Fighters*<sup>93</sup> where the court held that before it can grant an interim interdict, it must be satisfied that the applicant has good prospects of success in the final action to be sought. One of the reasons for this is that an interdict which prevents a state functionary from exercising the public power conferred upon it conflates the separation of powers between the branches of government. Therefore, it should only be granted in exceptional circumstances.<sup>94</sup>

Within the context of this study, it means the Judiciary must ensure that an applicant has established a *prima facie* right to electricity that is enforceable against Eskom. Thus, an interim interdict which has the effect of prohibiting Eskom from exercising its public powers must only be granted in exceptional circumstances.<sup>95</sup> The *prima facie* right, though temporary, must still fall within the ambit of the regulatory scheme. Therefore, if the regulatory framework does not make provision for a right to electricity that the residents of municipalities may enforce against Eskom, then such a right cannot exist at the interim relief stage.<sup>96</sup>

### 3.2.2 *No other remedy*

In *Setlogelo* the court held that an applicant seeking an interim interdict must demonstrate that they could not obtain similar relief by using an ordinary remedy. The ordinary remedy refers to relief that may either be provided in a contract or a statute regulating the relationship between the parties.<sup>97</sup> With respect to the electricity supply industry, the ERA regulates the relationship between municipalities, the residents of municipalities and Eskom. Accordingly, if the ERA fails to provide a remedy for the aggrieved residents of municipalities, only then will the last requirement for an interim interdict be established.<sup>98</sup> To meet this requirement, a party must demonstrate that they used the remedy provided in the statutes governing electricity supply or that the statutes do not provide any remedy.<sup>99</sup>

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<sup>93</sup> *Economic Freedom Fighters v Gordhan* 2020 (6) SA 325 (CC) (*EFF* case).

<sup>94</sup> *Idem*, at para 42.

<sup>95</sup> Section 21(5) of the ERA above n 13 lists the powers Eskom may exercise where a municipality fails to comply with the electricity supply agreement. These powers include restricting or terminating electricity supply to the municipality.

<sup>96</sup> Summers above n 87, at 172-175.

<sup>97</sup> *Setlogelo* above n 76, at 227.

<sup>98</sup> *Idem*.

<sup>99</sup> *Idem*.

The High Court, Supreme Court of Appeal and Constitutional Court recently<sup>100</sup> determined whether there is a *prima facie* right to electricity that the residents of a municipality may enforce against Eskom. The courts also made a decision as to the last requirement that there must be no other remedy. The judgments of the courts are investigated below.

### **3.3 The High Court, Supreme Court of Appeal and Constitutional Court judgments in *Eskom v Vaal River Development Association (Pty) Ltd and Others***

This section of the chapter investigates how the courts have interpreted how the residents of municipalities must establish a *prima facie* right and having no other remedy when seeking electricity supply directly from Eskom. The case examined is the *Eskom v Vaal River Development Association (Pty) Ltd and Others* case.<sup>101</sup> The purpose of this investigation is to determine how the courts have interpreted the aforementioned requirements in such interim interdicts.

#### *3.3.1 Factual background*

The residents of Ngwathe Municipality in the Free State and Lekwa Municipality in Mpumalanga (residents) sought urgent interim interdicts to compel Eskom, as the sole supplier of electricity to the municipalities, to restore electricity supply to the residents. The electricity supply was not terminated. Instead, Eskom reduced it to the Notified Maximum Demand (NMD) levels stipulated in the electricity supply agreements concluded between Eskom and the municipalities (the contracted NMD).<sup>102</sup>

For a period of time Eskom supplied electricity to the respective municipalities above the contracted NMD levels.<sup>103</sup> During this time, the municipalities failed to make payments to

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<sup>100</sup> The Constitutional Court judgment was handed down on 23 December 2022. See Eskom case above n 9.

<sup>101</sup> See the Eskom High Court judgment, Eskom Supreme Court of Appeal judgment and Eskom Constitutional Court judgment above n 9.

<sup>102</sup> Eskom High Court judgment above n 9, at paras 1 and 2. According to the Notified Maximum Demand (NMD) and Maximum Export Capacity (MEC) Rules (hereafter referred to as the NMD Rules), the NMD is a contractual value stipulating the contracted amount of NMD capacity (electricity capacity) that Eskom is contracted to provide. A customer is under an obligation not to exceed this amount.

<sup>103</sup> *Idem*, at para 19. The pleadings and judgments do not provide the specific time period.

Eskom in accordance with the respective electricity supply agreements.<sup>104</sup> Subsequently, in July 2020, Eskom reduced the electricity supply to the municipalities to the contracted NMD levels. The contracted NMD levels were not sufficient to meet the electricity demands of the residents.<sup>105</sup> According to Eskom, the electricity supply had to be reduced because it no longer had the capacity to supply electricity to the municipalities above the NMD levels. The national grid was thus being put under strain.<sup>106</sup> Eskom further submitted that if it had continued to supply electricity above the NMD levels without receiving any payment, it would also be contravening its statutory fiscal responsibilities.<sup>107</sup>

The residents' main contention was that Eskom's decision was unlawful because they had a public law right to electricity that is enforceable directly against Eskom. The residents did not seek to use a remedy provided in the ERA before instituting the interim interdict.<sup>108</sup>

### 3.3.2 *The Courts' judgments*

The High Court held that electricity supply is inextricably intertwined with several rights in the Bill of Rights.<sup>109</sup> Thus, because the supply of electricity is the corner stone for the realisation rights in the Bill of Rights,<sup>110</sup> the residents of the municipalities not only had a right to the supply of electricity by Eskom, but also had the right to be supplied with sufficient electricity to "meet the most basic threshold of the rights in the [B]ill of [R]ights". This, the court held, is a *prima facie* right that all organs of state, including Eskom, is obligated to fulfil.<sup>111</sup>

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<sup>104</sup> *Idem*, at para 18.

<sup>105</sup> *Idem*, at paras 22-29.

<sup>106</sup> *Idem*, at paras 35-38.

<sup>107</sup> This is set out in Eskom's application for leave to appeal filed before the Constitutional Court at paras 88-110. See the application at ConCourt Collections Home, *Eskom v Vaal River Development Association (Pty) Ltd and Others*. Available at: <https://collections.concourt.org.za/bitstream/handle/20.500.12144/37874/44%5bApplication%20for%20leave%20to%20appeal%20CCT%2044-22%20Eskom.pdf?sequence=5&isAllowed=y> (last accessed 24 July 2022).

<sup>108</sup> This is also set out in the residents' answering affidavit filed before the Constitutional Court at paras 10 -15. See the consolidated answering affidavit at ConCourt Collections Home, *Eskom v Vaal River Development Association (Pty) Ltd and Others*. Available at: <https://collections.concourt.org.za/bitstream/handle/20.500.12144/37874/44%5bFirst%20Respondents%27%20Joint%20Answering%20Affidavit%5d%20CCT%2044-22%20ESKOM.pdf?sequence=3&isAllowed=y> (last accessed 28 July 2022).

<sup>109</sup> Eskom High Court judgment above n 9, at para 35.

<sup>110</sup> *Idem*, at para 37.

<sup>111</sup> *Idem*, at para 40.

The Supreme Court of Appeal held that Eskom was statutorily and constitutionally mandated in accordance with the Constitution and the Intergovernmental Relations Framework Act<sup>112</sup> (IRFA) to collaborate with the municipalities and other role players. In terms of this mandate, Eskom had to take reasonable steps to resolve the intergovernmental dispute with the municipalities.<sup>113</sup> Eskom's failure to exhaust all efforts to resolve the dispute with the municipalities in terms of the IRFA, according to the court, established a *prima facie* right for the residents for the granting of an interim interdict.<sup>114</sup> Both courts granted the interim interdict.

The Constitutional Court's majority judgment by Madlanga J upheld the judgments of the High Court and the Supreme Court of Appeal. Madlanga J (commanding a 5/9 majority) held that if Eskom is not directed to supply the residents with electricity, they would have nowhere to turn to.<sup>115</sup> Relying on the High Court's Bill of Rights argument, he held that section 7(2) of the Constitution mandated Eskom, as a state organ, to provide the residents with electricity.<sup>116</sup> This, according to Madlanga J, established a *prima facie* right to electricity that was enforceable against Eskom.<sup>117</sup> As to the requirement that there be no other remedy, Madlanga J held that the remedies provided in the ERA may still be pursued by the parties when they're seeking final relief.<sup>118</sup>

The minority judgment, written by Unterhalter AJ, found the above judgments to be problematic. According to Unterhalter AJ, these judgments disregarded the regulatory framework governing electricity supply. Instead of using the ERA as a starting point, the judgments relied on the provisions of the Bill of Rights in the Constitution<sup>119</sup> and the IRFA.<sup>120</sup> This, so it was held, led to chapter seven of the Constitution and the ERA being overlooked. Chapter seven of the Constitution stipulates that access to electricity emanates from a

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<sup>112</sup> 13 of 2005. See section 41 which regulates intergovernmental disputes.

<sup>113</sup> Eskom Supreme Court of Appeal judgment above n 9, at para 31.

<sup>114</sup> *Idem*, at para 32.

<sup>115</sup> Eskom Constitutional Court judgment above n 9, at paras 216-224.

<sup>116</sup> *Idem*, at paras 194-210.

<sup>117</sup> *Idem*, at paras 304-310.

<sup>118</sup> *Idem*, at para 288.

<sup>119</sup> The Bill of Rights can be found in chapter two of the Constitution.

<sup>120</sup> *Idem*, at paras 142-149.

municipal obligation to provide municipal services.<sup>121</sup> Therefore, even at the interim stage, the regulatory framework demands that municipalities account for this municipal service. Unterhalter AJ found that the residents failed to prove the existence of a *prima facie* right to electricity that is enforceable against Eskom.<sup>122</sup> Additionally, it was found that the residents' failure to use the dispute resolution provided in the ERA, meant they failed to meet the requirement that there must be no other remedy. The minority judgment does not constitute a precedent that courts are bound to follow in future judgments.

### 3.3.3 Analysis

The current position held by the courts is that at the interim interdict stage there is a public law right to electricity due to the proximity between electricity supply and the rights in the Bill of Rights<sup>123</sup>. As a result, the courts place the municipal obligation to supply electricity to the residents of municipalities, on Eskom.<sup>124</sup>

The High Court and the majority judgment of the Constitutional Court also identified the rights in the Bill of Rights that had been infringed.<sup>125</sup> However, these rights were not pleaded by the residents. As was held in *Cato Ridge Gas Company*, a court cannot, after reading the papers of the parties, identify a *prima facie* right for the applicant.<sup>126</sup> No, it is incumbent on the applicant to plead the *prima facie* right that has allegedly been infringed.<sup>127</sup>

In addition to the above, the “public law right to electricity” was one that both the applicants and the courts could not articulate with certainty.<sup>128</sup> This is illustrated by how the High Court

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<sup>121</sup> *Idem*, at paras 164-168.

<sup>122</sup> *Idem*, at paras 176-182.

<sup>123</sup> The Eskom High Court judgment above n 9, at para 35. The judgment went further and held that not only is there a right to electricity that is enforceable against Eskom, but there is a right to “sufficient” electricity. This contravenes the Constitutional Court’s decision in *Grootboom* above n 29 that a minimum core – a minimum amount of resources that must be provided – cannot be enforced against the state.

<sup>124</sup> Eskom High Court judgment above n 9, at para 28.

<sup>125</sup> Eskom High Court judgment above n 9, at para 31 and Eskom Constitutional Court judgment above n 9, at para 200.

<sup>126</sup> *Cato Ridge Gas Company* above n 89. See also *Gcaba v Minister for Safety and Security and Others* 2010 (1) SA 238 (CC), at paras 39 and 75 where the Constitutional Court held that it is incumbent on parties to expressly plead their rights. It is not for the court to look behind the curtains and deduce the rights from the facts of the matter.

<sup>127</sup> *Cato Ridge Gas Company* above n 89. See also Eskom Constitutional Court judgment (minority judgment) above n 9.

<sup>128</sup> Eskom High Court judgment at para 28, Eskom Supreme Court of Appeal judgment at para 36 and Eskom Constitutional Court judgment above n 9, at para 216.

and the residents, when identifying the right, readily admitted that there is no such right. The court also acknowledged that if such a right existed, it stemmed from a municipal obligation.<sup>129</sup> Despite this, the courts proceeded to create such a right because of Eskom's duty to supply electricity to the municipalities.<sup>130</sup> The municipalities were accepted by the court as state organs that were too incompetent to fulfil their constitutional duties. Their involvement in the legal inquiry was only to mention their debt and incompetence.<sup>131</sup>

With respect to the ERA, neither the Constitutional Court majority judgment, the Supreme Court of Appeal nor the High Court considered section 30 as an alternative dispute resolution mechanism that can be used at the interim stage of the dispute.

### 3.4 Conclusion

The objective of this chapter was to investigate how interim interdicts, instituted by the residents of municipalities against Eskom for the supply of electricity, are decided by the courts.

Section 3.2 investigated the purpose of an interim interdict and examined the first and last requirements for the granting thereof. According to Carr-Hartley, although the requirements for an interim interdict must not be considered in isolation, each requirement must still be met.<sup>132</sup>

Section 3.2.1 investigated the first requirement for the granting of an interim interdict, namely establishing a *prima facie* right. According to Summers, when establishing a *prima facie* right the principle of legality remains applicable.<sup>133</sup> He explains that this is because even though the court is dealing with interim relief, legal certainty is the corner stone of any legal inquiry.<sup>134</sup> Therefore, a *prima facie* right must be interpreted in accordance with the relevant regulatory scheme.

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<sup>129</sup> *Idem*.

<sup>130</sup> Eskom High Court judgment above n 9, at para 22.

<sup>131</sup> *Idem*, at para 28.

<sup>132</sup> Carr-Hartley above n 82.

<sup>133</sup> Summers above n 87, at 171.

<sup>134</sup> *Idem*, at 169.

Section 3.2.2 examined the requirement that there be no other available remedy. Applying the principles held in *Setlogelo*, it was found that only if the ERA fails to provide a remedy or if the applicants used the remedies in the ERA before instituting an interim interdict will the last requirement for an interim interdict have been established.

Section 3.3 examined how the courts have interpreted how the residents of municipalities must establish a *prima facie* right, and illustrate that there are no other remedies when seeking electricity supply directly from Eskom, by means of an interim interdict. The case evaluated is the *Eskom v Vaal River Development Association (Pty) Ltd and Others* case. Section 3.3.1 provided a factual background of the case. This was followed by a summary of the High Court, Supreme Court of Appeal and Constitutional Court's judgment in section 3.3.2. Section 3.3.3 analysed the judgments of the courts.

According to the findings in this chapter, the current position held by the courts is that at the interim interdict stage there is a *prima facie* public law right to electricity due to the proximity between electricity supply and the rights in the Bill of Rights. The courts placed the municipal obligation to supply electricity to the residents, on Eskom. With respect to the ERA, the chapter findings demonstrate that neither the Constitutional Court majority judgment, the Supreme Court of Appeal nor the High Court considered section 30 as a remedy that must be used before instituting an interim interdict.

Looking back at the chapter, it demonstrated how disputes concerning electricity supply are decided by the courts at the interim interdict stage. In light of these findings, the next chapter determines whether the Regulator can play a role in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom.

## CHAPTER FOUR – NERSA AND SECTION 30 OF THE ERA

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### 4.1 Introduction

Palmer and Weatherly advance the case that expert determination for technical disputes is more efficient than court litigation.<sup>135</sup> They argue that this is because a body or a person with expertise in a technical field has the necessary skills to resolve a dispute, while considering the long-term implications of that decision on the industry.<sup>136</sup> Having considered how disputes concerning electricity supply at the interim interdict stage are decided by the courts, the role that the electricity supply regulatory body may play in resolving the interim disputes between Eskom, municipalities and the residents requires investigating.

The objective of this chapter is two-fold. The first objective is to determine whether the Regulator can play a role in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom. The second objective is to assess whether section 30 of the ERA provides an alternative mechanism for dispute resolution where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

The chapter is divided into six sections. Section 4.2 will assess the role of regulatory authorities. This will be followed, in section 4.3, by an assessment of the powers and functions of NERSA as South Africa's electricity regulator. In turn, section 4.4 will assess whether section 30 provides an alternative dispute resolution mechanism where a temporary (interim) resolution is required. Finally, section 4.5 will investigate the challenges that might be faced with a section 30 inquiry that requires a temporary dispute resolution, before concluding in section 4.6.

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<sup>135</sup> A technical dispute is one that relates to a specific industry and the techniques or craft relevant to that industry. See R. Palmer and M. Weatherly, *Expert determination for technical disputes – efficient alternative or jurisdictional battleground?*, (Special Report: International Dispute Resolution, 2019). Available at: <https://www.financierworldwide.com/expert-determination-for-technical-disputes-efficient-alternative-or-jurisdictional-battleground#ZCy61HbMKUk> (last accessed 28 December 2022).

<sup>136</sup> *Idem*.



## 4.2 Regulatory Authorities

The Centre for the Advancement of Energy Markets (CAEM) reports that the nature of the electricity supply industry makes it so that regulatory or judicial delay results in a negative impact<sup>137</sup> on the industry and a country's economy.<sup>138</sup> According to the CAEM's report, too often the solutions imposed by Judges are ill-tailored to the realities of the industry. Therefore, matters are better resolved by a regulatory authority.<sup>139</sup> Such a body has the necessary experts who understand the technical and regulatory issues associated with the industry.<sup>140</sup> Accordingly, Energy Regulators play an indispensable role in protecting a country's national grid.<sup>141</sup>

Chiang reports that dispute resolution is one of the core functions of a regulatory body.<sup>142</sup> He explains how when resolving disputes, the goal of the regulator is to resolve the dispute timeously and in a manner that avoids service disruptions and minimises undue harm amongst the parties. Additionally, he cautions that traditional court litigation is generally not an efficient means of resolving disputes. He argues that this is because most laws do not take into consideration the changing social norms and rapid advances in the field. Therefore, alternative dispute resolution (ADR) procedures that can be flexibly used by a regulator are the preferred dispute resolution mechanisms.<sup>143</sup> This does not mean that a regulator usurps the functions of the courts. According to the United Nations Industrial Development Organisation (UNIDO),

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<sup>137</sup> Centre for the Advancement of Energy Markets, *Using ADR to Resolve Energy Industry Disputes: The Better Way*, (CAEM 2006), at 15. Available at: <http://www.raabassociates.org/Articles/EnergyADRForumReport-Oct2006.pdf> (last accessed 20 October 2022). The Centre for the Advancement of Energy Markets (CAEM) is a non-profit, independent, Washington, DC-based think tank founded to promote market-oriented solutions to the challenges that confront the energy industry. The negative impact includes the electricity grid functioning with dilapidated infrastructure. Additionally, it includes delays that may result in the generated electricity not meeting demand and the collective grid being placed at risk of collapsing and ceasing to function.

<sup>138</sup> *Idem*. CAEM explains how a country's economy is more likely to experience decreased growth if electricity supply is unstable, inconsistent or decreased. This is because businesses require electricity to operate and generate money.

<sup>139</sup> *Idem*.

<sup>140</sup> *Idem*, at 11-16.

<sup>141</sup> National Association of Regulatory Utility Association (NARUC), *The Indispensable Role of Energy Regulators in Protecting the Electric Grid*. Available at: <https://www.naruc.org/international/news/the-indispensable-role-of-energy-regulators-in-protecting-the-electric-grid/> (last accessed 13 October 2022).

<sup>142</sup> UNESCO Institute for Statistics, Glossary. Available at: <https://uis.unesco.org/en/glossary> (last accessed 28 September 2022) defines a regulatory body/authority as a government or quasi-government body that establishes, enforces and monitors the laws within its allocated area of responsibility.

<sup>143</sup> E.P. Chiang, *How should a regulator resolve disputes related to interconnection?*, (Body of Knowledge on Infrastructure Regulation, 2009). Available at: <https://regulationbodyofknowledge.org/faq/telecommunication-regulation-interconnection/how-should-a-regulator-resolve-disputes-related-to-interconnection/> (last accessed 12 October 2022).

courts are generally empowered to act as the point of last appeal with their generalist expertise (as opposed to specialist expertise).<sup>144</sup> Thus, the courts are still able to exercise their judicial powers over matters. However, it is more appropriate that the regulator, with the necessary expertise, first attempt to resolve the dispute between the parties. This is one of the reasons for which they were created.<sup>145</sup>

The following factors are evident from the arguments advanced by the CAEM, Chiang and UNIDO:

- (a) A regulatory authority has specific expert knowledge of the relevant industry, whereas the courts have generalist knowledge.<sup>146</sup>
- (b) The use of ADR mechanisms allows for a more flexible and time-efficient dispute resolution.<sup>147</sup>
- (c) The solutions to a particular dispute must be tailored to the realities of the industry.<sup>148</sup>

With these factors in mind, section 4.3 will assess the role and function of South Africa's Energy Regulator, NERSA. Section 4.3 will examine NERSA insofar as its role and duties as the country's electricity regulator are concerned.

### 4.3 NERSA

NERSA was established as South Africa's National Energy Regulator in terms of the National Energy Regulator Act<sup>149</sup> (NERA). As the country's Energy Regulator, one of its functions includes undertaking the role of Electricity Regulator in terms of the ERA.<sup>150</sup> NERSA's membership composition is required to collectively have adequate economic, business, legal,

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<sup>144</sup> UNIDO, Structure, composition and role of an energy regulator. Available at: [https://www.unido.org/sites/default/files/2009-02/Module5\\_0.pdf](https://www.unido.org/sites/default/files/2009-02/Module5_0.pdf) (last accessed 15 October 2022).

<sup>145</sup> *Idem*.

<sup>146</sup> *Idem*. See also R. Baboolal-Frank, *A critical analysis of tribunals in South Africa to create a harmonised tribunal system*, (LLD thesis, University of Pretoria, 2019), at 18-25 who, when investigating specialised tribunals, explains that generally the membership of tribunals is required to reflect individuals with specific areas of expertise and knowledge, whereas the courts usually have a generalist expertise.

<sup>147</sup> Chiang above n 143.

<sup>148</sup> CAEM above n 137.

<sup>149</sup> 40 of 2004. See section 3 of the Act.

<sup>150</sup> Section 4(1)(c) of the ERA above n 13.

technical and other experience relevant to the electricity industry. Furthermore, NERSA is obligated to demonstrate impartiality and objectivity in its decision-making and must strike a fair balance between continuity and capacity building.<sup>151</sup>

The NERA also regulates NERSA's decisions. Section 10 of the NERA stipulates that NERSA's decisions must be—

- (a) consistent with the Constitution and applicable laws;
- (b) in the public interest;
- (c) consistent with the powers of NERSA;
- (d) procedurally fair; and
- (e) based on reasons, facts and evidence that must have a factual and legal basis.

In terms of section 4(b) of the ERA, NERSA may mediate disputes between generators,<sup>152</sup> transmitters,<sup>153</sup> distributors,<sup>154</sup> customers or end users<sup>155</sup> or perform any act incidental to its functions. Accordingly, NERSA is empowered to decide disputes arising in the electricity supply industry. Moreover, it is not only contractual parties that may approach NERSA. Parties who have no contractual rights to enforce against Eskom, such as the residents of municipalities (end users), may approach NERSA for a dispute to be resolved.<sup>156</sup>

NERSA has also issued NMD Rules. These Rules provide a detailed structure governing pricing rules that allow Eskom to plan for the provision of new electricity capacity.<sup>157</sup> The purpose of these Rules is to take measures to prevent the customer (municipalities) from exceeding electricity supply that's been allocated to it. If the allocated electricity supply is exceeded, the customer puts the country's electricity network under strain, hampers effective

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<sup>151</sup> *Idem*, at sections 6(2)(a) and (b) and 10.

<sup>152</sup> *Idem*, at section 1 defines an electricity generator as a person (or entity) who generates electricity Eskom.

<sup>153</sup> *Idem*. This is a person (or entity) who conveys electricity through a transmission power system excluding trading.

<sup>154</sup> *Idem*. This is a person (or entity) who conveys electricity through a distribution power system excluding trading municipalities.

<sup>155</sup> *Idem*. End users are the persons or entities that uses electricity residents of municipalities.

<sup>156</sup> See preamble of the ERA above n 13 and the Eskom Constitutional Court minority judgment above n 9, at para 174.

<sup>157</sup> See NMD Rules above n 102.

functioning of the network and capacity planning and places other customers' electricity supply and Eskom at risk.<sup>158</sup>

This exposition of the powers granted to NERSA serves to demonstrate that NERSA is entrusted with both technical and legal oversight over the electricity supply industry. NERSA's decisions are required to be sound in the economic, business, legal and technical sense.<sup>159</sup> The NMD Rules show that the agreements between Eskom and different municipalities do not only affect electricity supply to that municipality. A municipality contravening the agreement puts the national grid under strain.<sup>160</sup>

The sub-sections below will examine NERSA's functions with specific reference to the factors extracted from the CAEM, Chiang and UNIDO's reports above.

#### 4.3.1 *NERSA's expert knowledge*

According to NERSA's annual 2021 report, NERSA received 355 electricity-related disputes from 2020 to 2021. The disputes included complex and technical cases in the electricity supply industry.<sup>161</sup> NERSA's turnaround time for disputes resolution is 180 days.<sup>162</sup> This timeline may be truncated in urgent matter.<sup>163</sup> The report also contains data regarding NERSA's compliance monitoring and enforcement, as well as the challenges faced by the Regulator in the energy industries it regulates.<sup>164</sup> NERSA's decisions are thus not only informed by the electricity industry. It has an overview over the entire energy industry and has collated data to assess the implications of its decisions on not only the electricity industry, but the energy sector.<sup>165</sup>

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<sup>158</sup> *Idem*, at para 2.

<sup>159</sup> ERA above n 13 at sections 6(2)(a) and (b) and 10.

<sup>160</sup> NMD Rules above n 102.

<sup>161</sup> NERSA, *Annual Report 20/21*, (NERSA 2021). Available at: [https://static.pmg.org.za/Nersa\\_Annual\\_Report\\_2021\\_.pdf](https://static.pmg.org.za/Nersa_Annual_Report_2021_.pdf) (last accessed 20 October 2022), at 25.

<sup>162</sup> *Idem*. See also OECD, "What makes civil justice effective?", 18 *OECD Economics Department Policy Notes* (2013), at 11. According to the OECD, on average South Africa's litigation process exceeds 240 days.

<sup>163</sup> NERSA, *Annual Report 20/21* above n 161, at 55.

<sup>164</sup> *Idem*, at 25-35.

<sup>165</sup> *Idem*.

#### 4.3.2 *The use of ADR mechanisms*

NERSA's annual report also sets out programmes that implement dispute resolution mechanisms. The purpose of the programmes is to ensure that mediation and arbitration is used when required and within the prescribed procedures.<sup>166</sup>

#### 4.3.3 *Solutions tailored to the realities of the industry*

What serves as an example of this factor is section 34 of the ERA which requires the Minister of Minerals and Energy to consult NERSA when determining whether new electricity generation capacity is required. In terms of section 34, although it is the Minister who initiates this process, NERSA's approval is required.<sup>167</sup> NERSA is thus closely involved in policy-making decisions concerning the country's electricity capacity. It has access to the country's policies and is better placed than the courts to propose solutions that address the challenges confronting electricity supply. NERSA's role as the Energy Regulator also provides it with access to the most recent challenges confronting electricity supply.<sup>168</sup>

NERSA's intervention as the Regulator in electricity supply disputes is rooted in (a) the requirement that parties exhaust internal remedies before approaching the courts<sup>169</sup> and (b) an acknowledgement that in fields such as the electricity supply industry certain technical expertise may be required.<sup>170</sup> Therefore, it is in the best interests of the parties and the public interests for the Regulator to be given an opportunity to resolve the dispute.<sup>171</sup>

NERSA's role and functions illustrate that it is equipped with the regulatory powers and expertise to resolve disputes concerning electricity supply. NERSA's powers and functions enable it to assist municipalities, the residents of municipalities and Eskom to resolve electricity supply disputes.

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<sup>166</sup> *Idem*, at 45.

<sup>167</sup> Department of Mineral Resources and Energy, *Concurrence with the ministerial determination on the procurement of 2 500MW new generation capacity from nuclear*. Available at: <https://www.nersa.org.za/wp-content/uploads/bsk-pdf-manager/2021/11/Updated-Reasons-for-Determination-RfD-on-the-Concurrence-with-the-Ministerial-Determination-on-the-procurement-of-2-500MW-new-generation-capacity-from-nuclear.pdf> (last accessed 14 October 2022), at 9.

<sup>168</sup> *Idem*.

<sup>169</sup> F. Kathree-Setiloane, "The duty to exhaust internal remedies", 9 *Without Prejudice* (2009), at 8.

<sup>170</sup> D. McCarthy Gallagher, R. Miles and J Purdy, *Alternative Dispute Resolution in the Regulatory Process*, (Michigan State University Press, 2020), at 26.

<sup>171</sup> *Idem*.

#### 4.4 Section 30 of the ERA

Section 30 provides a dispute resolution mechanism in terms of which an aggrieved party may bring a dispute to NERSA.<sup>172</sup> It serves as a vehicle through which NERSA can exercise its dispute resolution powers. Section 4.4 will assess whether section 30 provides an alternative dispute resolution mechanism where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

This section examines (a) whether using section 30 will uphold the constitutional and regulatory scheme; and (b) whether section 30 can be used to resolve a dispute requiring a temporary resolution.

##### 4.4.1 *Upholding the Constitutional and regulatory scheme*

Section 30 requires NERSA to ensure that all the parties to the dispute are ascribed to them their specific rights and functions in terms of the ERA.<sup>173</sup> The Act places an obligation on NERSA to ensure legal compliance in the electricity supply industry.<sup>174</sup> Section 30(1)(b) makes provision for NERSA to resolve disputes between municipalities, Eskom and the residents of municipalities. It provides a remedy that the parties are obligated to use before approaching the courts.<sup>175</sup>

Employing section 30 means the parties are exhausting internal remedies before instituting an interim interdict. This accords with the principle of subsidiarity<sup>176</sup> and means compliance with the last requirement for the granting of an interim interdict.<sup>177</sup> Therefore, the remedy provided by the regulatory framework in terms of section 30 would have been exhausted before an interim interdict is sought.

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<sup>172</sup> See section 30 quoted above in chapter one [Background and introduction].

<sup>173</sup> See section 27 of the ERA above n 13.

<sup>174</sup> Section 3 of the ERA above n 13.

<sup>175</sup> Kathree-Setiloane above n 169.

<sup>176</sup> *My Vote Counts* above n 69. In accordance with this principle, remedies in the ERA would have to be used before using a remedy in the IRFA or the Constitution.

<sup>177</sup> The last requirement is that there must be no other remedy available. See *OUTA* above n 79, at para 41.

Furthermore, using section 30 prevents the parties from side-stepping the electricity supply regulatory framework. A dispute resolution in terms of section 30 requires NERSA to investigate electricity supply as a municipal service<sup>178</sup> and the rights and obligations of municipalities, the residents of municipalities and Eskom in terms of the statutes governing electricity supply.<sup>179</sup> Therefore, municipal obligations are considered with due reference to the NMD Rules,<sup>180</sup> section 27 of the ERA<sup>181</sup> and Eskom's powers in terms of section 21(5) of the ERA.<sup>182</sup> The role that municipalities play in supplying electricity to its residents is not overlooked.

Additionally, NERSA is able to examine the *prima facie* right to electricity in accordance with the regulatory framework governing electricity supply. This prevents the rights in the Bill of Rights from being used to place municipal obligations on another state organ, without considering the implications on the national grid or the regulatory scheme.<sup>183</sup>

#### 4.4.2 *Resolving disputes requiring a temporary resolution*

The way section 30 is drafted affords wide discretionary powers to NERSA.<sup>184</sup> It allows NERSA to make use of ADR mechanisms to remedy any dispute in the electricity supply industry in the manner in which it deems fit.<sup>185</sup> Section 30 does not limit NERSA in terms of the type of disputes in the electricity supply industry that it may decide. Thus, irrespective of whether a dispute requires final or interim relief, it falls within NERSA's dispute resolution powers. It constitutes a remedy that the parties must use before approaching the courts for an interim interdict.<sup>186</sup>

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<sup>178</sup> See the Systems Act above n 51.

<sup>179</sup> Sections 1, 2(g), 3, 21(5) and 27 of the ERA above n 13.

<sup>180</sup> NMD Rules above n 102. Para 2 stipulates that a municipality which exceeds the NMD allocated to it, it puts the network's electricity supply under strain.

<sup>181</sup> This section sets out the duties of municipalities in the electricity supply industry.

<sup>182</sup> This section stipulates Eskom's powers and duties in the electricity supply industry.

<sup>183</sup> NMD Rules above n 102 and the ERA above n 13.

<sup>184</sup> The interpretation of section 30 has not been disputed. Adopting the rules of interpretation as set out in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA), the words "settle that dispute by such means and on such terms as the Regulator thinks fit" is to be interpreted as NERSA having wide discretionary powers to settle a dispute. Disputes requiring an interim dispute resolution are not excluded from these powers.

<sup>185</sup> Section 30 of the ERA above n 13.

<sup>186</sup> *Setlogelo* above n 76.

## 4.5 Possible challenges with using section 30 at the interim stage of a dispute

Two challenges have been identified as possible obstacles in using section 30 as a dispute resolution mechanism at the interim stage of a dispute. Specifically, disputes arising from the residents of municipalities seeking electricity supply directly from Eskom. These challenges are discussed below.

### 4.5.1 *Increasing time to resolve disputes*

Parties who refer disputes to NERSA in terms of section 30 run the risk of increasing the time it takes for the dispute to be resolved. This would be the case where a dissatisfied party seeks judicial review of NERSA's decision in terms of section 10(3) of the NERA or appeals to the High Court in terms of section 10(4).<sup>187</sup> However, this is not a reason to justify circumventing an internal dispute resolution mechanism provided in the electricity supply regulatory scheme. The principle of subsidiarity, as well as the last requirement for the granting of an interim interdict there must be no other remedy require parties to first refer a dispute to NERSA before approaching the courts.<sup>188</sup>

Section 30 ensures that when courts consider disputes arising from the electricity supply industry, the matters are decided having considered how NERSA interpreted the rights, obligations and challenges in the nation's electricity supply industry. Interim interdicts instituted against Eskom would thus be subjected to the regulatory framework governing electricity supply.<sup>189</sup>

Using a dispute resolution mechanism before approaching the courts is also common practice in several fields. For example, in terms of the Labour Relations Act,<sup>190</sup> labour disputes are first referred to the the Commission for Conciliation, Mediation and Arbitration (CCMA) before

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<sup>187</sup> Section 10(3) of the NERA above n 149 permits any person to institute proceedings for the judicial review of an administrative action of NERSA. Section 10(4) permits any person to institute an appeal against a decision taken by NERSA.

<sup>188</sup> See chapters two and three above.

<sup>189</sup> ERA above n 13.

<sup>190</sup> 66 of 1995.



being referred to the Labour Court. In terms of the Companies Act,<sup>191</sup> disputes are first referred to the Competition Tribunal before being referred to the Competition Appeals Court.

Further to the above, as a general rule, interim decisions are not appealable save in exceptional circumstances.<sup>192</sup> Therefore, courts are less inclined to permit an appeal since the decision is not yet final. This decreases the chances of a court hearing an appeal against NERSA's interim decision.

Finally, section 30 also allows for flexibility in terms of the timelines within which NERSA resolves a dispute. The section allows the arbitrator or mediator to determine the necessary timelines, together with the parties, to resolve the dispute.<sup>193</sup> This flexibility flows from the wide discretionary powers afforded to NERSA in the dispute resolution process.<sup>194</sup> Therefore, section 30 can also be used where disputes require an urgent and interim resolution.

#### 4.5.2 *NERSA's capacity*

This challenge was identified having considered Eberhard's research which demonstrates that one of the reasons that municipalities are not held accountable in the electricity supply industry is due to the large numbers of municipalities.<sup>195</sup> This speaks to NERSA's capacity and ability to give effect to section 30 considering the number of municipalities in South Africa.<sup>196</sup>

Capacity building for regulatory authorities refers to implementing institutional and management processes to make regulation efficient and effective.<sup>197</sup> This includes providing training for staff members, providing facilities for dispute resolution and ensuring that there

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<sup>191</sup> 89 of 1998.

<sup>192</sup> *OUTA* above n 79, at para 23.

<sup>193</sup> NERSA, *Annual Report 20/21* above n 161, at 55.

<sup>194</sup> *Idem*.

<sup>195</sup> R. Eberhard, "The municipal industry – key dynamics with a focus on the metros", (Discussion paper, 2018). Available at: <https://csp.treasury.gov.za/csp/DocumentsToolbox/Muni%20Elec%20Industry%20DP.pdf> (last accessed 20 October 2022), at 4. He argues that the muted accountability of municipalities has contributed towards Eskom's reduced performance.

<sup>196</sup> Cooperative Governance Traditional Affairs, *Provincial Intervention in Local Government in terms of Section 139 of the Constitution and the Municipal Finance Management Act* above n 39. There are 278 municipalities.

<sup>197</sup> CRC Policy Brief, *Capacity building for regulation* (2014). Available at: <https://assets.publishing.service.gov.uk/media/57a08cd1e5274a27b2001451/CRCpb4.pdf> (last accessed 15 October 2022). "Effective" means the ability to give effect to the obligations set out in legislation, and "efficient" means the minimisation of scarce resources.

are sufficient staff members to assist parties in dispute resolution.<sup>198</sup> If NERSA's capacity is not strengthened to ensure that it can give effect to its legislative mandate, section 30 will be rendered nugatory.<sup>199</sup> Thus, the policies adopted by the Minister of Minerals and Energy<sup>200</sup> must ensure that sufficient resources are made available for NERSA's capacity building.

#### 4.6 Conclusion

The objective of this chapter was two-fold. The first objective was to determine whether the Regulator (NERSA) can play a role in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom. The second objective was to assess whether section 30 of the ERA provided an alternative mechanism for dispute resolution where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

To achieve its objectives, the chapter started by assessing the role of regulatory authorities in resolving disputes with solutions that cater to the realities of the industry. This was done in section 4.2. According to the CAEM, Chiang and UNIDO, regulatory authorities are more suited to resolve disputes in their industries because they have specific expert knowledge whereas the courts have generalist knowledge.<sup>201</sup>

This was followed by section 4.3 which assessed the role and function of South Africa's Energy Regulator, NERSA, in dispute resolutions. The research findings demonstrate that NERSA is equipped with the legislative powers and technical knowledge to provide solutions in disputes concerning electricity supply that are relevant to the realities of the industry.

Section 4.4 examined whether section 30 of the ERA provides an alternative dispute resolution mechanism where a temporary (interim) resolution is required, while upholding the

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<sup>198</sup> Worldbank, *Building Regulatory Capacity Assessment*, (2017). Available at: <https://www.gfdrr.org/sites/default/files/publication/building-regulatory-capacity-assessment-level-2-2017.pdf> (last accessed 24 October 2022), at 28-34.

<sup>199</sup> Digital Banker Africa, *Capacity Building as a requirement for Regulatory Change*. Available at: <https://digitalbankerafrica.com/capacity-building-as-requirement-for-regulatory-change/#:~:text=Capacity%2Dbuilding%20is%20the%20key,into%20their%20participation%20selection%20criteria>. (last accessed 22 October 2022).

<sup>200</sup> This is the member of the Executive that is responsible for administration of the ERA under section 1 of the ERA above n 13.

<sup>201</sup> UNIDO above n 144.

constitutional and regulatory scheme. The research findings demonstrated that using section 30 gives effect to the constitutional scheme. The use thereof complies with the principle of subsidiarity and the requirement to exhaust internal remedies before approaching the courts. Additionally, section 30 compels NERSA to decide a dispute in line with the rights and obligations afforded to municipalities, their residents and Eskom in terms of the electricity supply regulatory scheme. The provision also affords wide discretionary powers to NERSA. Thus, it allows NERSA to make use of ADR mechanisms to remedy any dispute in the electricity supply industry in the manner in which it deems fit.<sup>202</sup> This includes disputes requiring a temporary resolution.

Section 4.5 identified two challenges that may pose an obstacle in using section 30 as a dispute resolution mechanism at the interim stage of a dispute. The challenges identified were the increased time in resolving disputes and NERSA's capacity to assist parties with dispute resolution.

According to the research findings, parties who refer disputes to NERSA in terms of section 30 run the risk of increasing the time it takes for the dispute to be resolved. This would be the case where a dissatisfied party seeks judicial review of NERSA's decision in terms of section 10(3) of the NERA or appeals to the High Court in terms of section 10(4). However, this is not a reason to justify circumventing an internal dispute resolution mechanism provided in the electricity supply regulatory scheme.

The research findings further illustrate that section 30 ensures that when courts consider disputes arising from the electricity supply industry, the matters are decided having considered how NERSA interpreted the rights, obligations and challenges in the nation's electricity supply industry. Section 30 also allows the arbitrator or mediator to determine the necessary timelines, together with the parties, to resolve the dispute.<sup>203</sup> Therefore, it can still be used where disputes require an urgent and interim resolution.

With respect to NERSA's capacity, during the investigation it was determined that capacity building will be required for NERSA to give effect to section 30. The Minister of Minerals

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<sup>202</sup> Section 30 of the ERA above n 13.

<sup>203</sup> NERSA, *Annual Report 20/21* above n 161, at 55.

and Energy's policy goals will have to be directed towards ensuring that NERSA has the facilities and staff to attend to an increased use of section 30.

In the next chapter, the research findings will be consolidated and analysed.

## CHAPTER FIVE – CONCLUSION

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### 5.1 Introduction

This study aimed to investigate whether interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity, have as a result of the interim relief granted by the courts resulted in the Judiciary subverting the constitutional scheme and regulatory framework.

The study was undertaken in light of the arguments posited by the residents of municipalities when seeking interim interdicts for electricity supply against Eskom. In such matters, the residents invoke the rights in the Bill of Rights, such as the rights to dignity, housing and water. Even though the infringement of these rights originated from their municipalities' failure to fulfil their constitutional obligations to provide electricity, the residents have argued that this establishes a basis for interim relief against Eskom for electricity supply.

To achieve its aim, the study set out to achieve four objectives, namely to—

- (a) examine the constitutional and regulatory scheme governing the supply of electricity;
- (b) investigate how interim interdicts, instituted against Eskom for the supply of electricity to the residents of municipalities, are decided by the courts;
- (c) determine whether the Regulator can play a role in resolving electricity supply disputes between municipalities, the residents of municipalities and Eskom; and
- (d) assess whether section 30 of the ERA provides an alternative mechanism for dispute resolution where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme.

These objectives were achieved in chapters two to four of the study. The chapter findings are summarised below.

## 5.2 Evaluation and summary of chapter findings

The evaluation and summary start by considering chapter two. The chapter examined the constitutional and regulatory framework governing electricity supply in South Africa. The chapter findings demonstrated that there is a constitutional obligation that has been placed on municipalities in terms of chapter seven and Schedule 4B of the Constitution. In terms of this obligation, municipalities must provide electricity as a municipal obligation to their residents. Therefore, any entitlement to electricity is derived from a municipal constitutional mandate.

Chapter two also assessed the statutes enacted to give effect to the municipal obligation to supply electricity to the residents of municipalities. These statutes are the Systems Act, the ERA and the Conversion Act. According to the research findings, the Systems Act reinforces the position that the right to municipal services, such as electricity, is linked to a municipality's constitutional and statutory duty to provide these services. It is a right that is enforceable against a municipality, not Eskom. Furthermore, when deciding disputes regarding electricity supply, the principle of subsidiarity demands that the statutes enacted to govern electricity supply be applied as a starting point. Therefore, the Systems Act, Conversion Act and the ERA must be the point of departure in resolving disputes concerning electricity supply.

This was followed by an assessment of the requirements for the granting of an interim interdict in chapter three. The chapter considered the requirements for establishing a *prima facie* right and that there must be no other remedy. The chapter findings illustrated that a *prima facie* right is still bound to the principle of legality. Thus, a court cannot overlook an applicant trying to enforce a non-existent *prima facie* right to electricity against Eskom, by reasoning that the relief is only temporary. The chapter findings further demonstrated that to meet the requirement that there must be no other remedy, a party must demonstrate that they used the remedy provided in the statutes governing electricity supply.

Chapter three also examined recent judgments in which the courts considered whether there is “a public law right to electricity” that is enforceable against Eskom at the interim relief stage. According to the chapter findings, the courts' assessment of a *prima facie* right does not accord with the regulatory scheme investigated in chapter two. The courts have failed to consider that any right to electricity emanates from a municipal obligation. The courts have also failed to consider that the regulatory scheme does not make provision for a “public law right to electricity” that is directly enforceable against Eskom. Additionally, when considering the

applications for interim interdicts, the courts did not consider the remedies provided by the ERA, and whether these remedies were exhausted before instituting the interim interdict.

Having established how disputes concerning electricity supply at the interim interdict stage are decided by the courts, the next chapter determined whether the Regulator can play a role in resolving electricity supply disputes.

Chapter four demonstrated that regulatory authorities are more suited to resolve disputes in their industries because they have specific expert knowledge whereas the courts have generalist knowledge. According to the chapter findings, NERSA serves as South Africa's Energy Regulator. It is equipped with the legislative powers and technical knowledge to provide solutions in disputes concerning electricity supply.

Chapter four also examined whether section 30 of the ERA provides an alternative dispute resolution mechanism where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme. The chapter findings demonstrated that using section 30 complies with the principle of subsidiarity and the requirement that there be no other remedy when instituting an interim interdict. Additionally, section 30 compels NERSA to decide a dispute in line with the rights and obligations afforded to municipalities, their residents and Eskom in terms of the electricity supply regulatory scheme. The provision also affords wide discretionary powers to NERSA. It allows NERSA to make use of ADR mechanisms to remedy any dispute in the electricity supply industry in the manner in which it deems fit. This includes disputes requiring a temporary resolution.

Additionally, chapter four considered two challenges that may pose an obstacle in using section 30. The challenges identified were the increased time in resolving disputes and NERSA's capacity to assist parties with dispute resolution.

According to the research findings, parties who refer disputes to NERSA run the risk of increasing the time it takes for the dispute to be resolved. This would be the case where a dissatisfied party seeks judicial review or appeals to the High Court. However, this is not a reason to disregard a remedy provided in the electricity supply regulatory scheme.

The research findings in chapter four illustrated that section 30 ensures that when courts consider disputes arising from the electricity supply industry, the matters are decided having considered how NERSA interpreted the rights, obligations and challenges in the nation's electricity supply industry. Section 30 also allows the arbitrator or mediator to determine the

necessary timelines, together with the parties, to resolve the dispute. Therefore, it can still be used where disputes require an urgent and interim resolution.

With respect to NERSA's capacity, the research findings illustrated that capacity building will be required for NERSA to give effect to section 30. The Minister of Minerals and Energy's policy goals will have to be directed towards ensuring that NERSA has the facilities and staff to attend to an increased use of section 30.

### 5.3 Addressing the research problem

In answering the primary research question, namely Have interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity led to the Judiciary subverting the constitutional scheme and regulatory framework governing electricity supply? the study found the following by achieving its objectives:

- The constitutional and regulatory framework governing electricity supply do not make provision for “a right to electricity” that may be enforced against Eskom. The residents' entitlement to electricity is derived from a municipal constitutional mandate.
- The first requirement for an interim interdict is establishing a *prima facie* right. When establishing a *prima facie* right the principle of legality remains applicable. Therefore, even though the court is dealing with interim relief, the *prima facie* right must be interpreted in accordance with the relevant regulatory scheme. To meet the last requirement that there must be no other remedy a party must demonstrate that they used the remedy provided in the statutes governing electricity supply. The courts do not interpret a *prima facie* right to electricity in accordance with the constitutional and regulatory framework governing electricity supply. They also do not take into consideration the remedies in the ERA.
- NERSA, as the country's Energy Regulator, is equipped with the legislative powers and technical knowledge to provide solutions in disputes concerning electricity supply.
- Section 30 of the ERA provides an alternative dispute resolution mechanism where a temporary (interim) resolution is required, while upholding the constitutional and regulatory scheme. The use thereof complies with the principle of subsidiarity and the requirement to exhaust internal remedies before approaching the courts. It also ensures



that rights and obligations in the electricity supply industry are interpreted according to the regulatory framework.

According to the research findings, interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity have led to the Judiciary subverting the constitutional scheme and regulatory framework governing electricity supply. The constitutional and regulatory framework is circumvented in that—

- the courts do not interpret the alleged *prima facie* right to electricity in accordance with the constitutional and regulatory framework;
- the courts do not take into consideration the remedy that the parties must use in terms of the ERA before instituting an interim interdict;
- the courts grant interim interdicts for electricity supply from Eskom without allowing NERSA an opportunity to resolve the dispute; and
- the residents of municipalities seek interim interdicts and obtain them successfully without having referred the dispute to NERSA in terms of section 30 of the ERA.

#### **5.4 Recommendations**

The study recommends that the residents of municipalities use section 30 in electricity supply disputes requiring temporary resolutions. This is because using section 30 ensures that disputes are resolved by first referring the dispute to NERSA, thus ensuring that they are resolved in accordance with the regulatory framework governing electricity supply. Furthermore, should a party choose to institute an interim interdict, there will also be compliance with the last requirement for the granting of an interim interdict.

The study also identified two challenges that may pose an obstacle in using section 30 as a dispute resolution mechanism at the interim stage of a dispute. The challenges identified were the possible increased time in resolving disputes and NERSA's capacity to assist parties with dispute resolution.

The research findings demonstrated that section 30 allows for flexibility in terms of the timelines within which NERSA resolves a dispute. The section allows the arbitrator or mediator to determine the necessary timelines, together with the parties, to resolve the dispute. Therefore, section 30 can still be used where disputes require an urgent and interim resolution.

With respect to NERSA's capacity, during the investigation it was determined that capacity building will be required for NERSA to give effect to section 30. The Minister of Minerals and Energy's policy goals will have to be directed towards ensuring that NERSA has the facilities and staff to attend to an increased use of section 30.

## **5.5 Conclusion**

Interim interdicts instituted by the residents of municipalities against Eskom for the supply of electricity have led to the Judiciary subverting the constitutional scheme and regulatory framework governing electricity supply. To prevent this, disputes concerning electricity supply must first be resolved by NERSA in terms of section 30 of the ERA. This means the regulatory framework is not side-stepped in electricity supply disputes requiring a temporary resolution.

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