

Greenlight for residents to review Eskom's decision to reduce electricity supply

By [Sechaba Mchunu](#)

16 Jan 2023

In *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others [2022]*, the Constitutional Court (CC) determined that affected residents were entitled to review a decision by Eskom Holdings SOC Ltd (Eskom) to reduce the supply of bulk electricity under Promotion of Administrative Justice Act 3 of 2000 (PAJA).



Image source: Scott Betts – [123RF.com](#)

Eskom concluded two separate but similar supply agreements (the agreements) with the Ngwathe Municipality and Lekwa Municipality (the municipalities). In terms of the agreements, Eskom would supply bulk electricity to each municipality in accordance with the stipulated Notified Maximum Demand (NMD) in the separate agreements. However, for an extended period of time Eskom supplied excess electricity to both municipalities.

Reduced supply

In 2020, Eskom reduced the supply of excess electricity to the municipalities to the relevant NMD for each municipality. Reasons for the reduction were due to the municipalities' failure to pay Eskom for the electricity supplied.

Pursuant to Eskom's decision to reduce the excess electricity supply, residents of Lekwa Municipality represented by Lekwa Rate Payers Association NPC and Ngwathe Municipality represented by The Vaal River Development Association (the residents) launched urgent applications against Eskom and the relevant stakeholders. In both applications, which were joined, the residents sought an interim interdict to prohibit Eskom from implementing its decision to reduce the excess supply of electricity in the municipalities pending the outcome of the review proceedings of that decision in terms of PAJA and/or legality.

In hearing the application, the High Court had to determine and establish the residents' standing in the review and whether the requirements for an interim relief had been established in this application by the residents namely:

- A *prima facie* right;
- a reasonable apprehension of irreparable and imminent harm;
- balance of convenience;
- no other satisfactory remedy.

In doing so, the High Court found that Eskom's decision engaged administrative law with the residents with whom it had no contractual relationship with. Consequently, that permitted the residents to bring the applications before the court against Eskom. The High Court held that the residents were within their rights to pursue review proceedings and granted the prohibitory interdict having been satisfied that the requirements for interim relief had been established by the residents.

SCA appeal

Aggrieved by the decision, Eskom appealed against the High Court's decision in the Supreme Court of Appeal (SCA). The SCA had to consider the nature of Eskom's decision and whether the requirements for an interim interdictory relief were met.

At the heart of this matter was the issue of whether the decision was contractual in nature or an administrative action. Eskom argued the latter in the negative. The SCA held that Eskom's conduct constituted administrative action and could thus be subjected to a review process by the affected parties. Furthermore, the SCA affirmed that all the requirements for an interim relief had been established and that the High Court was correct in granting an order interdicting Eskom from implementing its decision to reduce the supply of the bulk electricity to the municipalities pending the review proceedings.

ConCourt appeal

Undeterred, Eskom appealed against the decision of the SCA in the CC. The CC had to consider whether the lower courts correctly granted the interim interdict. In doing so, the CC also had to unpack the requirements for an interim relief in conjunction with the nature of Eskom's decision.

Eskom contended that the High Court and SCA failed to have regard to section 27(2) of the Constitution which states that,

“ the state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. ”

Amongst other defences, Eskom contended that the dispute around its decision should have been resolved in terms of the Electricity Regulation Act 4 of 2006 (ERA) prior to engaging other remedies and approaching court.

The majority judgment of the CC explained the view that although Eskom was entitled to exercise its contractual and statutory options by reducing and terminating electricity supply, it emphasised that it had to do so within the confines of the Constitution and law.

In this context, it had to specifically comply with PAJA. The majority emphasised the importance of notifying and providing an opportunity to affected persons to make representations even in circumstances where the affected parties' contributions and representations are a mere formality and hold no water in influencing the outcome of a decision.

Majority rule

In the view of the majority judgment, the nature of the decision ousted the applicability of the supply agreements or ERA insofar as it related to the affected residents. The majority judgment explained that a single action could violate other fundamental rights catered for in the Bill of Rights. It further explained that the reduction of electricity without proper notice to the residents and providing them with an opportunity to make representations was a demonstration of a single act which violated fundamental rights such as the right to water, education and a healthy environment.

The majority was of the view that the violation occasioned by Eskom's decision ultimately afforded the residents an opportunity to seek enforcement and protection of their rights under PAJA.

Against this backdrop, the majority judgment of the CC agreed with the High Court and SCA in that Eskom's decision was administrative in nature and invoked the applicability of PAJA. The CC affirmed that the infringements of rights came as a result of Eskom's conduct and therefore there was a basis for review. The majority judgment of the CC held that the High Court and SCA were correct in granting the interim interdict pending the review proceedings and dismissed the appeal.

Conclusion

The takeaway from this judgment is that whilst a direct contractual relationship to supply electricity to residents may exist between Eskom and municipalities, any action taken by Eskom in line with a supply agreement which has the potential of affecting protected rights of residents, has to follow a process in terms of PAJA which engages the affected parties.

Eskom and other relevant state-owned enterprises have to appreciate their dual role as both a party to an agreement for purposes of generating income and a public entity which provides a service for the promotion of the rights of citizens. Failure to appreciate the dual role will result in many more court proceedings instituted by affected persons.

ABOUT THE AUTHOR

Sechaba Mchunu is an Advocate at the Johannesburg Society of Advocates

For more, visit: <https://www.bizcommunity.com>