THE SOUTH AFRICAN ENERGY CRISIS CONSTITUTIONALISES SOUTH AFRICAN LAW

Philip Thomas*

SUMMARY: 1.- Introduction; 2- Background and context; 3.- The facts; 4.- Supreme Court of Appeal; 5.- Constitutional Court; 5.1- The majority judgment; 5.2- Legal question; 5.2.1- Constitutional law; 5.2.2 - Law of Procedure; 5.2.3- Administrative law; 5.2.4.- Implications for private law; 6.- The minority judgment; 6.1- Constitutional law; 6.2- Law of procedure; 6.3- Administrative law; 6.4- Private law; 7.- Observations; 7.1- Pleadings; 7.2- Separation of powers; 7.3- No findings; 8. Conclusion.

1. Introduction

It is common knowledge that in 1994 the Republic of South Africa transformed herself into a democratic constitutional democracy. Free and fair elections for all and a new *interim* constitution made twenty-seven April of that year the beginning of a fresh start as a constitutional democracy. This Constitution as well as the final Constitution of 1996 contained a Bill of Rights which guarantees the traditional rights and liberties, but includes what were then relatively innovative rights for a national constitution such as the right of access to information; the right to administrative justice; a qualified right to the free pursuit of economic activity; the right to an environment which is not harmful to health or well-being; the right of children to security, basic nutrition, basic health and social services; language and cultural rights; and educational rights, labour rights and property rights. Important constitutional institutions such the Constitutional Court, the Human Rights Commission, and the Commission on Gender Equality were also established in South Africa.[1]

The Constitution instructs the courts to develop the common law courts promoting the rights, values, spirit and purport of the Bill of Rights.[2] The Constitutional Court has promoted the development of socio-economic rights in a number of landmark decisions.[3] However, such

*Emeritus professor of law, University of Pretoria.

[1] https://www.sahistory.org.za/article/interim-south-african--1993.

[2] Ss. 173, 39(2) and 8(3). L Hawthorne, *Constitution and contract: Human dignity, the theory of capabilities and Existenzgrundlage* in South Africa, *Studia Universitatis Babes-Bolyai Jurisprudentia*, 2011 (2), 27-46; *Id.*, *The development clause section 39(2) of the Constitution and the law of contract*, in *Journal of Contemporary Roman-Duct Law*, 2018 (81), 108-12 at 108f.

[3] Sandra Liebenberg, *Socio-economic rights adjudication under a transformative constitution*, 2010; Moyo, "*The jurisprudence of the South African Constitutional Court on socio-economuc rights"*, in *Socio-economic rights-progressive realisation?*, 2016, 37-79; E. Brundige & S. Kalantry, *Review of S. Liebenberg Socio-Economic Rights, Human Rights Quarterly*, 20112 34 3, 579-601. For example, *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC); *Minister of Health v Treatment*

decisions related to specific socio-economic rights included in the Bill of Rights and included the proviso that the realisation of these right should take place within available resources.
Recently, the ongoing electricity crisis in South Africa reached another nadir and made minor world news. Meanwhile, during December 2022 a decision of the Constitutional Court[4] dealt with this sorry saga and deserves mention as it touches on a variety of aspects of South African law.
It is obvious that matters of constitutional law,[5] administrative law,[6] Human Rights law and private law are intrinsically interwoven in this case, while in a jurisdiction whose administration of justice derives from English law, procedural law plays an important role. However, this essay will place the focus on the pervasive influence of the Constitution and more specifically Human Rights law in contemporary South African law.
This essay has no pretence to provide an in depth analysis and consequent addition to the many different disciplines of South African law before the court, but offers a screenshot of contemporary South African law and the promises of the democratic constitutional state. Moreover, the different interpretations concerning the latter, and the resulting differing paradigms found expression in the majority and minority decisions and it may be argued that the Constitutional Court appears to have opened the door to the creation of indirect, ancillary supplementary rights and abandoned the available resources restrictive proviso.
This article endeavours to illustrate the avenue opened by the Constitutional Court for the development of indirect supplementary fundamental rights in the recent decision of *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others.*[7] To achieve this objective the decision will be analysed and the constitutional, procedural, administrative

Action Campaign (No 2) [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC); *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC), at www.saflii.org/cases.

[4] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44, www.saflii.org/cases/ZACC/2022

[5] For example Eskom submitted the municipalities have been absolved from their constitutional obligations. Relying upon *New National Party New National Party of South Africa v Government of the Republic of South Africa* [1999] ZACC 5; 1999 (3) SA 191 (CC); 1999 (5) BCLR 489 (CC). Eskom contended that fault must lie with the municipalities for failing to carry out their duties.

[6] Thus, Eskom submitted that the lower courts failed to take into account that any increase to NMD levels must be in accordance with the NMD Rules and a dispute pertaining to NMD must be decided in accordance with ERA, not IRFA. According to Eskom, NERSA, as the specialist regulator, has the necessary expertise and exclusive jurisdiction to resolve a dispute pertaining to a complex issue such as NMD supply. Eskom relied on *Bato Star, Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC). where the Constitutional Court enunciated the import of judicial deference to administrative agencies such as NERSA. Eskom also referred to *Koyabe,v Minister for Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC). where the failure to exhaust internal remedies proved fatal to a party's review under PAJA. In respect of ERA, Eskom submits that section 30 of ERA provides an internal remedy to resolve such disputes. Thus, the internal remedies provided by ERA should have been utilised before invoking PAJA and approaching the courts.

[7] *Supra* n 4.

and private law aspects addressed. Finally, some observations relative to fundamentals of the rule of law, such as *trias politicas*, privity of contract, and legal certainty shall be ventilated in the context of a potential paradigm shift.

2. Background and context

In 2001 the Eskom Conversion Act[8] converted Eskom into a public company, incorporated in terms of the Companies Act.[9] The state was Eskom's sole shareholder and Eskom and the Minister of Public Enterprises entered into a Shareholder compact, which gave statutory force to the role of Eskom as a provider of public goods, taking account of cost, financial sustainability and competitiveness.

Eskom had a near monopoly over the generation, transmission and distribution of electricity and the Electricity Regulation Act[10] (ERA) ensured this monopoly and placed the National Energy Regulator of South Africa (NERSA) in control. The powers of NERSA include the resolution of disputes that end users may have against Eskom.[11] NERSA also determines price adjustment applications proposed by Eskom on the basis of NERSA's Multi-Year Price Determination Methodology.[12] However, the ERA made Eskom[13] an organ of state as it performs public functions in terms of legislation under the definition in section 239 of the Constitution.[14]

The Constitution places in sections 152 (1)(b)[15] and 153(a)[16] a duty on municipalities to provide services to communities. In order to do so municipalities buy bulk supplies of electricity from Eskom and then sell this electricity with a mark-up to end consumers.[17]

The Electricity Regulation Amendment Act[18]inserted section 27 in the Electricity Regulation Act, which imposes a number of duties on municipalities regarding the supply of electricity to

[8] No 13 of 2001. See also https://www.sahistory.org.za/article/short-history-eskom-1923-2001-part-1.
[9] No 71 of 2008.
[10] No 4 of 2006.
[11] S 30 of ERA.
[12] S.14(1)(e) of ERA describes the MYPDM as the methodology to be used in the determination of rates and tariffs which must be imposed by licensees.
[13] Eskom is also a major public entity listed in schedule 2 of the Public Finance Management Act, 1 of 1999 (PFMA). Eskom is thus made subject to the application of chapter 6 of the PFMA, which regulates the duties of accounting authorities responsible for public monies.
[14] In terms of section 239, an "organ of state" means: (b) any other functionary or institution; (ii) exercising a public power or performing a public function in terms of any legislation.
[15] S.152 (1)(b). The objects of local government are: (b) to ensure the provision of services to communities in a sustainable manner.
[16] S 153(a). [a] municipality must structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community.
[17] Local Government: Municipal Structures Act 117 of 1998, S. 84(1). A district municipality has the following functions and powers:(c) Bulk supply of electricity that affects a significant proportion of municipalities in the district.
[18] No 28 of 2007.

residents.[19] During the last twenty-five years the distribution and use of electricity has been greatly increased, both legally and illegally.

The relationship between Eskom, the municipalities and residents, had been the legal question in a previous decision of the Constitutional Court. In *Joseph v City of Johannesburg*[20] the applicants were tenants in a residential property. The lessor owed a substantial amount of money to City Power, the City of Johannesburg's electricity service provider, in respect of the supply of electricity to the property. As a result, the electricity supply was terminated. The Constitutional Court noted that the difficulties that arose in the case were the fact that the applicants were tenants who had no contractual right to receive electricity from City Power, and the fact that the applicants, paid their electricity bills to the lessor whose company had the contract with City Power for the supply of electricity. The Court thus had to answer the question whether "any legal relationship exists between the applicants and City Power outside the bounds of contractual privity that entitles the applicants to procedural fairness before their household electricity supply is terminated".[21] This termination of supply had taken place without City Power giving notice.[22] The applicants contended that the termination of supply without notice was procedurally unfair. The rights that they claimed had been infringed as a result of the termination and which founded the Promotion of administrative Justice Act cause of action were the right of access to housing in terms of section 26 of the Constitution and the right to human dignity in terms of section 10 of the Constitution as well as the contractual right to electricity supply in terms of the contract of lease.[23]

3. The facts

Eskom supplies bulk electricity to the Lekwa and Ngwathe Municipalities. The contracts concluded provide for the supply of a Notified Maximum Demand (NMD) as agreed between

[19] S 27. Each municipality must exercise its executive authority and perform its duty by: (a) complying with all the technical and operational requirements for electricity networks determined by the Regulator; (b) integrating its reticulation services with its integrated development plans; (c) preparing, implementing and requiring relevant plans and budgets; (d) progressively ensuring access to at least basic reticulation services through appropriate investments in its electricity infrastructure; (e) providing basic reticulation services free of charge or at a minimum cost to certain classes of end users within its available resources; (f) ensuring sustainable reticulation services through effective and efficient management and adherence to the national norms and standards contemplated in section 35; (g) regularly reporting and providing information to the Department of Provincial and Local Government, the National Treasury, the Regulator and customers; (h) executing its reticulation function in accordance with relevant national energy policies: and keeping separate financial statements, including a balance sheet of the reticulation business.

[20] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[21] *Joseph* at paras 1 and 2.

[22] *Joseph* at para 7.

[23] *Joseph* at para 12.

parties, respectively in 2010 and 2008. However, since these dates Eskom had supplied electricity to these municipalities in excess of their NMD.[24]

In July 2020 Eskom restricted the supply of electricity to these municipalities to the agreed NMD of each. The reasons for Eskom's actions are in question, but it is beyond dispute that the municipalities had failed to pay Eskom for all the electricity supplied to them. Eskom announced that the reductions of electricity supply were required by the failure of the municipalities to disconnect illegal connections as well as the failure to provide the infrastructure to support the supply of electricity above the NMD, which endangered the integrity of the national grid. Eskom informed the municipalities of this decision, but did not inform the residents. The limited electricity supply to the municipalities necessitated the latter to reduce the supply thereof to their customers. This had a significant impact on essential services such as water supply and the functioning of sewage works. Once the electricity supply was disrupted, the water treatment plants came to a standstill. As a result, taps ran dry and industrial and commercial activities, such as the poultry industry and abattoirs in or close to the affected towns, ceased functioning. Sewage also started spilling into the streets of the affected towns and into the Vaal River.[25]

Efforts on the part of the Ngwathe and Lekwa residents to engage with Eskom, the municipalities and Members of the Executive in the respective provinces were fruitless. Also, negotiations between Eskom and the two municipalities to increase the contractually agreed NMD supply levels remained without results. In consequence, residents of these municipalities approached the High Court for urgent relief through their respective (ratepayers) associations.[26] The associations argued that the fact that the municipalities had failed to fulfill their contractual obligations towards Eskom did not entitle Eskom to restrict their supply of electricity. Submitting that as the result of Eskom's actions not only businesses suffered harm, but that the effect upon essential services in the two towns was "an unfolding human and environmental catastrophe," since both drinking water and sewage disposal were compromised affecting hospitals and old age homes and causing pollution of the Vaal River from untreated waste.[27]

In consequence, the residents sought *interim* relief to secure the restoration of the supply of electricity that Eskom had provided to the municipalities prior to the restrictions. Such *interim*

[24] Eskom charged monthly penalties in terms of the Notified Maximum Demand and Maximum Export Capacity Rules of NERSA. The municipalities had applied to increase their NMD supply levels to meet the additional electricity demand, but Eskom had refused to agree to these increases, apparently because the municipalities had defaulted on their payment obligations. Information regarding the debt situation of municipalities towards ESKOM see https://www.moneyweb.co.za/news/south-africa/failed-broken-municipalities-with-r79bn-debt-pile-paint-treasury-into-a-corner/(10 March 2023).

[25] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at para 15.

[26] *Id.* at 16.

[27] *Id.* at para 9.

relief was to operate pending the final adjudication of a judicial review to set aside Eskom's decision to limit the bulk supply of electricity to the municipalities to the level of their NMD.[28] Eskom pleaded that it had no obligation to the residents of the municipalities, since it had contracted with the municipalities and had reduced the electricity within the terms of the agreements. The aggrieved residents should seek relief from the municipalities as they had contracted with them.[29]

The residents argued that the reduction decision constituted administrative action and that Eskom had a constitutional obligation to the residents of the municipalities.[30]

The High Court[31] relied on *Government of the Republic of South Africa v Grootboom*[32] to find that although the right to electricity is not specifically provided for in the Bill of Rights, the supply of electricity is inextricably intertwined with the rights to dignity, life, housing, healthcare, food, water and social security.[33] The High Court argued that enjoying a clear right to be supplied with electricity requires the supply of sufficient electricity "to meet the basic threshold of the individual rights in the Bill of Rights". To find otherwise would render those rights and the obligation of state organs, such as Eskom, to fulfil those rights nugatory.[34] In consequence the court held that the residents have a right to the supply of electricity and that a *prima facie* right had been established,[35] although there was no contractual relationship between ESKOM and the residents. ESKOM is a state-owned entity which made enforcement of the agreements with the municipalities an infringement of the rights of the residents.

The High Court held that Eskom enjoys a monopoly over the supply of bulk electricity so that the residents had no alternative other than to approach the High Court for relief.[36] The Court accordingly ordered Eskom to increase or, alternatively, restore the maximum electricity load supply to the level supplied prior to the reduction decision, thus interdicting and prohibiting Eskom from implementing its decision to limit the electricity supply. The order of the High Court was to operate as an *interim* interdict pending final adjudication of the residents'

[28] *Id.* at para 10.
[29] *Id.* at para 18.
[30] *Id.* at para 19.
[31] *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) (High Court judgment). JOL is JudgmentsOnline at legalnet.co.za/judgementOnline
[32] *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC). The High Court held at paras 34 and 37: While there is no specific reference in *Grootboom* to the provision of access to and supply of electricity, it is self-evident that the supply of electricity is the cornerstone upon which all the realisation of other rights is based.
[33] The high Court at para 35.
[34] As cited by Unterhalter AJ in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at para 25.
[35] High Court judgment at para 40.
[36] *Id.* at para 47.

application for a review of Eskom's reduction decision in terms of the Promotion of Administrative Justice Act (PAJA)[37] and/or legality.[38]

4. Supreme Court of Appeal

On appeal the Supreme Court of Appeal[39] held that an issue of special public importance was raised[40] and the question for determination on appeal was whether the High Court was correct in its finding that the residents had established a *prima facie* right to *interim* interdictory relief.[41]

This court relied on *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* [42] where the High Court found that Eskom has the power to interrupt the supply of electricity for non-payment in terms of section 21(5) of ERA. However, given the nature and source of this power, the exercise thereof amounts to administrative action for the purposes of section 33 of the Constitution[43] and the Promotion of Administrative Justice Act (PAJA).[44] Such exercise of power is controlled, if not by the requirement of reasonableness, then certainly under the standard of rationality.[45] In consequence, the High Court found that in view of the catastrophic socio-economic and humanitarian consequences Eskom's decision to incrementally reduce electricity supply with the ultimate goal of terminating supply altogether, was not rationally connected to the purpose for which the power to do so was given.[46]

The Supreme Court of Appeal also referred to its own decision in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd Resilient SCA*.[47] In this instance it was held that electricity is a component of the basic services that municipalities are constitutionally obliged to provide to their residents.[48] This means that ESKOM was required to take into account its constitutional obligations as an organ of state, before invoking its powers under section 21(5) of ERA. The Supreme Court of Appeal held further that as an organ of state Eskom supplies electricity to local governments for the economic and social well-being of the people. This brings the relationship between ESKOM and the municipalities within the scope of the Intergovernmental

[37] No 3 of 2000.
[38] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at para 28.
[39] *Eskom Holdings SOC Ltd v Lekwa Ratepayers Association* [2022] ZASCA 10; 2022 (4) SA 78 (SCA) (Supreme Court of Appeal judgment).
[40] Supreme Court of Appeal judgment at para 6.
[41] Supreme Court of Appeal judgment at para 21.
[42] *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 (2) SA 577 (GJ).
[43] S 33(1). Everyone has the right to administrative action that is lawful, reasonable and procedurally fair; (2). Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons; (3) National legislation must be enacted.
[44] No 3 of 2000.
[45] *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 (2) SA 577 (GJ) at para 74.
[46] *Id.* at paras 77-80.
[47] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd* [2020] ZASCA 185; 2021 (3) SA 47 (SCA).
[48] Supreme Court of Appeal at paras 29-34.

Relations Framework Act (IRFA),[49] in terms of section 41 whereof[50] organs of state are constitutionally and statutorily required to make reasonable efforts in good faith to settle intergovernmental disputes.[51]

The Supreme Court of Appeal held that Eskom was not constitutionally and statutorily permitted to unilaterally reduce the bulk electricity supply to the municipalities without first making every reasonable effort to settle its intergovernmental disputes with the municipalities and other spheres of government. Therefor the Supreme Court of Appeal found that all the requirements for granting *interim* interdictory relief had been established and that the High Court had correctly granted the *interim* interdicts.[52]

Eskom then approached the Constitutional Court which granted leave to appeal.

5. Constitutional Court

The legal questions were whether the High Court correctly granted an *interim* order, and if so whether the content of this order would survive constitutional scrutiny.

In this appeal ESKOM submitted that the primary question to be determined was whether the residents are entitled to a court order forcing ESKOM to supply them with sufficient electricity. Within the Constitutional Court two paradigms appeared. The first judgment, which was the minority judgment proposed the central thesis that the residents have no right to assert against Eskom. In contrast the majority judgement reached the opposite conclusion

5.1. The majority judgment

The majority decision eloquently presented by Madlanga J represents the paradigm of transformative constitutionalism.

Building on jurisprudence of the Constitutional Court the learned judge addressed the matter primarily as a procedural matter by placing the focus on the process by which the substantial reduction in electricity supply came about. He argued that this provided grounds for a PAJA review, since the residents enjoy constitutionally protected rights, which were materially and adversely affected by Eskom's reduction decision. Moreover, this decision was taken without following a fair procedure. Thus, the infringement of several fundamental rights satisfied the requirements for the *interim* interdict.

[49] No 13 of 2005.

[50] IRFA s 41. (1) All organs of state must make every reasonable effort: (a)to avoid intergovernmental disputes when exercising their statutory powers or performing their statutory functions; and (b) to settle intergovernmental disputes without resorting to judicial proceedings. (2) Any formal agreement between two or more organs of state in different governments regulating the exercise of statutory powers or performance of statutory functions, including any implementation protocol or agency agreement, must include dispute-settlement mechanisms or procedures that are appropriate to the nature of the agreement and the matters that are likely to become the subject of a dispute."

[51] Supreme Court of Appeal judgment at para 24.

[52] *Id.* at para 32.

Madlanga J held that it was unnecessary to rely on section 7(2) of the Constitution, but did so nevertheless as the first judgment insisted that Eskom had no obligation whatsoever towards the residents.

5.2. Legal question

Madlanga J viewed the matter at issue to be whether – pending the finalisation of review proceedings, which the residents intended to institute[53] – the Court should allow the effects of Eskom's conduct to persist. In other words must the Constitutional Court – at an *interim* stage – allow the residents to be subjected to such abject misery and horrendous violation of fundamental rights?[54]

The learned judge held the situation to be analogous to that in *Joseph v City of Johannesburg*,[55] where the rights infringed as a result of the termination of electricity were the right of access to housing in terms of section 26 of the Constitution and the right to human dignity in terms of section 10 of the Constitution.[56] Thus, Madlanga J stated that the residents asserted several constitutionally protected fundamental rights and continued to set out the relevance of these rights in the context of these proceedings and the proposed PAJA review.

Arguing that multiple rights protected in the Bill of Rights can be violated by a single action he found that in the present matter the sudden substantial reduction of electricity resulted in multiple rights violations, since a "human catastrophe" was the result.[57] Since no notice was given nor fair process preceded the decision, he found that the residents have a viable case in the intended Promotion of Administrative Justice Act review.[58]

5.2.1 Constitutional law

As stated above Madlanga J also dealt with section 7(2) of the Constitution.[59] The first judgment reasoned that as the residents enjoy no constitutional right to the supply of electricity

[53] In terms of the order made by the High Court when granting the *interim* interdict, the review application had to be launched not later than 30 October 2020. However, the status of the review is not clear.

[54] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at para 191.

[55] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).

[56] *Id.* at para 12.

[57] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at para 296: By way of one example, the residents are saying as a result of Eskom's conduct, water that is supposed to be potable has faeces. Now they cannot drink water which – immediately before Eskom's conduct – they could drink. This has nothing to do with the point about the progressive realisation of socio-economic rights made by the first judgment. This reasoning applies equally to the adverse effect that Eskom's conduct has had on healthcare services. At 297: For example, how do you repair the deeply offensive indignity suffered as a result of being forced to choose between drinking or using water contaminated with faecal matter, on the one hand, and not drinking or using that water at all, on the other? Bear in mind that a significant many in our country live in conditions of extreme poverty. Bottled water is not an option for them.

[58] *Id.* at para 284.

[59] S. 7(2): The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

by Eskom, there is no right to be respected, protected, promoted and fulfilled by Eskom in terms of section 7(2).[60]

Madlanga J held that the relevant part of section 7(2) in this matter is the obligation resting on the state (which includes Eskom as an organ of state) to respect the rights in the Bill of Rights. Following the decision of the Constitutional Court in *Glenister v President of the Republic of South Africar*[61] he held that the state must refrain from unreasonable conduct resulting in infringement of the Bill of Rights.[62] The judge held the sudden, substantial reduction of electricity supply without notice to be the event that caused the catastrophic infringements of the residents' rights. Not only did ESKOM not give them notice, but they were denied an opportunity to make representations.[63]

In the minority judgment Unterhalter AJ had discussed the principle of subsidiarity[64] and found that an application hereof is that when legislation has been enacted to give effect to a specific constitutional right this right can no longer be directly invoked. Instead, the constitutionality of such legislation must be challenged. In consequence, Unterhalter AJ reasoned that since Parliament has legislated the ERA, the residents must assert their rights in terms of the ERA or challenge its constitutionality. Madlanga J disagreed. After scrutinising the jurisprudence of the Constitutional Court relative to the principle of subsidiarity[65], as well as the legal

[60] *ESKOM* CC at para 142-147.

[61] *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC). At para 194 Moseneke DCJ and Cameron J held that "[s]ection 7(2) implicitly demands that the steps the state takes must be reasonable".

[62] *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* [2022] ZACC 44 at para 199.

[63] The learned judge stressed the importance of such opportunity at length and cited *John v Rees; Martin v Davis; Rees v John* [1970] Ch 345 at 402D and reliance on this case in the CC in *S v Van der Walt* [2020] ZACC 19; 2020 (2) SACR 371 (CC); 2020 (11) BCLR 1337 (CC) at para 28; *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (CC); 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC) (*My Vote Counts I*) at para 176; and *Administrator, Transvaal v Zenzile* [1990] ZASCA 108; 1991 (1) SA 21 (A) at 37E-F. Also C. Hoexter and G. Penfold *Administrative Law in South Africa*, Cape Town 2021, 502.

[64] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) did not mention the principle by name, but was the first decision to give explicit recognition to the doctrine of subsidiarity. Of importance, the context was section 33(3) of the Constitution, which provides that national legislation must be enacted to give effect to the rights contained in section 33(1) and (2) and that such legislation must, inter alia, "provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal". In this sense, *Bato Star* was also about effect giving legislation.

[65] Starting with the minority judgment in *My Vote Counts NPC v Speaker of the National Assembly* [2015] ZACC 31 (CC); 2016 (1) SA 132 (CC); 2015 (12) BCLR 1407 (CC), where Cameron J followed Klare who introduced the term an "effect giving statute", *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* [2022] ZACC 5; 2022 (4); SA 1 (CC); 2022 (7) BCLR 850 (CC), *Minister of Health v New Clicks South Africa (Pty) Ltd (Treatment Action Campaign and Another as Amici Curiae)* [2005] ZACC 14; 2006 (2) SA 311 (CC); 2006 (1) BCLR 1 (CC), *South African National Defence Union v Minister of Defence* [2007] ZACC 10; 2007 (5) SA 400 (CC); 2007 (8) BCLR 863 (CC), *MEC for Education, KwaZulu-Natal v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC), *Mazibuko v City of Johannesburg* [2009] ZACC 28; 2010 (4) SA 1 (CC); 2010 (3) BCLR 239 (CC), *PFE International v Industrial Development Corporation of South Africa Ltd* [2012] ZACC 21; 2013 (1) SA 1 (CC); 2013 (1) BCLR 55 (CC), *De Lange v Methodist Church* [2015]

literature,[66]he held that the legislation in question is the ERA, but concluded that this Act has nothing to do with giving effect to a constitutional right[67] and that section 34 of the Constitution[68] entitles the residents to seek appropriate relief in terms of section 38 of the Constitution.[69] As stated above the appeal also involved with matters of the law of procedure, administrative law as well as private law.

5.2.2 Law of Procedure

The appeal dealt with an interim interdict and consequently the majority opinion devoted ample attention to the question whether the requirements for an interim interdict had been met.The crux of the matter revolves around the question whether the residents succeeded in asserting a prima facie right. It is on this point that Madlanga J differed sharply from Unterhalter AJ and the minority judgment. In an emotional discourse the learned judge described the consequences of the rotational loadshedding and rhetorically asked "If these facts do not demonstrate an infringement of several rights guaranteed in the Bill of Rights, nothing will. Of course, the implicated rights are the right to dignity, the right to life, the right of access to healthcare

ZACC 35; 2016 (2) SA 1 (CC); 2016 (1) BCLR 1 (CC), *Thubakgale v Ekurhuleni Metropolitan Municipality* [2021] ZACC 45; 2022 (8) BCLR 985 (CC) and *Residents of Industry House, 5 Davies Street, New Doornfontein, Johannesburg v Minister of Police* [2021] ZACC 37; 2022 (1) BCLR 46 (CC).

[66] The learned judge referred to Currie and De Waal, *Bill of Rights Handbook,* Cape Town 2016), 12-3; Du Plessis, "*Interpretation*" in Woolman et al (eds), *Constitutional Law of South Africa*, Service 6 (2008), 152-3 and 158; Van der Walt, *"Normative Pluralism and Anarchy: Reflections on the 2007 Term*", in *Constitutional Court Review* 2008 1, 77; Klare, *"Legal Subsidiarity and Constitutional Rights: A Reply to AJ van der Walt"*, in *Constitutional Court Review* 2008 1, 129; Du Plessis, "*Subsidiarity: What's in the Name for constitutional interpretation and adjudication?*", Stellenbosch Law Review 2006 17, 207; Murcott and Van der Westhuizen, *"The Ebb and Flow of the Application of the Principle of Subsidiarity – Critical Reflections on Motau and My Vote Counts*", in *Constitutional Court Review* 2015 1, 7; Quinot *et al,* (eds) *Administrative Justice in South Africa: An Introduction,* Cape Town 2020, 135, 333 and 399; and Hoexter and Penfold, *Administrative Law in South Africa*, Cape Town 2021, 149-51.

[67] The long title of the ERA reads:

"To establish a national regulatory framework for the electricity supply industry; to make the National Energy Regulator the custodian and enforcer of the national electricity regulatory framework; to provide for licences and registration as the manner in which generation, transmission, distribution, trading and the import and export of electricity are regulated; to regulate the reticulation of electricity by municipalities; and to provide for matters connected therewith."

S 2 provides: "The objects of this Act are to: (a) achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa; (b) ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the electricity supply industry within the broader context of economic energy regulation in the Republic; (c) facilitate investment in the electricity supply industry; (d) facilitate universal access to electricity; (e) promote the use of diverse energy sources and energy efficiency; (f) promote competitiveness and customer and end user choice; and (g) facilitate a fair balance between the interests of customers and end users, licensees, investors in the electricity supply industry and the public."

[68] S 34. Everyone has the right to have a dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

[69] S 38. Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threated, and the court may grant appropriate relief, including a declaration of rights. The section then lists categories of persons who have standing in various circumstances.

services, the right of access to sufficient water (I would add this must surely mean potable and generally usable water, not water contaminated with faecal matter and generally not cleaned properly), the right to an environment that is not harmful to health or well-being and the right to basic education."[70]

The learned judge relied on *Joseph v City of Johannesburg* for authority regarding the question what constitutes "rights" for purposes of PAJA. In that case Skweyiya J had held that the lessor, albeit that he had a contract as a 'customer' with City Power, was a mere conduit, thus following Sachs J in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*.[71] Skweyiya J found *Joseph v City of Johannesburg* to fall within "the special cluster of relationships that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction. He held that at this level, administrative law principles operate to govern these relations beyond the law of contract.[72] Thus, Madlanga J reduced the question to that whether the fact that Eskom's decision was taken and implements without giving notice or following a fair procedure gave the residents a *prima facie* right. He stated that the nature of the right envisaged by the definition of "administrative action" in section 1, read together with section 4(1), of PAJA is not restricted. A right may take whatever form based on what we know of that concept in common law, statutory law or in respect of constitutionally protected rights.[73] The only question is whether the decision in issue has adversely (section 1) or has materially and adversely (section 4(1)) affected that right, whatever its nature. He cited Quinot and Maree[74] who state that besides common-law rights or fundamental rights in the Bill of Rights, so-called 'public-law rights', which emerge from broad constitutional and statutory obligations placed on organs of state,[75] are also included. He

[70] *ESKOM* CC at para 260.
[71] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC).
[72] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC) at para 24; *Joe Slovo* at para 343.
[73] *ESKOM* CC at para 280. Also fn 241: "I repeat that for my purposes, I am not concerned with the debate whether "right" includes something more than what we know to be a right. It is not necessary to engage in that debate because here we are concerned with what are unquestionably rights. The debate between the first and my judgments is about what right or rights can properly be asserted for purposes of the interim interdict and intended PAJA review."
[74] G. Quinot and P. Maree, "*Administrative Action*" in G. Quinot *et al* (eds) *Administrative Justice in South Africa: An Introduction*, Cape Town 2020.
[75] Quinot and Maree at 93-95. Madlanga at para 281 summarises the authors: "According to them, the envisaged right is so expansive as to include what are "obviously much broader than a traditional understanding of legal rights". By this they are referring to what they call "public-law rights". Generally when – outside of the Bill of Rights – the Constitution imposes obligations, it simultaneously creates a corresponding entitlement in respect of each such obligation. Those are the public law rights the authors are referring to. De Ville says "[t]here is no natural limit to what can be understood as falling within the concept of 'rights'". Likewise, I understand Hoexter and Penfold – who quote, amongst others, De Ville – not to place any restriction on the nature of the right

continued that moreover in *National Treasury v Opposition to Urban Tolling Alliance* (*OUTA*) the Constitutional Court had held that "[i]f the right asserted in a claim for an *interim* interdict is sourced from the Constitution it would be redundant to enquire whether that right exists",[76] and held consequently that the rights invoked by the residents in the ESKOM case are sourced from the Constitution. Thus, their existence cannot be contested.[77]

Madlanga J also addressed the requirement of irreparable harm as stipulated by Moseneke DCJ in the *OUTA* decision.[78] He entertained no doubt that irreparable harm would definitely ensue if the fundamental rights pleaded by the residents were not protected by an *interim* interdict. Satisfied that the residents showed that ESKOM's decision had an adverse impact on their rights, the Court held it to be perverse to suggest that the residents cannot rely on the fundamental rights for purposes of the *interim* interdict.[79]

Furthermore, the majority decision addressed another requirement for an *interim* interdict set out in *OUTA*, namely the balance of convenience enquiry. This entails that a court must investigate whether and to what extent the restraining order might intrude into the exclusive terrain of another branch of Government. A court must keep in mind that a temporary restraint against the exercise of statutory power, well ahead of the final adjudication of a claimant's case, may be granted only in the clearest of cases and after a careful consideration of harm to the separation of powers.[80] However, in *OUTA* the Court had added that "one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights".[81] Consequently Madangla J found that in the present case the harm suffered, which was continuing at the time the *interim* interdict was sought and obtained, does amount to a breach of several fundamental rights protected by the Bill of Rights. The rights violations are atrocious and the learned judge concluded that the balance of convenience certainly favours the residents.[82]

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that may be asserted for purposes of a PAJA review. Again, let me emphasise that I am here not concerned with the question of "interest" or "legitimate expectations". My focus is on rights. That is what is at issue."
The references are to J De Ville *Judicial Review of Administrative Action in South Africa*, Durban 2005, 53 and C. Hoexter and G. Penfold, *Administrative Law in South Africa*, Cape Town 2021, 309-20.

[76] *National Treasury v Opposition to Urban Tolling Alliance* [2012] ZACC 18; 2012 (6) SA 223 (CC); 2012 (11) BCLR 1148 (CC) at para 51.

[77] *ESKOM* CC, Madlanga J at para 292.

[78] *OUTA* above n 74 at para 50.

[79] ESKOM CC at para 205.

[80] *OUTA* above n 74 at para 47. Cf. also *Economic Freedom Fighters v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 48 where Khampepe J held that an interim interdict would only be granted in exceptional cases in which a strong case for that relief has been made out and that the duty of determining how public resources are to be drawn upon and re-ordered lies in the heartland of Executive Government and domain.

[81] *OUTA* above n 74 at para 47. Hoexter and Penfold observe, the overemphasis of "clearest cases" may have the effect of: (a) being overly favourable to the public authority; and (b) not paying sufficient regard to the significantly important factor of protecting fundamental rights. Hoexter and Penfold at 806.

[82] *ESKOM* CC at par 305.

A common law requirement for the grant of *interim* interdictory relief is that there is no other satisfactory remedy and this remedy, may, but need not, be an internal remedy.[83]
Madlanga J held that this common law requirement is burdensome to the right of access to court guaranteed in section 34 of the Constitution.[84] Regarding section 7(2)(a) of the PAJA the learned judge followed the interpretation of Griesel J in *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* where it was held that in case of doubt in relation to either of the two criteria laid down by section 7(2)(c) of PAJA the Court should interpret the facts and the law that promotes access to the courts.[85] After perusal of the findings Mokgoro J[86] and O'Regan J[87] on this matter Madlanga J left the question of what role, if any, section 7(2)(a) and (c) must play in proceedings for an *interim* interdict pending a AJA review open. He found that the High Court was satisfied that the requirement that an applicant for an *interim* interdict must demonstrate the absence of any other satisfactory remedy had been met and Eskom had not appealed against the finding that there was no other satisfactory remedy. Thus, it is not open to this Court to consider the factual question whether it was practical for the residents to pursue other remedies, including the ERA processes. That is a factual question that has been determined by the High Court and is not on appeal.[88]

5.2.3 Administrative law

In regard to the aspects of the case dealing with administrative law the majority decision found that *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* had laid down that section 6 of PAJA has codified the grounds of review of administrative action and that, therefore, one could no longer rely on the common law as a basis for review.[89] Consequently,

[83] Hoexter and Penfold at 747 interpret "internal" and "any other law" in the phrase as "any internal remedy provided for in any other law", which must be "read restrictively to include only remedies specifically provided for in the legislation with which the case is concerned and to exclude optional extras". For this, the authors rely on *Agri South Africa v Minister of Minerals and Energy; Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) at paras 20-2; and *Van der Westhuizen v Butler* 2009 (6) SA 174 (C) at 188B-C.
[84] In *OUTA* above n 74 it was held: "[T]he test [for the grant of interim relief] must be applied cognisant of the normative scheme and democratic principles that underpin our Constitution. This means that when a court considers whether to grant an interim interdict it must do so in a way that promotes the objects, spirit and purport of the Constitution."
[85] *Earthlife Africa (Cape Town) v Director-General: Department of Environmental Affairs and Tourism* 2005 (3) SA 156 (C) at para 67.
[86] In *Koyabe v Minister for Home Affairs* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) Mokgoro J held at para 36: Approaching a court before the higher administrative body is given the opportunity to exhaust its own existing mechanisms undermines the autonomy of the administrative process. It renders the judicial process premature, effectively usurping the executive role and function. The scope of administrative action extends over a wide range of circumstances, and the crafting of specialist administrative procedures suited to the particular administrative action in question enhances procedural fairness as enshrined in our Constitution.
[87] In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 17 O'Regan J accepted the possibility that review proceedings and the exhaustion of internal remedies may run concurrently.
[88] *ESKOM* CC at para 228.
[89] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

Madlanga J considered whether the decision, which was the intended objective of the proposed PAJA review, qualified as an administrative action. Relying on Nugent JA in *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* that administrative action is an action that has the capacity to affect legal rights,[90] he found these rights in the residents' right to dignity, their right of access to healthcare services, their right to an environment that is not harmful to health or well-being, the right to basic education and the right to life and that infringement of these rights constitutes the "adverse" and "material and adverse" effect envisaged in sections 1 and 4(1) of PAJA respectively.[91]

As the residents contend that the administrative action was taken without following a fair procedure, Madlanga J held this sufficient for purposes of a *prima facie* case founded on section 6(2)(c) of PAJA.[92]

The learned judge allowed that an administrative action may be intended to avert grave consequences, but held that this does not allow the administrator to ignore the fair process applicable to an administrative action affecting the rights of the public as provided for in section 4 of PAJA.[93]

Madangla J granted, however, that the form and extent of the fair process depends on the nature and circumstances of what is at issue, but held that the review stage will deal with the question of fair process as guaranteed in section 33 of the Constitution.[94] Moreover, Madlanga J emphasised that the matters before the High Court, the Supreme Court of Appeal and the Constitutional Court dealt with an *interim* relief for an interdict sought by way of urgency pending a review and not a review. In consequence, he held that section 7(2)(a) and section 7(2)(c) of the PAJA played no role as these proceedings were not a PAJA review.

The majority opinion paid considerable attention to the contention of the Ngwathe residents that Eskom's conduct was not about the NMD levels, but that Eskom is seeking to enforce the outstanding debts. He held that this argument implicated section 6(2)(e)(ii) of PAJA, which renders administrative action taken for an ulterior purpose or motive susceptible to review.[95]

Madlanga J declared himself satisfied that the residents have shown their entitlement to the pleaded fundamental rights, and have also set out grounds of review sufficient for this stage of the proceedings.[96]

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[90] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 23. Madlanga J also relied on *Joseph v City of Johannesburg* (above n 19 at para 27) where it was held that the termination had a "direct, external legal effect" on the residents.

[91] *ESKOM* CC at para 195.

[92] *Id.* at para 197.

[93] Section 4(1) titled administrative action affecting public. In cases where an administrative action materially and adversely affects the rights of the public, an administrator, in order to give effect to the right to procedurally fair administrative action, must decide whether: (a)to hold a public inquiry in terms of subsection (2); (b)to follow a notice and comment procedure in terms of subsection (3); (c)to follow the procedures in both subsections (2) and (3); (d)where the administrator is empowered by any empowering provision to follow a procedure which is fair but different, to follow that procedure; or to follow another appropriate procedure which gives effect to section 3.

[94] *ESKOM* CC at para 211.

[95] *Id.* at para 276.

[96] *Id.* at para 279.

5.2.4 Implications for private law

Madlanga J agreed that there was contractual privity between Eskom and the municipalities, and not between the residents and Eskom. He opined that the lack of contractual privity did not stand in the way of the residents asserting other rights protected by the Bill of Rights.[97]

He reasoned that the existence of a contract for the supply of electricity between Eskom and the municipalities cannot alter what is essentially a statutory relationship governed by the ERA between these organs of state. Thus, the fact that the contract makes provision for the reduction or termination of supply was irrelevant, as section 21(5) of the ERA provides for the reduction and termination of supply. He called it sophistry to suggest otherwise, as contracts interposed to serve purposes that are concurrently served by statutory *fiat* would be the simplest stratagem to avoid the consequences of improper exercise of public power.[98]

6. The minority judgment

Unterhalter AJ, the author of the minority judgment approached the case before him from a less outcome-based perspective. He viewed the essence of the matter before the court whether for purposes of both the *interim* interdict and the intended PAJA review the residents could assert a right to the supply of electricity by Eskom.[99] In consequence, he posed the question concerning the origin of the obligation of Eskom towards the residents and found that this could not be found in the contracts for the supply of electricity between the municipalities and Eskom, because the residents were not parties to those contracts.[100] He also noted that the residents had not argued that Eskom was prohibited by section 21(5) of ERA from reducing the supply of electricity to the municipalities.[101] Unterhalter AJ argued that the municipalities, as customers, were in arrears as they had not paid for all of the electricity procured, and that in terms of section 21(5) Eskom was entitled to take the reduction decision.[102]

Referring to the proposed review under PAJA Unterhalter AJ referred to the requirement laid down in *Grey's Marine*[103] that the administrative action should adversely affect the rights of the residents, which brought him back to his first question, namely on which rights of the residents is the proposition based that Eskom has a duty of supply towards the residents.[104]

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[97] *ESKOM* CC at para 265. The learned judge relied on *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC) at para 49.

[98] *ESKOM* CC at para 273:cf also n 237.

[99] *ESKOM* CC at paras 63,71, 95, 110, 123, 127, 135, 140, 142, 144, 154, 185.

[100] *ESKOM* CC at para 90.

[101] S. 25(5). A licensee may not reduce or terminate the supply of electricity to a customer, unless:(a) the customer is insolvent; (b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or (c) the customer has contravened the payment conditions of that licensee.

[102] *ESKOM* CC at paras 91 and 92.

[103] *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* [2005] ZASCA 43; 2005 (6) SA 313 (SCA); 2005 (10) BCLR 931 (SCA) at para 23.

[104] *ESKOM* CC at para 94.

The learned judge addressed the residents' invocation of a basic public right to the supply of electricity. He found that they mention the specific rights to life, dignity, water, education and a healthy environment, but had not contended that these rights include the right to the supply of electricity. Instead they averred that electricity is a means by which these rights are realised.[105]

Furthermore, Unterhalter AJ found that neither the High Court, nor the majority judgment, explain how the long list of rights they rely upon have a content that gives rise to the infringement they find to have been established.[106]

Returning to the question whether Eskom owes a duty to the residents to supply them with the electricity that supports their well-being and whether the residents consequently enjoy a correlative right to claim that electricity from Eskom, the minority decision held that Eskom has no such duty and the residents have no such right.[107] Thus, the reduction of supply by Eskom cannot infringe a right to the supply of electricity from Eskom. Instead the learned judge held that the duty lies with the municipalities.[108]

Unterhalter AJ continued by stating that the Constitutional Courts's decision in *Joseph v City of Johannesburg*[109] has been interpreted by certain High Courts to extend the municipal obligation to supply electricity[110] onto Eskom. He held this reasoning to be mistaken, since the Constitution imposes obligations upon municipalities, who constitute the autonomous local sphere of government and enjoy specified powers and bear defined duties in order to discharge crucial functions.[111] He argued that the constitutional mandate of municipalities includes the provision of basic services, but that municipalities cannot be considered mere conduits.[112] The learned judge conceded that municipalities often procure goods and services to discharge their functions, but reasoned that even if such providers are organs of state, such as Eskom, that does not transfer the duties of the municipalities onto such providers. Concluding that he failed to find an obligation of Eskom to supply residents by reason of the transposition of the municipalities' duties upon Eskom, he perused whether the Constitution imposes such a duty.

6.1 Constitutional law

[105] *Id.* at paras 95, 97, 110, 113, 134.
[106] *Id.* at paras 95,97, 99-102, 112, 113, 116-121, 123, 125; 129.
[107] *Id.* at paras 99, 100, 107-109, 120, 121, 123, 141.
[108] *Id.* at paras 83, 84, 99, 105, 146.
[109] *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (4) SA 55 (CC); 2010 (3) BCLR 212 (CC).
[110] Referring to *Cape Gate (Pty) Ltd v Eskom Holdings (SOC) Ltd* 2019 (4) SA 14 (GJ) at paras 129-130 the learned judge summarised the High Court's reasoning, which was that the municipality is a conduit between the supplier of electricity, Eskom, and the consumers who pay for the electricity supplied, that is the residents. Since the residents have a public law right against the municipality for the supply of electricity, it is logical that the beneficiary of and payer of the electricity has the right to enforce due performance by the initiating supplier of the electricity of a public-law duty owed by it to the conduit of the electricity.
[111] *ESKOM* CC at para 105.
[112] *Ibid.*

Unterhalter AJ analysed the reasoning of Petse DP in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd Resilient SCA*[113], who found ESKOM to have two constitutional duties. The first based on the enablement argument according to which ESKOM as an organ of state has a constitutional duty deriving from section 8(1) read with section 7(2) of the Constitution[114] to ensure that municipalities "are enabled to discharge their obligations under the Constitution".[115] Moreover, as an organ of state, Eskom is bound, in terms of section 41(3) of the Constitution,[116] and the provisions of IRFA, to make every reasonable effort to settle an intergovernmental dispute in which it is involved, which is the so-called settlement argument. Until Eskom has done so, it may not implement a decision to interrupt supply, or to reduce supply.[117]

Unterhalter AJ held that no rights in the Bill of Rights provide for the supply of electricity and that consequently section 7(2) of the Constitution does not apply, because the means to realise rights do not define the contents of these rights.[118] As to the residents assertion and High Court's and majority judgement's decisions that the right to the supply of electricity is inexorably bound up with the rights to life and dignity, basic education and a healthy environment, he concludes that none of these rights include a right enjoyed by the residents to be supplied with a given quantity of electricity by Eskom,[119] thus disagreeing with Madlanga J. Unterhalter AJ argued that rights always have a content and the right enjoyed by a person gives rise to a duty owed by another to the rights-holder. The majority judgment does not set out the contents of the residents' right to life, to dignity, to an environment that is not harmful to their health or well-being, but observes the deplorable conditions brought about by the reduction decisions, and from this gives these rights contents, which allows challenges on review.

He contended that as the residents claim the restoration of the supply of electricity that Eskom provided prior to the reduction decisions, the content of the rights claimed is the supply of a determined amount of electricity. The majority judgment did not identify the contents, but held that the deplorable conditions suffered by the residents came about because of the reduction decisions, and Eskom must be ordered to restore the *status quo*. Why Eskom, and not the municipalities, has the legal duty to do so is unexplained. Unterhalter reiterated that Eskom cannot have a legal duty to restore supply to the residents if the residents have no right to claim

[113] *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd* [2020] ZASCA 185; 2021 (3) SA 47 (SCA).
[114] *Allpay Consolidated Investment Holdings (Pty) Ltd v Chief Executive Officer, South African Social Security Agency* [2014] ZACC 12; 2014 (4) SA 179 (CC); 2014 (6) BCLR 641 (CC).
[115] *Resilient SCA* above n 47 at para 80.
[116] Section 41(3) states the following:
"An organ of state involved in an intergovernmental dispute must make every reasonable effort to settle the dispute by means of mechanisms and procedures provided for that purpose, and must exhaust all other remedies before it approaches a court to resolve the dispute."
[117] *Resilient SCA* above n 47 at paras 61, 64 and 79.
[118] *ESKOM* CC at paras 110 and 112.
[119] *Id.* at paras 115.

that supply and that the majority judgment avoided the central question upon which the case rests. Instead Madlanga J held that as Eskom supplied electricity, and the consequences of the reduction were so harmful, the residents have a right to claim restoration of the supply of electricity. This reasoning avoids whether the residents enjoyed the right to the supply of electricity from Eskom by virtue of their constitutional rights. Unterhalter held that *Joseph v City of Johannesburg* it was held that their rights lie against the municipalities. Alternatively, they should seek recourse under the regulatory scheme of ERA.[120]

Unterhalter clearly dissented from the approach of the majority judgment that residents' rights lie in section 7(2) of the Constitution and in the residents' case that Eskom has acted without procedural fairness, contrary to the requirements of PAJA. He pointed out that in order to enforce restoration of electricity it must be ascertained that they have a right to the supply of electricity from Eskom, which derives from the rights in the Bill of Rights that the residents rely upon. If that claim forms no part of the contents of the rights that the residents invoke, then they have no claim in law deriving from these rights. He held that section 7(2) of the Constitution cannot support a claim if the residents do not have a right in the Bill of Rights that supports their claim, so there is nothing for the state to respect.[121]

In respect of the PAJA review Unterhalter AJ uttered the same reservations since the administrative action should adversely affect the rights of the residents. As they do not have the claimed rights it is impossible for their rights to be adversely affected by Eskom's reduction decision.[122] He was skeptical regarding the statement that there is no "natural limit" to rights that fall into the class.[123]

The learned judge embarked on a lengthy warning regarding the constitutional danger the second judgment might bring about in his opinion.[124]

Concluding that the reasoning of the High Court and the majority judgment cannot support their conclusions, Unterhalter AJ reiterated that only after the content of the right is determined, the question of infringement may be decided. The majority judgment did not demonstrate that the content of the rights it referenced includes the right of the residents to a particular level of supply of electricity.[125]

6.2 Law of procedure

Unterhalter AJ reviewed several points regarding the law of procedure. First, that the residents did not plead that Eskom has a duty of supply to the residents.[126] He admitted that courts often

[120] *Id.* at paras 116-124.
[121] *Id.* at paras 124-127.
[122] *Id.* at para 127.
[123] *Ibid.*
[124] *Id.* at paras 128-134.
[125] *Id.* at para 135.
[126] *Id.* at paras 136-138.

interpret pleadings with generosity,[127] but nevertheless held that litigants who seek to review administrative action should identify clearly both the facts and the legal basis of their cause of action.[128] However, the residents based their proposed review on a basic public law right, but did not specify the rights upon which they rely, the contents of those rights, and the facts that support their infringement. In short they do not show how Eskom breached a duty that the residents have never pleaded or established.[129] He held this to be important as ESKOM was entitled to know what rights are claimed in order to understand the correlative duties of these rights. Moreover, a court must decide the dispute before it on the pleadings and he founds that the majority judgment allows a court to read into the facts the rights and their contents that it considers worthy of vindication.[130]

Regarding the question of *interim* relief Unterhalter AJ stated that an application for *interim* relief is related to the applicant's prospects of success in obtaining final relief.[131] The *prima facie* right to be established to obtain *interim* relief is the right that is the subject of the main action or proceedings. In the present case this was the Associations' right to the judicial review of Eskom's reduction decisions. The court, which finally determines the matter shall decide whether the right, that the applicant relied upon to secure *interim* relief, has been proven on a balance of probabilities so as to secure final relief.[132] He disagreed strongly with Madlanga J who disconnected the two proceedings and merely investigated whether the residents had shown a *prima facie* right.[133]

Unterhalter AJ further held that the residents failed to demonstrate that their case is in compliance with section 7(2)(a) of PAJA,[134] i e that they have exhausted internal remedies, or that they rely on section 7(2)(c),[135] which provides for an exemption from this obligation.[136]

6.3 Administrative law

Unterhalter's AJ analysis and interpretation of the administrative aspect of the appeal focused on the fact that section 30 of ERA requires NERSA to settle disputes between an end user, defined to mean a user of electricity, and a licensee, such as Eskom. Since the residents have not used section 30, their claim for *interim* relief fails upon section 7(2) of PAJA, which

[127] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 27.
[128] *Ibid.*
[129] *ESKOM* CC at para 100.
[130] *Id.* at para 101.
[131] *Id.* at paras 64-67, 161.
[132] *Id.* at para 68.
[133] *Id.* at para 62, 67, 68, 162.
[134] S 7(2)(a). No court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
[135] S 7(2)(c). A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedies if the court or tribunal deems it in the interest of justice.
[136] *ESKOM* CC at paras 158 and 159.

requires the exhaustion of all internal remedies, save in exceptional circumstances.[137] He disagreed with Madlanga who held that section 7(2) of PAJA plays no role in the determination of applications for *interim* relief pending a PAJA.[138] Madlanga J motivates this opinion on the arguments that an application for *interim* relief does not constitute a review; secondly, that the residents may yet seek to exhaust their internal remedies under section 30 of ERA or show exceptional circumstances to exclude compliance; and finally that to find otherwise would infringe on the right of access to the courts.[139]

Relative to Madlanga's J argument that the residents made a supportable case that Eskom has acted for ulterior purposes because it took the reduction decisions to pressure the municipalities to settle their outstanding debts, Unterhalter AJ held that this ground of review had not been pleaded, and could thus not be considered, as an appellate court cannot raise a ground of review that was not pleaded. Moreover, he held that Eskom was acting within its rights under the regulatory scheme.[140]

6.4 Private law

In respect of the principle of privity of contract Unterhalter AJ reasoned that the residents are not parties to the contracts for the supply of electricity between the municipalities and Eskom. Referring to *Rademan v Moqhaka Local Municipality*,[141] where it was held that a municipality may disconnect a resident's electricity supply where that resident failed to pay for other municipal services, but had paid for electricity supply,[142] he reasoned that since the Constitutional Court had held that section 21(5)(c) of ERA was met if the customer contravened the municipality's conditions of payment (as set out in the municipal by-laws read with the Local Government: Municipal Systems Act[143] and the agreement between the parties), the municipality was entitled to cut off the resident's electricity supply, Eskom could not be liable for the supply of electricity if the conditions of its electricity supply agreements have been breached.[144]

7. Observations

[137] *Ibid.*
[138] *ESKOM* CC at para 159: "as this would impose too great a burden on an applicant for interim relief, in that the grant of interim relief already requires a showing that there is no other satisfactory remedy. To add a requirement that an applicant must also show that it will comply with PAJA is to unduly curtail access to the courts. Furthermore, an applicant may yet persuade the review court of exceptional circumstances that, in terms of section 7(2)(c), excuse compliance with the obligation to exhaust any internal remedy."
[139] *Id.* at paras 216-229.
[140] *Id.* at paras 166 and 167.
[141] *Rademan v Moqhaka Local Municipality* [2013] ZACC 11; 2013 (4) SA 225 (CC); 2013 (7) BCLR 791 (CC).
[142] *Id.* at para 39.
[143] No 32 of 2000.
[144] *ESKOM* CC at para 88.

South Africa has a mixed jurisdiction[145] of which the judicial administration is based on the English common law. The ESKOM case provides an interesting extension of the adversarial character of this model where the judges representing the majority and minority judgments engaged in robust debate on the merits of each other's findings.

7.1 Pleadings

Hawthorne has drawn attention to the fact that the transformative imperative of the Constitution has altered the tradition of judicial unpreparedness.[146] In *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd*[147] the Constitutional Court addressed the implications of section 39 (2) of the Constitution on the established practices in the law of procedure and the instruction of this section to the courts. Van der Westhuizen J stated that "in some cases courts are obliged to raise the matter *meru motu* even though it has not been raised by the parties, but such cases are rare" and held that fundamental changes are more appropriately undertaken by way of legislation.[148] This explains the willingness of Madlanga J to consider matters beyond the pleadings and to relinquish the passive judge of the common law tradition in order to don the mantle of judicial activism required for transformative constitutionalism.

In consequence, the instance in which Unterhalter AJ addressed the fact that the residents did not plead a certain point, Madlanga J relied on the generosity of interpretation shown by courts.

7.2 Separation of powers

The majority judgment acknowledged in her discussion of the balance of convenience the finding in *OUTA*,[149] that a court order may intrude into the exclusive terrain of another branch of Government and may cause harm to the constitutional separation of powers. In OUTA the Court had emphasised that executive decisions were "about the ordering of public resources, over which the Executive Government disposes and for which it, and it alone, has the public responsibility".[150] However, the Court had added that "one important consideration would be whether the harm apprehended by the claimant amounts to a breach of one or more fundamental rights warranted by the Bill of Rights".[151] Madlanga J held that in such instances a sliding scale

[145]Thomas, P.J., Viljoen, Frans, *Mixed Blessings of Mixed Legal Systems: Servitudes and Restrictive Conditions, SALJ (South African Law Journal)* 1997 114, no. 4, pp. 738-749; Thomas**,** Ph. J., *Harmonising the law in a multilingual environment with different legal systems; Lessons to be drawn from the legal history of South Africa*, in *Fundamina* 2008 (14-2) pp.133-155*;*Thomas, P.J., *Some reflexions on the role of the judge from a perspective of a mixed legal system*, in *S. Correa Fattori et al.*(eds.), *Estudos em homenagem a Luiz Fabiano Correa*, São Paulo, Max Limonad 2014, pp. 347-361.

[146] L Hawthorne, *The development clause section 39(2) of the Constitution and the law of contract*, in *Journal of Contemporary Roman-Duct Law*, 2018 (81), 108-12 at 114.

[147] *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd* 2016 1 SA 624 CC.

[148] *Id.* at para 44.

[149] *OUTA* above n 74 at para 47. Also *Economic Freedom Fighters v Gordhan* [2020] ZACC 10; 2020 (6) SA 325 (CC); 2020 (8) BCLR 916 (CC) at para 48.

[150] *OUTA* above n 74 at paras 65-68.

[151] *OUTA* above n 74 at para 47.

was to be applied[152] and that affected fundamental rights must always play a critical role in that balance. Moreover, in some cases the affected rights may be of such a nature and their breach so grievous that they may influence the decision in favour of the victim of the rights violation even in the face of a highly policy laden and polycentric executive decision.[153] The ultimate question regarding the point of balance on the sliding scale appears to have remained unanswered amidst the rhetoric.

7.3 No findings

Throughout his judgment Madlanga J left many questions open. He stated explicitly that he made no decision on whether the residents have a constitutional right to the supply of electricity by Eskom,[154] although the residents did assert that right. Nor did he hold that the residents would be entitled to a continued adequate supply of electricity in circumstances where Eskom would be entitled to terminate or reduce supply in terms of section 21(5) of the ERA.

Moreover, Madlanga J did not enter the debate about the interface between sections 3 and 4 of PAJA,[155] but stated that section 4(1) of PAJA proceeds from the premise that a fair procedure where the administrative action materially and adversely affects the rights of the public is necessary.[156] Neither did the court hold that the intended review will succeed; it merely said that pending its determination, the residents are entitled to *interim* relief. His judgment did not and could not question Eskom's substantive entitlement, indeed power, to terminate or reduce electricity under section 21(5) of the ERA.

Neither did Madlanga J engage thoroughly with the academic discussion on the principle of subsidiarity,[157] but restricted himself to the jurisprudence of the Constitutional Court. Concerning the wide-ranging possibility of review and the danger of second-guessing of executive decisions, the learned judge was equally ambivalent. Referring to *OUTA* he accentuated that this was a highly policy laden decision and ventured the opinion that in cases where both policy and violation of fundamental tights are involved a sliding scale should be applied, in which the more policy laden or polycentric the decision, the more the violation of fundamental rights should influence the court's decision. He cautioned that the courts should always be aware of the fact that this remains a balancing exercise, and in some cases the affected rights may be of such a nature and their breach so grievous that they may influence the decision in favour of the victim of the rights violation even in the face of a highly policy laden and polycentric executive decision. The ultimate question is: what is the outcome dictated

[152] *ESKOM* CC at para 303. See above n 79.
[153] N Raboshakga, The Separation of Powers in Interim Interdict Applications, *Constitutional Court Review*, 2013 5 1, 366, 373 and 376.
[154] *ESKOM* CC at para 190; see also n 128 of the judgment.
[155] *ESKOM* CC at para 209; see also n 147 of the judgment.
[156] *Ibid.*
[157] *Id.* at para 243.

by the balancing exercise? He cited Moseneke DCJ dicta in *South African Informal Traders,*[158] *as well as* Mokgoro J in *Koyabe,* but refrained from a decision.

Another important point raised by the learned judge was that the rights in question, the right to dignity, the right to life, the right to an environment that is not harmful to health or well-being and the right to basic education are not subject to progressive realisation in accordance with reasonable measures, within the state's available resources, as is the case in respect of socio-economic rights.[159] Madlaga J found that the fears that his approach would cause Eskom to collapse were unfounded, stating that an *interim* interdict is only effective until the final determination of the review. Also he held categorically that if a review was warranted, courts should not shy away from exercising their review power, as reluctance would give Eskom a licence to ride roughshod over the rights of individuals, by just threatening the fear of collapse. On the other hand Unterhalter AJ in the minority judgment voiced the hypothesis that the constitutional right to social security in section 27(1)(c) may be wide enough to include access to basic services, including electricity, but made no finding whatever on this score.[160]

8. Conclusion

As stated at the outset, this decision shows clearly that at present two competing paradigms exist, not only in the ivory tower of academia, but in the highest court of the nation. The conclusion of Hawthorne that section 39 (2) has imported the inquisitorial system of procedure into South African law as the judiciary is instructed to find and apply the law *ex officio*, combined with the adhortations of Davis and Klare[161] that new methods and new criteria for the application of the common law in a democratic society characterised by the values of the Bill of Rights should be developed, appears to have borne fruit.

On the one side the minority judgment as expressed by Unterhalter AJ represents traditional legal science, that is positivism. Approaching the Constitution, statutes, precedents in a "value free" manner within a strict interpretation, linking rights and remedies, Unterhalter AJ held that to be entitled to an interdict, albeit an *interim* one, the applicants should prove a right to what they demanded, i e electricity.

Madlanga J represents transformative constitutionalism and in his own words does not shy away from meeting the first judgment's point frontally. His point of departure was the impact of ESKOM's conduct on the various fundamental constitutional rights. "By way of one

[158] *South African Informal Traders Forum v City of Johannesburg* [2014] ZACC 8; 2014 (4) SA 371 (CC); 2014 (6) BCLR 726 (CC) at para 31.

[159] Subsections (1) and (2) of section 27 of the Constitution provide: (1) Everyone has the right to have access to (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."

[160] *ESKOM* CC at para 111.

[161] Transformative constitutionalism and the common law and customary law, *South African Journal of Human Rights* 2010, 403- 509; Also A J van der Walt, *Property and Constitution*,3 2012, 96.

example, the residents are saying as a result of Eskom's conduct, water that is supposed to be potable has faeces. Now they cannot drink water which – immediately before Eskom's conduct – they could drink. This has nothing to do with the point about the progressive realisation of socio-economic rights made by the first judgment. This reasoning applies equally to the adverse effect that Eskom's conduct has had on healthcare services." [162]

He continues adding, "For example, how do you repair the deeply offensive indignity suffered as a result of being forced to choose between drinking or using water contaminated with faecal matter, on the one hand, and not drinking or using that water at all, on the other? Bear in mind that a significant many in our country live in conditions of extreme poverty. Bottled water is not an option for them."[163]

This is validated by his choice and interpretation of sources, which is mainly found in previous jurisprudence of the Constitutional Court. Focusing on the catastrophic results of the rotational loadshedding he finds that a variety of fundamental rights protected in the Bill of Rights have been violated and places these violations directly at the door of ESKOM, ignoring the finer details of both the law of contract and the constitutional dispensation, which in Chapter 7 dealing with local government allocates the sustainable provision of services to municipalities.[164]

A drastic step in transformative constitutionalism was the validation of Sachs J reasoning in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others*[165] which opened the door for removing relationships between municipal councils and residents from the sphere of the common law. Sachs J held that such matters should be viewed in the context of the special cluster of legal relationships between councils and residents established by the Constitution and relevant legislation. He added that such relationships flow from an articulation of public responsibilities and are of an ongoing, organic and dynamic nature. The reality of this approach appears to be that privity of contract shall be abandoned in instances such as the supply of electricity.

Although the victory of transformative constitutionalism may be applauded as a step in the realisation of the founding values of the democratic constitutional state of South Africa, it may be appropriate to pause a moment at the interpretation of the majority judgement by the minority.

Unterhalter AJ voiced concern that Madlanga's judgment focused on a number of constitutional rights identified as infringed by the reduction of electricity and ignored the question whether the resident's had a constitutional right to be supplied with electricity.

[162] *ESKOM* CC at para 296.
[163] *Id.* at para 297.
[164] Financial transfers from the national government and own income from rates and taxes are the main sources of municipal income. https://www.statssa.gov.za/?p=14537.
[165] *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others* (CCT 22/08) [2009] ZACC 16; 2009 (9) BCLR 847 (CC) ; 2010 (3) SA 454 (CC).

Madlanga J considered the facts set out in the founding affidavit as self-evidently showing an infringement of the residents' right to dignity, life, an environment that is not harmful to health or well-being, basic education, and clean water. He deemed it unnecessary to consider whether the contents of these rights provide for a right to a specific quality of electricity from Eskom and the focus on these rights eliminates the implications upon the state's budget.[166] The majority held that the residents did not have to show that they have a right to claim from Eskom the supply of electricity that it has reduced, but finds the residents' rights in the obligations of the state to respect, protect, promote and fulfil the rights in the Bill of Rights, as section 7(2) of the Constitution requires, and, by reference to the residents' case that Eskom has acted without procedural fairness, contrary to the requirements of Promotion of Administrative Justice Act.

In consequence, the minority warned that a seed of constitutional danger may have been sown. The many disadvantaged people in this country live in dire circumstances and the majority decision may open the door for claims against the state for the necessary means derived from constitutional rights, such as the right to life and dignity, coupled with the obligations cast upon the state in section 7(2) of the Constitution, without the available resources limitation.

This would place policy decisions in the hands of the courts, which in a democratic state should be decided by the Legislature and the Executive.

With this last admonition in place, it should duly be noted that the optimistic approach of Madlanga J carries severe risks. First, the timeframe of court proceedings and that of executive decisions varies greatly. The ESKOM reduction decision was taken in early 2020. The judgment on the *interim* interdict was delivered at the end of 2022. However, at the beginning of the proceedings before the Constitutional Court the review was still pending.

Madlanga's J prophesy that the skies will not fall if – *purely in the interim* – Eskom continues to provide electricity at above NMD levels because he saw this to be a well calculated debt collection strategy and that he would sooner have the residents of the municipalities – *purely on an interim basis* – living lives that are as near as possible to wholesome, than subject them to the current "human catastrophe", was proven incorrect. On 9 February 2023 the government declared a national state of disaster: impact of severe electricity supply constraint.[167]

Regarding the codification of judicial review and the implication constitutional principle of *trias politicas* it may be concluded the PAJA has opened a door to aggrieved parties, be it ratepayers, political opponents, politicians, office holders or management of State Owned Entities allegedly implicated in state capture and /or corruption by investigative commissions *et al*, turning to the courts to contest executive decisions on the ground of unreasonableness or irrationality.

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[166] *Id.* at para 289.

[167] https://www.gov.za/documents/disaster-management-act-declaration-national-state-disaster-impact-severe-electricity https://www.gov.za/documents/disaster-management-act-declaration-national-state-disaster-impact-severe-electricity.

Furthermore, the accepted view that ESKOM, a public company, albeit that the state is a hundred percent shareholder, is an organ of the state on the basis that the provision of electricity is a state function, raises the question in respect of other public companies, whose shares are held by pension funds, investment banks, hedge funds and private persons, but have contracted with the state to perform certain services. Are these entities also restrained from discontinuing their service in the event of non-payment? Can aggrieved citizens turn to the courts to be granted court orders instructing them to remove rubbish, pave the roads etc? This question has become all the more acute since Madlanga J interpretated[168] the decision of the Constitutional Court in *Juma Musjid*[169] to have laid down that even a private person or entity bears a negative obligation in terms of section 8(2) of the Constitution not to act in a manner that "interfere[s] with or diminish[es] the enjoyment of a right".[170]

Unterhalter AJ voiced concern that the majority judgment could be interpretated in South Africa, a country in which a large part of the population suffers appalling conditions to open the door to claims based on constitutional rights, such as the right to life and dignity. Claims for redress in respect of a variety of aspects of these rights could be linked to the obligations section 7(2) of the Constitution has placed upon the state. If, as the majority judgment proposes, the right to life or to dignity could found claims to maintain a certain level of welfare, the democratic state would be undermined as the courts would be tasked with allocating part of the public resources and deciding how the state should act.

Another major point raised by the learned judge was that the rights in question, the right to dignity, the right to life, the right to an environment that is not harmful to health or well-being and the right to basic education are not subject to progressive realisation in accordance with reasonable measures, within the state's available resources, as is the case in respect of socio-economic rights.[171] Madlanga J held that if a review was warranted, courts should not shy away from exercising their review power, as reluctance would give Eskom a licence to ride roughshod over the rights of individuals, by just threatening the fear of collapse.

Finally, the old war horse of positivism must be brought out of the stable. Section 1 (c) of the constitution contains two values: supremacy of the Constitution and the rule of law. Adherence to the rule of law has through the centuries implied legal certainty, a principle held in high value by the world of commerce, and it may be argued that the route opened by Madlanga J has the potential to seriously jeopardise legal certainty and thus the rule of law.

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[168] *ESKOM* CC at para 267.

[169] *Governing Body of the Juma Musjid Primary School v Essay N.O. (Centre for Child Law and Another as Amici Curiae)* [2011] ZACC 13; 2011 (8) BCLR 761 (CC).

[170] *Id.* at para 58.

[171] S 27. (1) Everyone has the right to have access to: (a) health care services, including reproductive health care; (b) sufficient food and water; and (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights. (3) No one may be refused emergency medical treatment.

Abstract

The Constitution of 1996 brought about drastic changes to the South African jurisdiction. Different interpretations led to the development of new paradigms and no corner of the legal landscape remained the same. A recent decision of the Constitutional Court which dealt with the perennial electricity crisis offers an opportunity to show how the Constitution is influencing legal development in various disciplines and how different paradigms interpret the constitutional imperatives.

La Costituzione del 1996 ha apportato drastici cambiamenti alla giurisdizione sudafricana. Le diverse interpretazioni giurisprudenziali hanno portato allo sviluppo di nuovi principi e nessun angolo del panorama giuridico è rimasto immodificato. Una recente decisione della Corte Costituzionale, che si è occupata della la perenne crisi dell'energia elettrica offre l'opportunità di mostrare come la Costituzione stia influenzando lo sviluppo giuridico in varie discipline e come i diversi modelli interpretativi intendano gli imperativi costituzionali.