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‘How can the rights of paying consumers to electricity be squared with the rights of Eskom to be paid?’

A research-paper submitted in partial fulfilment of the requirements for the LL.M degree in the Faculty of Law of the University of the Western Cape

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Declaration

I, Lisa Jade Wyngaard, declare that **“How can the rights of paying consumers to electricity be squared with the rights of Eskom to be paid?”** is my own work, that it has not been submitted before for any degree or examination in any other University, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Student: Lisa Jade Wyngaard

Signed:

**This thesis is dedicated to the loving memory of my grandmother Lydia
MagdelinaVoyce, fondly known as “Katie”.**

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Electricity Regulation Act 4 of 2006

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Chapter 1

Introduction

1. Problem Statement

Electricity supply can be classified into three stages namely: generation, transmission and distribution, with the functions of generation and transmission being carried out by Eskom.¹ In 2001, Eskom was converted from a statutory body into a public company having a share capital with its entire share capital held by the State.² It is a major public entity and therefore an Organ of State and albeit that Eskom is classified as a public company, it is still a State-owned Enterprise.³ Municipalities purchase electricity from Eskom in bulk in order to carry out the distribution function and manage bulk supply of electricity to end-users in terms of the Local Government: Municipal Structures Act 117 of 1998 (Structures Act).⁴ Municipalities re-sell electricity purchased from Eskom to end-users as well as provide free basic electricity to indigent consumers.⁵

The difficulty that has arisen is that some end-users are dutifully paying their municipal accounts for the provision of electricity, yet municipalities are struggling to keep up with their payments to Eskom for the bulk supply of electricity. Municipalities face financial, legal, regulatory, operational and administrative challenges all contributing to the problem of them significantly defaulting on their scheduled monthly payments to Eskom for the supply of bulk electricity.⁶ An example would be that of smaller municipalities who inevitably struggle to raise their own revenue, such as municipalities in Mpumalanga, Free State and the North West.⁷ Eskom therefore cannot be paid because the municipalities owe them a debt. This is evident from the recent judgement, *Afriforum NPC & Others v Eskom Holdings SOC Limited & Others (Afriforum)* in which it is identified that in the period of March 2016 to

¹ *Afriforum NPC & Others v Eskom Holdings SOC Limited & Others* [2017] ZAGPPHC (24 May 2017) para 8.

² S 2 Eskom Conversion Act No. 13 of 2001.

³ Schedule 2 Public Finance Management Act No. 29 of 1999.

⁴ S 84 (1)(c) (*Afriforum 24 May 2017*).

⁵ Steytler N & De Visser J *Local Government Law of South Africa* (2016) 17-10.

⁶ National Treasury (2011) 2011 *Local Government Budgets and Expenditure Review 2006/07 – 2012/13* RP103/2011 68.

⁷ Rahim N A *The requirements for, and Appropriateness of, Stopping the Equitable Share of Municipalities in terms of Section 216* (unpublished LLM Thesis, the University of the Western Cape 2016) 31.

November 2016, the total municipal debt owed to Eskom increased from R6 billion to R10.2 billion.⁸

It is important for Eskom to collect revenue owed to it or the power utility will be hampered in its ability to generate electricity.⁹ Municipalities contribute to almost 42 percent of Eskom's total sales and almost 41 percent of Eskom's revenue annually, therefore non-payment by municipalities has a significant impact on Eskom's cash flow.¹⁰

Eskom thus needs to be paid for electricity provided. One of the measures to ensure this was a section 216 intervention in terms of the Constitution of the Republic of South Africa (Constitution), which enables National Treasury (NT) to stop the transfer of funds to an organ of state. This can be done once the organ of state commits a serious or persistent material breach of measures put in place by the NT to ensure transparency and expenditure control in each sphere of government. This method was utilised in 2015 on 59 defaulting municipalities who owed Eskom money and was ineffective in securing a long-term solution.

Another measure is for Eskom to cut off supply of electricity to errant municipalities in order to effect payment; however, this would then leave paying customers and the indigent without electricity. This method therefore poses a threat to the right of end-users to electricity.

A third measure is for Eskom and end-users to circumvent the municipality in electricity distribution with Eskom distributing electricity directly to paying end-users with these end-users paying Eskom directly for electricity consumed.

A fourth and final possible measure is an intervention in terms of section 139(5) of the Constitution. This intervention places a focus on restructuring the finances of municipalities that find themselves in a serious financial crisis.

2. Research Question

The research question stemming from the above problem can be stated as follows:

⁸ *Afriforum* (5 January) para 15.

⁹ Naidoo R. 'Yes, Eskom can cut power to municipalities' 10 January 2017 available at <http://www.infrastructurene.ws/2017/01/10/yes-eskom-can-cut-power-to-municipalities/> (accessed 10 December 2017).

¹⁰ Naidoo (2017).

How can the rights of paying consumers to electricity be reconciled with the rights of Eskom to be paid? In other words, what are the legalities and practicalities of the measures used (or that may be used) to ensure that municipalities pay Eskom for electricity consumed?

- a. Is the stopping of transfers in terms of section 216 of the Constitution to those municipalities who fail to pay Eskom a constitutional and a practical solution in the long-term to stop municipalities from defaulting?
- b. Can Eskom lawfully cut the supply of electricity to those municipalities who fail to pay their accounts? If so, is this a practical solution?
- c. Can paying customers bypass municipalities and pay Eskom directly for electricity consumed? If so, is it a practical solution?
- d. If the above measures, although lawful, are not practical solutions; is a financial intervention by provinces (and the national government) in terms of section 139(5) of the Constitution a possible sustainable solution?

3. Argument

In order to prove that the rights of paying consumers to electricity should be reconciled with the rights of Eskom to be paid, the following will be argued:

Firstly, it is argued that the stopping of transfers albeit constitutional, does not provide a sustainable solution in that it is temporary in nature and does not address the financial crises municipalities face, thus making it unsustainable.

Secondly, Eskom can lawfully cut the supply of electricity to those municipalities who fail to pay their accounts, thus affecting the supply of electricity to the end-consumer. This is as a result of the fact that there is no direct relationship between Eskom and the paying consumer and Eskom has a right, which is contractual in nature, to do so. However, this solution is not practical due to it not solving the issue of paying customers having the right to receive electricity.

Thirdly, Eskom may supply electricity directly to the end-user, bypassing a municipality only once a service level agreement is in place between it and the municipality. The practicality of this method is however questioned as it brings with it various challenges such as

municipalities losing revenue and an administrative burden being placed on Eskom. Additionally, the role of municipalities in providing electricity to indigent consumers would be compromised as Eskom would have to assume this responsibility.

Lastly, it is argued that the problem of non-paying municipalities can only be sustainably addressed through a structural review and changes to municipal finances, which can best be effected by financial rescue plans following an intervention in terms of section 139(5).

4. Literature Review

There is some literature available on the topic of electricity supply in South Africa. The focus of this literature however, is centred on the monopoly of supply in electricity; generation capacity; the regulatory aspect of electricity supply in South Africa and, the intergovernmental relations regarding the matter.

Patrick Kelly wrote a working paper based on the regulatory function mentioned above.¹¹ He places a particular focus on the regulator/regulatory institution in terms of electricity supply and the success and failures thereof. Mention is made of how the processes of the regulator in relation to tariffs and the National Energy Regulator of South Africa (NERSA) in particular, are poorly established and run often at the expense of municipalities.¹² This feeds into the research conducted in this paper in terms of analysing whether the problem is rooted in management or rather mismanagement of funds, but provides no detailed analyses of the problem faced currently by Eskom and the end-user.

Lucy Baker in her paper focuses on electricity supply and generation post-apartheid quite extensively.¹³ She researches and refutes the manner in which electricity supply has been operating from pre to post-apartheid. She ultimately looks at South Africa's new renewable energy sector within the context of the country's electricity system and political economy. She therefore adds a considerable amount of academic research to the field that is the electricity system in South Africa, with mention being made of municipalities' role therein. No detail is provided, however, on the crises that arise once Eskom threatens to interrupt the supply of electricity to defaulting municipalities, which creates a gap in the literature.

¹¹ Kelly P available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2866295 2016 (accessed 13 July 2017).

¹² Kelly (2016) 17.

¹³ Baker L 'Post-apartheid electricity policy and the emergence of South Africa's renewable energy sector' (2016) *WIDER Working Paper*.

There is little to no literature around the intricacy of the relationship between Eskom, municipalities and end-users. Less so is found on the problem which arises once there is a threat of interrupted electricity supply and the effect of such decision with a focus on rights being violated.

In the book *Local Government Law in South Africa* by Nico Steytler and Jaap De Visser, Chapter 17 is dedicated to Electricity Services. The question posed in this chapter is whether there are preventative measures to be taken before a disconnection of supply becomes necessary. In answering this, a range of issues are extensively delved into based on the current legal framework with regard to the role, function and duties of municipalities relating to the generation and reticulation of electricity.¹⁴

In addition, the possible remedies from Steytler and De Visser's points of view are touched on such as National Government intervention in terms of section 216 (2) of the Constitution, which did not work when attempted in 2015. A further remedy is based on whether the cause of indebtedness is related to maladministration, corruption, mismanagement and the like, if so, the democratic dispensation allows for relief to the end-user in terms of dissolution of the Municipal Council and the election of a new one. This, however, as noted by the authors, is not an immediate relief mechanism which results in a problem.

They further note that Eskom's sustainability is dependent on collecting its dues. It is also noted that, however, fair procedure measures owed by Eskom to municipalities and, inevitably, end-users is important (as can be seen in the *Joseph v City of Johannesburg and Others*¹⁵ (*Joseph*) and *Afriforum*¹⁶ cases).

More intricately examined solutions should be explored with the aim of finding a solution to remedy the problem which exists. Although touched on by the authors above, this paper provides insight and information on the remedies available to Eskom and paying end-users when some municipalities do not pay Eskom for electricity used and therefore incur historical debt.

¹⁴ Steytler & De Visser (2016) 17-3.

¹⁵ 2010 (3) BCLR 212 (CC).

¹⁶ (*Afriforum* 24 May 2017).

5. Chapter Outline

Chapter Two explores the law regarding section 216(2) of the Constitution as well as the practice hereof. The aim hereof is to ascertain whether this is a possible solution to the problem by critically assessing the successes and failures of action in terms of this section.

Chapter Three examines the legality and practicality of the measure of cutting off electricity to errant municipalities, despite the fact that there are paying customers.

Chapter Four focuses on the legality and practicality of Eskom circumventing the municipality in provision of electricity directly to the end-user, and collecting monthly payments from the end-user.

Chapter Five explores whether a permanent solution can be offered by a section 139(5) intervention. The law and practice surrounding section 139(5) of the Constitution is taken into account as well as whether a financial recovery plan could prove to be a possible solution or not.

Finally, Chapter Six, based on the analysis brought forward thus far in the paper, establishes what the most sustainable solution/s offered to the problem are.

6. Methodology

The methodology employed in researching this paper is a desktop study based mainly on primary and secondary sources, which provide the basis for established practice and law regarding the topic. Primary sources in this instance include legislation, court cases, rules and regulations and government documents/reports. Secondary sources used include academic articles/journals, theses, newspaper articles as well as internet news articles.

Chapter 2

Stopping of Financial Transfers to Municipalities by the National Treasury to Enforce Payments to Eskom

1. Introduction

Although some end-users pay their municipal electricity accounts, municipalities default on their payments to Eskom. This is evident based on the amount of money owed to Eskom by municipalities, totalling an estimate of R10.2 billion by November 2016.¹⁷ The bulk of Eskom debt in 2017 is held by municipalities in the Free State, Mpumalanga and North West, owing Eskom nearly R7.5 billion between them.¹⁸

Section 216(2) of the Constitution provides a prime facie solution to the problem, which is temporary in nature.¹⁹ This section gives power to the NT to ensure that the different spheres of government are kept in line with the prescribed norms and standards of sound financial management, including the payment of creditors, by temporarily stopping the transfer of equitable shares.²⁰ Eskom is not paid for services provided, which affects their sustainability. Eskom therefore needs to enforce payment from municipalities and the NT is allowed to assist Eskom in forcing such payment out of municipalities by using the ‘big stick’ that is section 216 of the Constitution.

The application of this section has, however, proven to be unsuccessful in coercing municipalities to pay their debts owed to creditors including Eskom. In 2015, the NT invoked section 216(2) to coerce 59 municipalities to pay debt owed to Eskom and Water Boards, but to no avail as these municipalities reneged on payment agreements shortly after they were concluded with Eskom and the Water Boards.²¹

¹⁷ *Afriforum* (24 May) para 15.

¹⁸ Magubane K ‘Free State Councils are top Eskom debtors’ *Business Live* 2 August 2017 available at <https://www.businesslive.co.za/bd/national/2017-08-02-free-state-councils-are-top-eskom-debtors/> (accessed 2 September 2017).

¹⁹ Steytler & De Visser (2016) 15-56.

²⁰ Steytler & De Visser (2016) 15-55.

²¹ National Treasury Media Statement released 31 March 2015 available at http://www.treasury.gov.za/comm_media/press/2015/20150331%2520-%2520National%2520Treasury%2520Withholds%2520Transfer%2520Transger%2520of%2520Funds%2520to%2520Municipalities.pdf (accessed 1 November 2017).

Section 216(2) is therefore explored in this chapter as a possible solution to the problem of the rights of paying customers being affected by the threat of termination of electricity supply by Eskom to defaulting municipalities. The requirements of implementing an intervention in terms of the section is to be assessed by looking at what the substantive and procedural requirements are, relevant to whether the section can be invoked once a municipality falls into arrears with creditors. The implementation and invocation of the section by the NT is also explored, with a focus on the events which occurred in 2015. It is then assessed whether, based on previous invocations of the section, it can act as a solution to the current problem faced which is a violation of rights of paying end-users in the midst of Eskom threatening to disrupt electricity supply to defaulting municipalities.

2. Section 216(2) of the Constitution – the Legal Requirements

Section 216(2) of the Constitution provides that ‘[t]he National Treasury must enforce compliance with the measures established in terms of subsection (1), and may stop the transfer of funds to an organ of state if that organ of state commits a serious or persistent material breach of those measures’. Section 216(1) of the Constitution provides that national legislation must establish a NT and prescribe measures to ensure both transparency and expenditure control in each sphere of government. These measures are prescribed as a generally recognised accounting practice, uniform expenditure classifications and uniform treasury norms and standards.²² Therefore, section 216(2) enforces section 216(1) of the Constitution.

Section 216(2) of the Constitution allows for the stopping of transfers of all funds from national government to other spheres of government, including their equitable share allocations.²³ The invocation of section 216(2) of the Constitution is dependent on NT making a finding that a sphere of government has not complied with section 216(1). Particularly, it should be found that municipalities are not complying with measures put in place to ensure both transparency and expenditure control in each sphere of government in terms of section 216(1).

²² S 216(1)(a)-(c) Constitution.

²³ Khumalo B, Dawood G & Mahabir J ‘South Africa’s Intergovernmental Fiscal Relations System’ in Steytler N & Ghai YP (eds) *Kenya-South Africa Dialogue on Devolution* (2015) 222.

In aid of section 216(2) are provisions contained in the Municipal Finance Management Act (MFMA). These provisions regulate how the NT may stop the transfer of funds of equitable shares of revenue raised nationally and any other intergovernmental transfer or conditional grants.²⁴ Additionally, section 38(1) of the MFMA places emphasis on the fact that the breach of section 216(1) must be a serious or persistent material breach. This constitutes a substantive requirement to be met before the NT stops the transfer of funds due to a municipality in terms of section 216(2).

2.1. Does Non-Payment of Municipal Debt Fall within the ambit of Section 216?

The MFMA places a duty on the accounting officer of a municipality to take all reasonable steps to ensure that all money owed by the municipality must be paid within 30 days of receiving the relevant invoice or statement.²⁵ This calls for an analysis of section 216(1)(c) as it is key in determining whether the non-payment of creditors, 30 days after invoices were sent to municipalities for payment, falls within the ambit on this section. Section 216(1)(c) was the ground upon which the NT decided to invoke section 216(2) against the 59 defaulting municipalities in 2015.²⁶

As contained in section 216(1)(c) of the Constitution, a ‘norm’ is defined as something that ought to happen in a manner provided while a ‘standard’ is defined as a generally recognised established practice.²⁷ The sources which make up NT norms and standards are contained in the NT MFMA Circular No. 66 Municipal Budget Circular for the 2013/14 MTREF.²⁸ NT’s norms and standards are broad and include circulars, regulations and guidelines.²⁹ The MFMA contains binding rules which also make up these norms and standards enforced by the NT.³⁰ Rahim notes that the MFMA forms part of the ‘uniform treasury norms and standards’ referred to in section 216(1)(c) as it is a listed source thereof.³¹

Section 65(2)(e) of the MFMA expects the municipal manager to take ‘reasonable’ steps only in ensuring that municipalities pay their accounts within 30 days. This provision therefore

²⁴ S 38(1) Local Government: Municipal Financial Management Act 56 of 2003 (MFMA).

²⁵ S 65(2)(e) and S 99(2)(b) MFMA.

²⁶ Rahim (2016) 16.

²⁷ *Colins Dictionary of Law*, 2ed (2001) & *Black’s Law Dictionary*, 10 ed (2009).

²⁸ Rahim (2016) 17.

²⁹ Rahim (2016) 17

³⁰ Rahim (2016) 17.

³¹ Rahim (2016) 18.

forms part of these uniform treasury norms and standards in place for the NT to enforce compliance with as contained in section 216(1)(c) of the Constitution.³²

It is thus concluded by Rahim that the provision on ‘payment to creditors within 30 days’ as contained in the MFMA is indeed a norm and standard referred to in section 216.³³ There is therefore a breach of section 216(1)(c) of the Constitution if no reasonable steps have been taken to ensure payment to creditors within 30 days.³⁴ The errant municipalities coming under threat of electricity supply interruptions by Eskom due to non-payment would therefore be susceptible to such breach as payment to Eskom was not ensured within 30 days after receiving the relevant invoice or statement.

2.2. Procedural Requirements

There are various procedural safeguards put in place by the MFMA which are mandatory. In relation to fair procedure, the NT has to provide an opportunity for the municipality to submit written representations about the proposed stoppage of funds due to them.³⁵ Further, the Cabinet member responsible for the national department making a conditional grant transfer to a municipality which is affected must be consulted.³⁶ This procedural requirement is not applicable to the equitable share due to local government as the NT makes this transfer.³⁷

The Member of the Executive Council (MEC) for Local Government in the province must also be informed before the decision is taken.³⁸ Additionally, where the stopping of funds affects the ability of the municipality to provide basic municipal services in the municipality, the provincial executive must monitor the continuation of those services.³⁹ Section 139 of the Constitution applies should the municipality fail to comply with its obligations with regard to the provision of basic municipal services meaning that the provincial executive may then intervene.

The MFMA prescribes various factors to be taken into account when the NT considers stopping the transfer of funds to a municipality. These include the municipality’s record of compliance with the provisions contained in the MFMA, including those related to annual

³² Rahim (2016) 18.

³³ Rahim (2016) 18.

³⁴ Rahim (2016) 18.

³⁵ S 38(2)(a) MFMA

³⁶ S 38(2)(c) MFMA.

³⁷ Rahim (2016) 24.

³⁸ S 38(2)(b) MFMA.

³⁹ S 38(3) MFMA.

financial statements and budgets.⁴⁰ A district and local municipality's cooperation with other municipalities on fiscal financial matters should also be taken into account.⁴¹

2.3. Duration of Stoppage of Equitable Share Allocations to Municipalities

The decision to stop the transfer made by the Treasury will lapse retrospectively if the relevant approval from Parliament is not obtained.⁴² The approval by Parliament should follow a process substantially the same as that established in terms of section 75 of the Constitution and it must be completed within 30 days of the decision by the Treasury to stop the transfer of funds.⁴³ The correctly approved decision to stop the transfer will lapse after the expiry of 120 days unless it is renewed by Parliament.⁴⁴

Parliament may renew the decision made to stop the transfer of an equitable share for 120 days at a time, following the same process.⁴⁵ For this purpose, Parliament may request a report on the matter from the Auditor-General and must allow for representations from the affected municipality.⁴⁶

3. The Practice of Implementing Section 216(2) of the Constitution

The NT stopped financial transfers to municipalities in two instances which are explored below in a bid to illustrate the circumstances under which a municipality should ideally find itself in, in order for the section to have its desired effect.

⁴⁰ S 38(4)(a)(i) and (ii) MFMA.

⁴¹ S 38(4)(b) MFMA.

⁴² S 39(1)(b) MFMA.

⁴³ S 39(1)(b) MFMA.

⁴⁴ S 39(1)(a) MFMA.

⁴⁵ S 39(2) MFMA.

⁴⁶ S 39(3) MFMA.

3.1. The Stopping of Transfers to Nine Municipalities in 2012/2013

The NT invoked section 216(2) against nine municipalities between December 2012 and January 2013 for infringing section 126 of the MFMA.⁴⁷ Section 126 deals with the submission and auditing of annual financial statements. The nine municipalities failed to comply with this section. The South African Local Government Association (SALGA) was of the view that this particular intervention was necessary and effective in solving the problem of preparing the necessary reports. The sanction prompted the affected municipalities to seek help from SALGA which assisted them in producing ‘tangible action plans’ to avoid any further contraventions of section 126 of the MFMA and monitoring the implementation thereof.⁴⁸

It is evident that section 216(2) provides a solution to a situation where a municipality finds itself having to comply with a provision which involves them doing or producing something tangible or easily rectifiable.

3.2. The Stopping of Transfers to 59 Municipalities in 2015

NT also used section 216 to enforce the payment of Eskom accounts. On 6 March 2015 NT issued a notice to 59 municipalities informing them that if they did not pay their arrears owed to Eskom, their equitable share would be withheld.⁴⁹ The affected municipalities did not comply with the demands of the NT with the result that on 20 March 2015, the NT withheld the equitable share of 59 municipalities in terms of section 216 of the Constitution due to them not paying debts owed to two major creditors, namely Eskom and the water boards.⁵⁰ NT held that these municipalities’ equitable shares would be released once they complied

⁴⁷ SALGA ‘National Treasury stops transfers to nine municipalities’ available at <https://www.salga.org.za/Documents/Media%20Room/Media%20Statements%201/Media-Release.pdf> (accessed 3 October 2017).

⁴⁸ SALGA ‘National Treasury stops transfers to nine municipalities’ available at <https://www.salga.org.za/Documents/Media%20Room/Media%20Statements%201/Media-Release.pdf> (accessed 3 October 2017).

⁴⁹ National Treasury Media Statement released 27 November 2017 available at [http://www.treasury.gov.za/comm_media/press/2015/2015112701-%20Press%20Statement%20Decision%20not%20to%20invoke%20Section%20216\(2\)%20to%20Municipalities.pdf](http://www.treasury.gov.za/comm_media/press/2015/2015112701-%20Press%20Statement%20Decision%20not%20to%20invoke%20Section%20216(2)%20to%20Municipalities.pdf) (accessed 24 July 2018).

⁵⁰ National Treasury Media Statement released 31 March 2015 available at http://www.treasury.gov.za/comm_media/press/2015/20150331%2520-%2520National%2520Treasury%2520Withholds%2520Transfer%2520Transger%2520of%2520Funds%2520to%2520Municipalities.pdf (accessed 1 November 2017).

with all the requirements as communicated to them, of which a formal repayment arrangement between the two parties was required.⁵¹

The NT managed to get 56 out of the 59 municipalities to comply with their demand of entering into payment agreements with Eskom and subsequently released their equitable share, with three municipalities not entering into payment agreements. However, 27 of them failed to honour their payment agreements/obligations with Eskom a few months thereafter.⁵² The Treasury again found itself threatening to withhold the equitable share transfers of the 27 defaulting municipalities in terms of section 216(2) to ensure compliance.⁵³

It is noted by Rahim that while these section 216(2) financial interventions seemed effective on the face of it, they were actually only effective in ensuring that the defaulting municipalities entered into signed payment agreements with creditors.⁵⁴ It did not provide a solution to the problem of non-payment by municipalities to their creditors. The 27 reneging municipalities did not make good on their commitments in terms of their signed payment agreements with Eskom at all, which prompts the conclusion that they only signed the payment agreements in order to have their equitable share released.⁵⁵

A section 216(2) intervention fails to deal with the underlying issues, which includes, but is not limited to, the financial positions the affected municipalities found themselves in and the inability of some of these municipalities to collect revenue owed to them.⁵⁶ This is illustrated by the statement of Treasury spokesperson Yolisa Tyantsi that ‘there is a relatively large correlation between the list of 27 municipalities [who breached repayment plans back in 2015] and those on Eskom’s [current] list’ (see introduction).⁵⁷

For example, in Makana Local Municipality it is alleged that the funds collected from paying customers of electricity is utilised to pay salaries of municipal workers to the amount of R13

⁵¹ National Treasury Media Statement released 31 March 2015 available at http://www.treasury.gov.za/comm_media/press/2015/20150331%2520-%2520National%2520Treasury%2520Withholds%2520Transfer%2520Transger%2520of%2520Funds%2520to%2520Municipalities.pdf (accessed 1 November 2017).

⁵² Maake M ‘Eskom Defaulters Not New to Debt’ *Business Live* 16 January 2017 available at <https://www.businesslive.co.za/bd/companies/energy/2017-01-16-eskom-defaulters-not-new-to-debt/> (accessed 29 August 2017).

⁵³ National Treasury Media Statement released 31 March 2015 available at http://www.treasury.gov.za/comm_media/press/2015/20150331%2520-%2520National%2520Treasury%2520Withholds%2520Transfer%2520Transger%2520of%2520Funds%2520to%2520Municipalities.pdf (accessed 1 November 2017).

⁵⁴ Rahim (2016) 44.

⁵⁵ Rahim (2016) 44.

⁵⁶ Rahim (2016) 45.

⁵⁷ Maake (2017).

million monthly instead of paying Eskom its dues.⁵⁸ Further, SALGA also alleges that there are systematic and structural challenges underlying the debt owed to Eskom by municipalities.⁵⁹ SALGA further states that additional underlying issues such as deep-seated organisational and financial problems need to be taken care of before any sustainable solutions to service delivery, including electricity, can be provided.⁶⁰

4. The Viability of Section 216(2) Providing a Permanent Solution

The problem of imminent threats of electricity supply termination to delinquent municipalities is one which calls for a fast, but also long term solution. This is so especially considering the impact an electricity cut off by Eskom will have on the right of those end-users who pay their municipal electricity accounts to such electricity. The impact of using section 216(2) as a method of protecting the rights of paying customers and other customers who are entitled to electricity could be an option. This is so in that should section 216(2) have the necessary impact in forcing municipalities to pay their debt owed to Eskom, the threat of electricity supply interruptions would cease. Paying customers would therefore receive the electricity supply paid for. This intervention, if utilised effectively, could force municipalities to direct income received from paying customers into being used for its proper purpose which is paying Eskom.

However, these transfers play a pivotal role in ensuring that municipalities are able to provide poor households with basic services (such as water, electricity, refuse removal and sanitation) and supports municipalities with limited own resources available to perform mandatory functions assigned to them.⁶¹ According to SALGA, the problem has been that municipalities' revenue collection and financial management systems are not aligned with the 'Eskom 15 day's credit control measure', which translates into high interests being accrued.⁶²

⁵⁸ MacLennan S 'Electricity cut-off a last resort – Eskom' *Grocott's Mail* 24 October 2017 available at <http://www.grocotts.co.za/2017/10/24/electricity-cut-off-a-last-resort-eskom/> (accessed 20 October 2017).

⁵⁹ SALGA News 'Inter – ministerial task team meeting to discuss electricity reticulation and supply' *SALGA News* 18 May 2017 available at <http://salga.org.za/Salga%20News93.html> (accessed 4 September 2017).

⁶⁰ Heese K & Allan K 'Eskom debt needs switched-on action' *SALGA News* 15 February 2017 available at <https://www.businesslive.co.za/bd/opinion/2017-02-15-eskom-debt-needs-switched-on-action/> (accessed 4 September 2017).

⁶¹ Oosthuizen M & Thornhill C 'The grant system of financing the South African local government sphere: Can sustainable local government be promoted?' (2017) *Local Economy* 32(5) 437.

⁶² Rahim (2016) 31.

Municipalities face financial, legal, regulatory, operational and administrative challenges all contributing to the problem of them significantly defaulting on their scheduled monthly payments to Eskom for the supply of bulk electricity. An example would be that of smaller municipalities who inevitably struggle to raise their own revenue such as municipalities in Mpumalanga, Free State and the North West which accounted for 82 percent of total arrears owed to Eskom.⁶³

It can be seen that the effectiveness of section 216 as a control measure over financial good governance is dependent on the situation in which the affected sphere of government finds itself in. The method does, however, introduce a challenge to municipalities finding itself reliant on the equitable share to remain financially viable and sustain delivery of free basic services to the indigent in their area.⁶⁴ For example, SALGA was advised that upon NT withholding the equitable share from the affected municipalities in 2015, these municipalities have since battled to pay staff salaries, other creditors and to render general services.⁶⁵ The stopping of these transfers could, therefore, entail a situation in which municipalities that are smaller in size and population and/or mired in debt become and remain financially unviable in that they would have to ‘borrow from Peter to pay Paul’.

Section 216(2) is utilised by the NT to send out a strong message that maladministration, corruption, fraud and financial mismanagement will not be tolerated or condoned at the expense of transparency and accountability.⁶⁶ This was a statement made by the Treasury itself when it invoked section 216(2) against Nala Local Municipality for its persistent breach of financial management prescripts and alleged mismanagement of public funds in 2012. Nala Local Municipality has persistently failed to comply with the Municipal Budget and Reporting Regulations with various allegations, such as, corruption, maladministration and flouting of procurement processes against it. The NT held that although it was aware of the fact that the invocation of section 216(2) would make it difficult for the municipality to meet its financial obligations, including the payment of salaries and allowances for staff and councillors, it was something that had to be done to curb financial mismanagement.⁶⁷

⁶³ Rahim (2016) 31.

⁶⁴ SALGA presentation ‘Withholding of equitable share to municipalities’ *Portfolio Committee meeting on Cooperative Governance and Traditional Affairs*, 12 May 2015.

⁶⁵ Rahim (2016) 46.

⁶⁶ National Treasury Media Statement released 12 September 2012 available at <https://www.gov.za/national-treasury-stop-further-transfers-nala-local-municipality-free-state> (accessed 1 November 2017).

⁶⁷ National Treasury Media Statement (2012).

The link therefore, is that although a section 216(2) intervention can be effective in engaging defaulting municipalities to comply with provisions focusing on issues such as reporting regulations, it is an ineffective tool in addressing matters such as deep-seated structural issues within a municipality. Municipalities that need to comply with provisions which require them to direct additional funds into paying creditors, for example, that are not readily available to them, will not benefit from a section 216(2) intervention.

4.1. The Consequences of Stopping Transfers to Municipalities – Reasons why Section 216 is not a Viable Option

The Constitution, in sections 152 and 153, provides that local government be tasked with a duty to ensure that they organise their structures, finances and operations in such a way that they are able to give priority to the basic needs of the community. The objectives of municipalities include the provision of services to communities in a sustainable manner and the promotion of social and economic development and a safe and healthy development.⁶⁸ Additionally and more importantly, municipalities should strive to achieve these objectives within their financial and administrative capacity.⁶⁹

Sustainability is described as ‘uninterrupted, seamless provision of quality services to the people’ as well as service that is ‘forever improving’, eventually leading to independence.⁷⁰ It is also stated that one of the most important aspects of sustainability is financial self-sufficiency which entails being able to meet the demands of society by ‘means of funds generated from own resources’.⁷¹

The local government equitable share is an unconditional transfer that supplements the revenue that municipalities can raise themselves through property rates and service charges. It is essential in subsidising municipalities that would not have otherwise had a great potential to cover costs such as delivering free basic services and subsidising costs of administration and other core services from their own revenues.

There is a wide variant (between 10 and 90 percent) among municipalities in raising own revenue which is attributable to demographic factors.⁷² An example would be the City of

⁶⁸ Oosthuizen & Thornhill (2017) 435.

⁶⁹ Oosthuizen & Thornhill (2017) 435.

⁷⁰ Oosthuizen & Thornhill (2017) 435.

⁷¹ Oosthuizen & Thornhill (2017) 435.

⁷² Khumalo, Dawood & Mahabir (2015) 209.

Cape Town, which is a metropolitan municipality with a big property tax base in comparison to a rural municipality with very small property tax bases where the prospects for service charges are also limited. In place to remedy the fiscal imbalance created by a mismatch between revenue-raising powers are fiscal transfers, which include equitable shares.⁷³

4.1.1. Cash Flow Problems Caused by a Section 216(2) Intervention

Municipal performance does not meet the expected standards in that although basic service delivery has extended to a larger amount of households, the sustainability thereof is threatened by neglect of routine maintenance and service delivery backlogs.⁷⁴ Other serious challenges for municipalities include the lack of municipal capacity to manage its resources, lack of transparency and accountability, weak leadership and poor financial management.⁷⁵ The likelihood of these challenges being addressed or even improving has proven to be extremely low since 60 percent of municipalities are in ‘financial distress’.⁷⁶ Furthermore, research has indicated that the worst performing municipalities are in the Free State Province and North West Province where 25 and 26 municipalities respectively face massive cash shortfalls and are ‘probably commercially insolvent’.⁷⁷ It is therefore evident that these municipalities do not have an abundance of cash-flow in the first place to address service delivery shortfalls and debt owed to creditors.

Further, of the 59 municipalities, there were a handful that received an equitable share of R129 million while their creditor list equates to R550 million.⁷⁸ This provides further evidence of the fact that NT stopping the transfer of equitable shares in terms of section 216(2) would not be suitable in that NT would only be depriving municipalities of more money, which they already do not have.

Among the municipalities whose equitable shares had been withheld in 2015, were ones that were also among the most reliant on equitable share transfers to ensure that they were able to

⁷³ National Treasury ‘Chapter 7 – Provincial and Local Government’ available at www.treasury.gov.za/documents/national%20budget/2014/review/chpater%2017.pdf (accessed 2 March 2017) 94.

⁷⁴ Oosthuizen & Thornhill (2017) 455.

⁷⁵ Oosthuizen & Thornhill (2017) 455.

⁷⁶ Oosthuizen & Thornhill (2017) 455.

⁷⁷ Oosthuizen & Thornhill (2017) 456.

⁷⁸ PMG Committee Meeting ‘Withholding equitable share from municipalities: input by Department of Cooperative Governance; National Treasury & SALGA’ 12 May 2015 available at <https://pmg.org.za/commitee-meeting/20829> (accessed 21 November 2017).

fulfil their obligations. The municipalities currently facing the threat of termination/disruption of electricity by Eskom are also among those reliant on the equitable share transfers as well as the livelihood of their big production companies (which too could be immensely affected by breaks in transmission of services required). The stopping of transfers therefore starts to become even less likely in being an effective tool and solution to municipalities paying Eskom its dues.

4.1.2. Section 216(2) is only a Temporary Incentive

The above reliance creates a situation where, if the transfers are stopped, these municipalities face temporary cash flow problems. There is no flow of money into municipalities that cannot and do not collect own revenue, or that collect own-revenue but it is simply not sufficient to service sustainability of the municipality. There is then also no supplementary cash flow via intergovernmental transfers for a possible period of four months.

A case study concluded on Ventersdorp Local Municipality indicates that the use of equitable share transfers to pay for bulk supply of electricity from Eskom is concerning as it is meant to supplement service delivery in poor households.⁷⁹ Furthermore, once the equitable share was withheld from the municipality, available monies were redirected into paying the salaries of municipal staff until the equitable share was released four months later.⁸⁰ Not only does the stopping of transfers create cash flow problems in a municipality, it creates an even bigger backlog in the payment of creditors by municipalities.

The stopping of transfers to municipalities therefore does not contribute to solving the problem of municipal debt to Eskom being serviced, the threats of electricity supply interruption by Eskom ceasing, and the prevention of a violation of the rights of paying consumers.

5. Conclusion

The NT can use section 216 of the Constitution to try to enforce payment of electricity accounts by municipalities to Eskom, but cannot provide a sustainable solution to the problem of this intervention due to various consequences thereof. The temporary nature of a

⁷⁹ Rahim (2016) 47.

⁸⁰ Rahim (2016) 47.

section 216(2) intervention is not conducive to providing long-term solutions to municipalities not being able to pay their creditors due to underlying factors. For the success to be a reality there has to be a change in financial behaviour of the affected municipality.

It was seen that the stopping of transfers to the 59 municipalities in 2015 was unsuccessful, however, the stopping of transfers to nine municipalities in 2012/2013 was successful. The solution should be suitable to the problem of having historical debt as well as being unable to pay creditors due to little to no revenue available to do so. This 'solution' proved unsuccessful in 2015 because it did not address the underlying problem of a majority of the affected municipalities not being able to collect own revenue. Furthermore, these municipalities seemed to have only complied with the demands of the Treasury to sign payment agreements with Eskom in order to have their transfers released to them, which defeats the purpose. It further highlights the coercive nature of section 216(2), which may prove to be detrimental.

The second incident which occurred in 2012/2013 was successful in its task but, for a different predicament. The situation in this case entailed the nine municipalities not complying with section 126 of the MFMA as they failed to submit and audit annual financial statements. Section 216(2) was invoked and the Treasury was successful in that the municipalities sought help from SALGA to conclude tangible action plans to avoid further contraventions.

The success of section 216(2) as an intervention method is highly dependent on the situation seeking to be remedied. It is proven not to be successful in remedying a situation where municipalities find themselves severely indebted, unable to collect own revenue due to lack of resources to do so and/or lack of capacity. The intervention cannot provide a solution to municipalities that are poor and/or rural in nature, as it does not provide them with the extra cash flow needed to resolve financial crises. It is, however, successful in remedying situations where municipalities breach specific financial management requirements such as the submission of financial management reports. An example would be Nala Local Municipality in which section 216(2) was invoked on the basis that they failed to comply with the Municipal Budget and Reporting Regulations.

Further, section 216(2) is effective in holding municipalities to account by the NT and ensuring matters such as corruption, fraud, maladministration and financial management are kept at bay, but it cannot be effective where the issues have reached a point where there are

underlying problems that this type of intervention simply cannot address. These underlying issues are challenges such as lack of municipal capacity to manage its resources, lack of transparency and accountability, weak leadership and poor financial management.

A further point on the failure of section 216(2) as a solution in the current situation, as in 2015, is the consequence of stopping equitable shares to rural municipalities (which constitutes the majority of the delinquent municipalities currently and in 2015). These municipalities are then unable to provide basic services due to there being no funds available to fulfil their mandates. They then face further temporary cash flow problems where it becomes a situation of having to 'borrow from Peter to pay Paul'. There are no funds available to provide sustainable basic services or pay staff due to these municipalities being inefficient and ineffective in collecting own revenue. Stopping of transfers in terms of section 216(2) aggravates this circumstance in that then there is no money flowing into the municipality to provide for sustainability.

It is therefore an ineffective method in providing a solution to the problem of municipalities failing to pay their creditors, especially where there are underlying structural and financial issues. This method is particularly ineffective where there are no funds freely available to the municipality to begin with. This can be seen in that the defaulting municipalities are the same ones which currently find themselves in arrears with Eskom.

The current problem of threats by Eskom to disrupt the supply of electricity to defaulting municipalities would not be solved by this section. This is so because it was invoked in 2015 to address the same issue of defaulted payments to creditors and did not succeed in its task.

Chapter 3

Interrupting Electricity Supply to Errant Municipalities

1. Introduction

The end-user dutifully pays his/her municipal electricity account while Eskom has resorted to threats to intermittently interrupt the supply of electricity to defaulting municipalities at scheduled times as a debt collection measure.⁸¹ This begs the question whether Eskom is legally entitled to do so, given that it might violate the rights of the consumer.

Eskom implemented power supply interruptions in November 2017 in Mpumalanga as municipalities therein were in a deficit of more than R400 million to Eskom.⁸² These interruptions were challenged by the Chambers of Commerce and Tourism in Sabie, Lydenburg and Graskop who approached the Mpumalanga High Court to intervene in Eskom's interruptions, but the case was dismissed.⁸³ This does not come as a surprise considering that in May 2017 the High Court in *Afriforum* had ruled that Eskom is entitled, by virtue of right, to interrupt electricity supply as a debt collection measure. These Chambers brought compelling arguments to the fore, however, in illustrating that these supply interruptions bring with it 'catastrophic' effects for the entire municipality and violations of rights of 'innocent' end-users.⁸⁴ They further argued that these power supply interruptions infringe on multiple rights including 'the right to dignity, the right to healthcare services, and the right to sufficient water'.⁸⁵

The Constitution, in sections 152 and 153, provides that local government be tasked with a duty to ensure that they organise their structures, finances and operations in such a way that they are able to give priority to the basic needs of the community. This, according to Judge

⁸¹ *Afriforum* (24 May) para 31.

⁸² Mkhonza T. 'Mpumalanga municipality owes Eskom R400m' 7 November 2017 available at <https://www.iol.co.za/business-report/companies/mpumalanga-municipality-owes-eskom-r400m-11890390> (accessed 10 November 2017).

⁸³ Mkhonza (2017).

⁸⁴ Mkhonza (2017).

⁸⁵ Mkhonza (2017).

Murphy in the *Afriforum* case, includes electricity.⁸⁶ This, however, alludes to a problem which could arise once the supply of electricity is threatened due to non-payment of accounts.

This chapter examines the right of Eskom to interrupt electricity supply as a debt collection measure. It does so by examining the legality of interruptions, the relationship between Eskom and paying customers in terms of Eskom's right to interrupt supply, the right of Eskom to interrupt supply as a debt collection measure, the impact of interruptions on willing payers, and the practicality of termination as a long-term solution.

2. Legality of Interruptions

Section 8 of the Electricity Regulation Act (ERA) states that the functions of generation, transmission and distribution can only be carried out by a person who is granted a licence issued by the Regulator. It has been established in Chapter One of this paper that the functions of generation and transmission are carried out by Eskom, which is licensed to do so. Section 15 of the ERA places conditions on a licence granted with subsection (1)(a) thereof stating that the licence 'governs relations between a licensee and/or its end-users'. The licence in this case therefore acts as a binding contract. Section 22(1) of the ERA states that a licence issued in terms of the Act empowers and obliges the licensee to exercise the powers and perform the duties set out in such licence and the Act.

Section 21 of the ERA sets out the powers and duties of licensees vis-a-vis their customers. The relevant subsection dealing with the reduction or termination of supply reads:

- “(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.”

The Court in *Afriforum* notes that section 21(5) of the ERA entitles Eskom as a licensee to reduce or terminate power to a customer, such as a municipality, if that customer contravenes

⁸⁶ *Afriforum NPC & Others v Eskom Holdings SOC Limited & Others* (99984/2015) [2017] ZAGPPHC 63 (5 January 2017) 2 (*Afriforum – 5 January Judgment*).

payment conditions.⁸⁷ This provision in the ERA is framed in the negative in that Eskom as a licensee is not permitted by its licence to reduce or terminate supply, with the breach of payment conditions by a customer being an exception thereto. This feeds into the notion that the licence of supply granted to Eskom acts as a contract between it and the end-user. This ‘contract’ has a ‘clause’, which prescribes when Eskom may reduce or terminate the supply of electricity to a customer. Eskom may not decide whether it has a valid claim to terminate the supply of electricity out of its own accord, it may only terminate the supply once one of the three conditions in section 21 are met.⁸⁸

It is evident that in terms of customers breaching payment conditions acting as an exception to the provision, the ERA is clear in that a licensee, in terms of such licence, is entitled to payment for services provided. The problem then arises when municipalities do not pay their accounts with Eskom and the end-user who has been dutifully paying their municipal electrical bill finds him/herself without electricity due to termination in supply.

The contractual nature is further regulated by electricity supply agreements (ESAs) which set out the terms on which Eskom supplies electricity to municipalities.⁸⁹ In terms of these ESAs municipalities are customers of Eskom and the parties who purchase the electricity from municipalities are termed end-users.⁹⁰ Eskom cutting off electricity supply in order to expedite payment is therefore legal.

2.1. The Relationship between Paying Customers and Eskom

Eskom does not stand in the same constitutional or public law relationship with end-users as a municipality, however, the absence of such relationship does not preclude other public law relations between Eskom and end-users.⁹¹ Because of the public law relationship that exists between end-users and municipalities as explained above, residents have a public law right. This right is protected by the Promotion of Access to Justice Act (PAJA)⁹² which provides that “[a]dministrative action which materially and adversely affects the rights or legitimate expectation of any person must be procedurally fair”.⁹³

⁸⁷ *Afriforum* (5 January) 7.

⁸⁸ *Afriforum* (24 May) para 147.

⁸⁹ *Afriforum* (24 May) para 11.

⁹⁰ *Afriforum* (24 May) para 11.

⁹¹ Steytler & De Visser (2016) 17-20.

⁹² Act 3 of 2000.

⁹³ S 3(1).PAJA

Municipalities, in terms of its public law relationship with end-users, owe a duty to end-users to provide them with basic services, which includes electricity. Eskom exercises a public power in terms of the ERA by supplying bulk electricity to municipalities.⁹⁴ A right-duty relationship exists between end-users and municipalities; this would be infringed by Eskom's action to terminate the supply of electricity to the municipality.⁹⁵ The decision by Eskom to cut off the supply of electricity to a municipality thus affects the public law rights of residents and therefore fair procedure in terms of PAJA is owed to them.⁹⁶

Residents are thus afforded procedurally fair administrative action in the form of being given adequate notice (which would amount to pre-termination notice in this case), opportunity to make representations and adequate notice of the right to request reasons, amongst others.⁹⁷ In *Ngwathe Local Municipality v Eskom and Others*⁹⁸, the Court held that as much as Eskom is entitled to disconnect supply of electricity to delinquent municipalities, they are also tasked with the responsibility of granting electricity-consumers certain procedural protections.⁹⁹ These included notices of the intention to discontinue electricity supply. The first notice had to be given to the municipality and circulated in a newspaper in the municipality at least four weeks prior to the disconnection of supply.¹⁰⁰ A final notice of intention to discontinue supply should then be given by Eskom to municipalities, as well as circulated in newspapers, at least 14 days before the discontinuation is scheduled to take place.¹⁰¹

2.2. The Right of Eskom to Terminate Power Supply as a Debt Collection Measure

In *Afriforum* the question before the Court was whether Eskom's decision to implement scheduled interruptions of the supply of electricity to three municipalities: Madibeng, Lekwa and Kamiesberg as a debt collection measure was constitutional, lawful and reasonable.¹⁰² The applicants in *Afriforum* argued that the termination of supply of electricity by Eskom in terms of section 21(5) of the ERA is unconstitutional in that it violates and places significant

⁹⁴ Steytler & De Visser (2016) 17-20.

⁹⁵ Steytler & De Visser (2016) 17-20.

⁹⁶ Steytler & De Visser (2016) 17-20.

⁹⁷ S 3(2)(b)(1)(i)-(v) PAJA.

⁹⁸ *Ngwathe Local Municipality v Eskom Holdings SoC Ltd and Others* (44252014) [2015] ZAFSHC 104 (*Ngwathe*).

⁹⁹ Steytler & De Visser (2016) 17-20.

¹⁰⁰ *Ngwathe* para 46.

¹⁰¹ *Ngwathe* para 46.

¹⁰² *Afriforum* (24 May) para 4.

constraint on the rights and duties of municipalities and residents, to which the Court agreed.¹⁰³

They contended that a reading down of the section would relieve the above by the insertion of judicial oversight as a requirement of the section.¹⁰⁴ Judicial oversight in this case would take the form of pre-authorisation by the courts before section 21(5) can be invoked by Eskom. The Court, however, disagreed with this contention and held that the temporary termination or reduction of supply of electricity by Eskom in terms of the section is more ‘akin to withholding contractual performance in accordance with the principle of reciprocity’.¹⁰⁵ Having said that, the Court was also mindful of overstating that fact, given Eskom’s public law duties. Judge Murphy ruled in favour of Eskom. In essence, the Court agreed that it is well within Eskom’s rights to terminate the supply of electricity to defaulting municipalities as a debt collection measure in terms of section 21(5) of the ERA. The Court conducted an in-depth analysis of the matter-at-hand and found that the decision taken by Eskom to threaten interruption of supply based on section 21(5) of the Electricity Regulation Act is lawful.

The matter before the Court in *Ngwathe* was the threat of Eskom to terminate supply of electricity to the Ngwathe Local Municipality due to it being in arrears of R274.8 million.¹⁰⁶ The municipality sought to interdict Eskom from going forth with the threatened interruptions in electricity supply. The Court had ruled that Eskom was entitled to terminate the supply of electricity as a debt collection measure, save for certain procedural protections to be exercised in protection of end-users. Although the municipality feared the affect this would have on inhabitants, the Court held that it could not be held ransom by such threats.¹⁰⁷

The decision should follow the correct procedures of the PAJA and once this is done, the decision is open to review by a court of law upon which the constitutionality and lawfulness thereof can be decided. The issue of a decision taken under PAJA was not litigated upon in this matter, as the decision was never taken.

¹⁰³ *Afriforum* (24 May) para 136.

¹⁰⁴ *Afriforum* (24 May) para 137.

¹⁰⁵ *Afriforum* (24 May) para 147.

¹⁰⁶ *Ngwathe* para 44.

¹⁰⁷ *Ngwathe* para 43.

3. The Impact of Interruptions on Willing Payers

The right to electricity is not explicitly mentioned in the Constitution, however, the Court in *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) in an *obiter dictum* said that the right to adequate housing is importantly coupled with the right to access to electricity. The Constitutional Court in *Joseph* held that there is indeed a duty to provide electricity as part of the right to basic municipal services.

Municipalities, in terms of their mandate briefly explained earlier herein, owe a duty to their end-users which translates into a right afforded to them. In *Joseph*, Justice Skweyiya J states the following which is quoted in a bid to illustrate the importance of the duty imposed on municipalities:

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public services provider the [City of Johannesburg] accepted that the provision of electricity is one of those services that local government is required to provide. Indeed they could not have contended otherwise. In *Mkontwana*, Yacoob J. held that “municipalities are *obliged* to provide water and *electricity* to residents in their area *as a matter of public duty*”. Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society. The obligation borne by local government to provide basic municipal services is sourced in both the Constitution and legislation.¹⁰⁸

The *Joseph* judgment explicitly recognises the right and so does the *Afriforum* judgment in which it is stated that although there is no explicitly recognised right to electricity, it expresses itself by being the key realisation to various other rights contained in the Bill of Rights.¹⁰⁹ It is further held in *Afriforum* that a consumer does not have any contract with Eskom but rather a contractual relationship with a municipality.¹¹⁰

¹⁰⁸ *Joseph* at para 34.

¹⁰⁹ *Afriforum* (5 January 2017) para 68.

¹¹⁰ *Afriforum* (5 January) page 6.

Paying customers therefore have a right to electricity. In addition, indigent customers who qualify in terms of the *Electricity Basic Services Support tariff (Free Basic Electricity Policy) Policy for the Republic of South Africa* will receive 50kWh (kilo Watt hours) free in a bid to ensure that basic energy needs are met.¹¹¹ The above has been reinforced by the National Framework for Municipal Indigent Policies (2006). The cutting of electricity by Eskom in order to effect payment from municipalities would therefore unduly affect the right to electricity afforded to willing payers as well as indigent customers.

4. Practicality of Interruptions as a Solution

Payment for bulk electricity delivered is essential for the sustainability of Eskom and the electricity supply of South Africa, therefore, the method of cutting off electricity supply to errant municipalities in order to effect payment would cater to the sustainability of Eskom.¹¹² In *Ngwathe* the Court held that Eskom cannot continue to supply electricity without being paid as this will lead to a detrimental effect on the functional integrity of Eskom.¹¹³ This solution is, however, detrimental to the rights of paying customers as well as indigent customers. Moreover, the disruption of electricity supply brings with it a host of consequences such as the disruption of essential services, in particular access to water.¹¹⁴

Further, SALGA is of the view that matters relating to electricity and Eskom should not be viewed in isolation and ought to be dealt with holistically as a collective in the spirit of intergovernmental relations.¹¹⁵ Dealing with electricity debt requires accurate indigent rolls and transparent allocations of the equitable share. Eskom has indicated that it does not want to interfere with the distribution licences and rather favours agreements that look at mechanisms such as prepaid meters to improve debt collection. By distancing local government from electricity distribution, income will be lost, but if this income was being poorly expended and unaccounted for, and offset by rising debt, would there be any negative effect on service delivery?

¹¹¹ Steytler & De Visser (2016) 17-10.

¹¹² Naidoo R. 10 January 2017.

¹¹³ *Ngwathe* para 43.

¹¹⁴ *TMG* Digital 'Eskom to suspend power interruptions in Mpumalanga' 27 February 2017 available at <https://www.businesslive.co.za/bd/national/2017-02-23-eskom-to-suspend-power-interruptions-in-mpumalanga/> (accessed 10 December 2017).

¹¹⁵ SALGA News 'Inter – Ministerial Task Team Meeting to Discuss Electricity Reticulation and Supply' available at <http://salga.org.za/Salga%20News93.html> (accessed 13 July 2017).

5. Conclusion

Eskom cutting off electricity supply to errant municipalities in order to effect payment acts as a partial solution to the problem of paying customers' rights being reconciled with that of Eskom to be paid due to it resulting in practical challenges.

The ERA as well as ESA's entered into between municipalities and Eskom regulate the manner in and basis on which electricity supply is regulated between the two. Section 15 of the ERA and the ESA's point to the contractual nature of electricity supply between Eskom and municipalities while section 21(5) of the ERA gives Eskom the liberty of terminating electricity supply upon breach of payment conditions by a customer thereof. Eskom is therefore entitled, upon a breach in the terms of electricity supply by its customers, to terminate electricity supply in order to effect payment.

This method can be effective in that municipalities would be prompted to pay Eskom which would receive the much-needed revenue it garners from the bulk sale of electricity to municipalities in particular, but it produces unavoidable consequences to paying end-users of electricity.

Paying end-users and all those others entitled to electricity have a right to receive such electricity by the municipality. This right is breached once Eskom decides to terminate supply of electricity to errant municipalities in order to effect payment, yet the end-user dutifully pays his/her municipal electricity account. Eskom, however, does not owe the end-user anything else but fair procedure in terms of PAJA as there is no direct relationship between it and the end-user. The consequence of rights being violated and essential services being interrupted by the termination of supply of electricity supply by Eskom is not an ideal situation. The solution explored therefore only provides a partial solution in that Eskom's right to be paid is preserved while the paying end-users right is violated.

Chapter 4

Circumventing Municipalities: Direct Provision and Sale of Electricity by Eskom to End-users

1. Introduction

The third solution explored is Eskom and end-users circumventing municipalities by way of Eskom supplying electricity directly to paying end-users, who then in turn pay Eskom for electricity consumed.

This chapter includes an analysis of the circumvention of municipalities by Eskom and paying customers. This entails an examination of circumvention as a solution, the legality of circumvention of municipalities, as well as the practicality thereof.

It will be assessed further whether Eskom and paying customers circumventing the municipality in electricity distribution would qualify as a solution to the problem of paying customers' rights being violated by municipalities defaulting on payment to Eskom. The circumvention of a municipality poses various challenges including constitutional and functional challenges.

It is argued that although circumvention is, on the face of it, a solution in that the paying consumer would receive the service they are paying for, it poses unavoidable consequences to the municipality, which cannot be ignored. This includes the municipality becoming financially unviable as a result of it losing a substantial amount of income derived from electricity sales to its residents.

2. The Municipality's Constitutional Power of Reticulating Electricity

Eskom is responsible for over 95 percent of electricity generation and all transmission in the country while municipalities are tasked with the distribution function of electricity to end-users.¹¹⁶ Historically, municipalities reticulated electricity in white areas while Eskom distributed in black townships, some households and major consumers such as mining and

¹¹⁶ National Treasury (2011) 143.

industrial enterprises.¹¹⁷ This dispensation is reflected today with Eskom being responsible for 60.3 percent of total sales, which include mining and manufacturing customers.¹¹⁸

Reticulation of electricity is a municipal responsibility as per Schedule 4B of the Constitution.¹¹⁹ However, in practice we see that Eskom also carries out this function with 56 local municipalities that did not provide any electricity to their residents according to South Africa's Non-financial Census of Municipalities for 2009.¹²⁰ The majority of these municipalities were rural and did not have the capacity and resources to reticulate electricity.¹²¹ The question that poses itself is whether Eskom carrying out the function of distribution is therefore constitutional or not.¹²² Further, it should be determined then on what basis Eskom is distributing electricity.¹²³ These questions are posed in a bid to determine how the rights and functions attributed to municipalities and Eskom affect the paying end-user.

The Electricity Regulation Act 4 of 2006 defines "distribution" as "the conveyance of electricity through a distribution power system excluding trading" and a "power system" as a power system that operates at or below 132kV with one that operates at above 132kV regarded as transmission.¹²⁴ Eskom provides electricity to smaller households as well as large industrial consumers. The servicing of large consumers that are directly connected to transmission lines of Eskom, because they are provided electricity on a system that operates above 132Kv, therefore does not fall under the banner of distribution.¹²⁵

When Eskom reticulates electricity on behalf of a municipality, it should do so in terms of a service level agreement.¹²⁶ A municipality may provide a municipal service through an external mechanism such as another municipality, a municipal entity, an organ of state, a community or non-governmental organisation or any other institution by entering into a service level agreement with the preferred mechanism.¹²⁷

This should be the case with non-distributing municipalities in order for the service to be uniformly applied throughout a municipality instead of Eskom reticulating in some areas of a

¹¹⁷ Steytler & De Visser (2016) 17-20(2).

¹¹⁸ Steytler & De Visser (2016) 17-20(2).

¹¹⁹ Schedule 4B Constitution.

¹²⁰ National Treasury (2011) 148.

¹²¹ National Treasury (2011) 148.

¹²² Steytler & De Visser (2016) 17-20(2).

¹²³ Steytler & De Visser (2016) 17-21.

¹²⁴ S 1.

¹²⁵ Steytler & De Visser (2016) 17-21.

¹²⁶ S 80(1) Local Government: Municipal Systems Act 32 of 2000.

¹²⁷ S 76(b)(i) – (v) Systems Act.

municipality while the municipality itself reticulates in other areas.¹²⁸ A service level agreement is a way of ensuring that the constitutional distribution of competencies is not negated by the fact that Eskom carries out the distribution function in practice.¹²⁹

3. The Relationship between Paying Customers and Municipalities

A duty to pay for services rendered in the form of services fees and surcharges on fees imposed by a municipality rests on the consumers of such services.¹³⁰ This duty, however, is based on the premise that a service has indeed been rendered.¹³¹

In *Joseph* the applicants' electricity supply had been terminated, albeit that the applicants were paying their electricity bills, although not to the City.¹³² The applicants were renting the affected property and were paying the property owner who had accumulated substantial arrears in payments owing to the City of Johannesburg's electricity service provider, City Power (Pty) Limited.¹³³

The difficulty the Court faced in this case was that the tenants had no contractual right to receive electricity from City Power as they pay their electricity bills to their landlord.¹³⁴ The Court however ruled that the right to receive electricity applies regardless of whether there is a contractual relationship in place with the relevant public service provider or not. This is so because the right to receive electricity is recognised as a basic service.¹³⁵ Justice Skweyiya further recognised that the provision of basic municipal services (which includes electricity) is an important function of every municipal government, with the central mandate of local government being to meet the basic needs of all inhabitants of South Africa, regardless of whether they have a contractual relationship with the relevant public services provider or not.¹³⁶ Yacoob J held that "municipalities are obliged to provide water and electricity to residents in their area as a matter of public duty".¹³⁷ Further, the Court mentioned that with

¹²⁸ Steytler & De Visser 17-22.

¹²⁹ Steytler & De Visser 17-22.

¹³⁰ S 5(2)(b) Systems Act.

¹³¹ Steytler & De Visser (2016) 17-30.

¹³² *Joseph* para 1.

¹³³ *Joseph* para 1.

¹³⁴ *Joseph* para 2.

¹³⁵ *Joseph* heading of para 34.

¹³⁶ *Joseph* para 34.

¹³⁷ *Joseph* para 34.

the right to electricity comes the responsibility of the end-user to pay for services provided to them.¹³⁸

The facts in *Joseph* are analogous with only slight differences to the current scenario where municipalities are not paying Eskom, albeit that some residents of such municipalities do in fact pay their monthly electricity bill to the respective municipalities. This, therefore, substantiates the notion that, albeit that there exists no direct relationship between Eskom and the end-user such as with a municipality and the end-user, Eskom plays an important role in providing paying customers with electricity. The right of the end-user to electricity is not, however, against Eskom, but rather against the municipality.

The rights afforded to paying customers therefore stems from the fact that end-users are parties to a public law relationship, which exists between end-users and municipalities. This is born out of the constitutional and statutory duties of local government to provide basic municipal services. It flows from this that once a right is established, a decision made or failure to make a decision by an organ of state which affects or infringes the right established is reviewable under section 3 of the Promotion of Access to Justice Act 3 of 2000.

4. Circumvention of Municipalities by Eskom and Paying Customers by Direct Distribution to, and Payment by, End-users

A possible solution to the problem of the rights of electricity-paying customers being violated upon termination or reduction in supply by Eskom is circumvention of the municipality by paying customers and Eskom. This would entail municipalities being bypassed in a manner whereby Eskom would distribute electricity directly to end-users, and such end-users would pay Eskom for that distribution. This would cut municipalities out as the middle-man between end-users and Eskom, halting their practice of purchasing electricity in bulk supply from Eskom and distributing that to end-users.

In *Afriforum* it is contended by the Astral applicants that because their production processes are particularly vulnerable to breaks in electricity, the power supply interruptions would result in 'negative and disproportionate financial, commercial, industrial relations and health

¹³⁸ *Joseph* para 52.

consequences for its daily operations'.¹³⁹ It is further noted that Astral is the backbone of economic activity in Lekwa Local Municipality and without the sustainable operation thereof, Lekwa's local economy could possibly fail.¹⁴⁰ A tri-partite agreement was therefore entered into between Eskom, Astral Poultry and Lekwa Local Municipality in terms of which Astral would pay Eskom directly for the electricity consumed. In terms of this agreement, Astral is to pay Eskom directly, and that amount is subtracted from what the municipality owes Eskom. The condition imposed based on the above arrangement is that Astral's electricity supply would not to be interrupted by Eskom for reasons other than technical necessity for as long as they do not default on this agreement.¹⁴¹ This agreement was made an order of court. The agreement further provided that Lekwa would remain responsible for electricity used by consumers, besides Astral Poultry, and pay its monthly instalments in relation thereto.¹⁴²

The approval by the Court and implementation of this method and agreement begs the following questions: (1) what is the legal and constitutional basis of such an agreement, and (2) whether such a mechanism would prove successful in providing a long-term solution to the problem faced by paying-electricity consumers and Eskom, especially in municipalities where there are no major companies such as Astral operating?

4.1. Legality of Eskom Circumventing the Municipality

Schedule 4B of the Constitution states that 'electricity and gas reticulation' is a functional area assigned to municipalities. With distribution being defined briefly as a power system that operates at or below 132Kv and municipalities carrying out the function of distribution, it is apparent that it is the level of voltage that is the determinative factor in the distinction of distribution and transmission.

In order for Eskom to legally distribute electricity directly to end-users, it has to enter into service level agreements with municipalities in order to reticulate on their behalf.¹⁴³ Chapter Eight of the Systems Act provides for the outsourcing of any municipal service. An example of this would be the City of Johannesburg which has established a municipal entity called

¹³⁹ *Afriforum* (24 May) para 25.

¹⁴⁰ *Afriforum* (24 May) para 25.

¹⁴¹ *Afriforum* (24 May) para 27.

¹⁴² Slabbert A 'Court Orders Astral to pay Eskom directly' 3 May 2017 available at <https://www.moneyweb.co.za/news/south-africa/court-orders-astral-to-pay-eskom-directly/> (accessed 23 November 2017).

¹⁴³ 'Defaulting municipalities': Eskom briefing 8 March 2017 available at <https://pmg.org.za/committee-meeting/24107> (accessed 15 November 2017).

City Power to reticulate on its behalf.¹⁴⁴ In practice, we see that Eskom carries out the function of distribution without having entered into service level agreements with municipalities, thus distributing unconstitutionally.

In 2009, there was an attempt by national government to restructure the electricity distribution industry by which it sought to introduce regional electricity distributors (REDs).¹⁴⁵ It was decided that six wall-to-wall REDs would be established, each straddling provincial boundaries and anchored by a metropolitan municipality, albeit that it was noted that this establishment would infringe on the Schedule 4B power allocated to municipalities regarding electricity reticulation.¹⁴⁶ The 17th Constitution Amendment Bill of 2009 was therefore introduced to facilitate the process and avoid violation of the Constitution.¹⁴⁷ The amendment would include an amendment of section 156 of the Constitution to allocate additional powers to national government in terms of further regulating the executive authority of local government.¹⁴⁸ The Bill proposed that national government limit the executive authority of municipalities in respect of all the matters listed in Schedules 4B and 5B. It went further than regulation of electricity reticulation and proposed that “all local powers and functions would be subject to such national regulation”.¹⁴⁹

The Bill was introduced in Parliament in 2009, was approved by Cabinet on 15 April 2009, and was published for comments on 17 June to 16 July.¹⁵⁰ The proposed REDs plans were however halted in December 2010 due to pressure from the major municipalities - and consequently - the Bill had not been passed into law.¹⁵¹ Due to the proposed constitutional amendment not being passed as law, Eskom distributing on behalf of a municipality without a service level agreement in place therefore remains unconstitutional.

Practice, however, seems to prevail in this case as we see Eskom distributing to large industrialised consumers and smaller residential consumers in rural areas alike (albeit that these residential customers fall within the low use category), never mind the

¹⁴⁴ Steytler & De Visser (2016) 17-26.

¹⁴⁵ Steytler & De Visser (2016) 17-3.

¹⁴⁶ Electricity Distribution Industry Restructuring: Update Briefing by Electricity Distribution Industry Holdings (EDI) 1 September 2009 available at <https://pmg.org.za/committee-meeting/10748/> (accessed 15 November 2017).

¹⁴⁷ Electricity Distribution Industry Restructuring (2009).

¹⁴⁸ Electricity Distribution Industry Restructuring (2009).

¹⁴⁹ Steytler & De Visser (2016) 17-3.

¹⁵⁰ Electricity Distribution Industry Restructuring (2009).

¹⁵¹ Steytler & De Visser (2016) 17-3.

unconstitutionality of the arrangement.¹⁵² Voltage supplied to smaller households does not exceed the 135kV limit for the supply to be termed as distribution. This notion is based on voltage being the distinguishing factor between distribution and transmission.

4.2. Practicality of Eskom Circumventing the Municipality

Municipalities act as middle-men in that they buy electricity from Eskom in bulk and then resell the power to residential, business, and industrial customers, as well as provide free basic electricity to indigent consumers. The operating revenue generated from electricity sales to end-users by municipalities amounted to about 40 percent by 2012/2013.¹⁵³ They therefore derive substantial income from such sales, with the surplus thereof utilised to fund other activities such as providing non-economic services (health, sport and recreation and planning, for example) which do not supply the municipality with an income.¹⁵⁴ Eyal Shevel, Sector Head of Corporate and Public Sector Ratings at Global Credit Ratings (GCR) has stated that the circumvention of municipalities in the distribution of electricity by Eskom would place “enormous economic strain on both local and national coffers”.¹⁵⁵ He further stated that should delinquent municipalities lose control of electricity distribution to Eskom, they would lose a crucial part of income due to the way the municipal finances in South Africa have been structured.¹⁵⁶

Eskom circumventing the municipality and gaining more customers via direct distribution would result in municipalities losing the substantial revenue generated from sales of electricity to their local community. This solution would prove more detrimental to the few rural municipalities (where Eskom does not supply electricity directly to consumers) where electricity distribution as a revenue source is second only to intergovernmental grants, albeit that it only accounts for about 24 percent revenue on average.¹⁵⁷ On the other hand, the solution could prove successful if big customers pay their own accounts in that the amount of indebtedness of municipalities to Eskom would decrease. This would therefore not affect the overall financial viability of a municipality as explained above.

¹⁵² National Treasury (2008) *Local Government Budgets and Expenditure Review: 2003/04 – 2009/10* RP113/2008 117.

¹⁵³ National Treasury (2011) 150.

¹⁵⁴ Stats SA ‘Electricity Redistribution: Which Councils are likely to feel the Pinch?’ available at <http://www.statssa.gov.za/?p=4772> (accessed 10 November 2017).

¹⁵⁵ Roberts J. ‘Why SA can’t afford to get power directly from Eskom’ 23 January 2017 available at <https://www.moneymarketing.co.za/26108-2/> (accessed 1 November 2017).

¹⁵⁶ Roberts (2017).

¹⁵⁷ Roberts (2017).

Municipalities are entitled to utilise electricity supply interruptions in order to effect payment from end-users for other municipal charges and taxes in the form of consolidated accounts.¹⁵⁸ Section 102(1)(a) of the Systems Act provides for consolidated accounts in which a municipality may consolidate separate accounts of persons liable for payment to the municipality, i.e. a rate account can be consolidated with an electricity account.

In *Rademan v Moqhaka Municipality and Others*, the appellant had withheld payment of rates and taxes to the municipality (apart from electricity payments), which then terminated her electricity supply in order to effect payment of such rates and taxes.¹⁵⁹ Justice Bosielo then observed that the consolidation of accounts for various services was intended as a tool of leverage granted to municipalities to circumvent the problem of residents choosing which account they want to pay and which they do not.¹⁶⁰ Justice Zondo in the Constitutional Court judgment of the above case concurred with this notion in that he noted the fact that it is not for a customer to prescribe to the municipality how he/she wants to pay his/her municipal account.¹⁶¹ It can therefore be seen that the discontinuation of supply of electricity as leverage to a municipality against residents that do not pay rates is strong and effective in its task.

Furthermore, having Eskom directly distribute to more end-users would place an “enormous administrative strain” on them, “especially at a time when they need to be focusing on power generation and maintenance”.¹⁶²

There is therefore no long-term solution provided for by Eskom circumventing municipalities in electricity distribution as the consequences thereof outweigh any possible benefits, albeit that this remedy provides partial relief to the problem. The circumvention of municipalities would result in revenue loss, and loss of leverage for payment of other charges. It would further result in the provision of free basic electricity, provided for by the municipality in a bid to realise the constitutional right of access to sufficient electricity, being terminated. Additionally, the administrative burden that would be placed on Eskom, should it circumvent the municipality to collect payments owed to it from end-users, would be problematic. The rights of the paying customer would be preserved but to the dire consequence of their municipality possibly facing bankruptcy, amongst others. Furthermore, it might be an

¹⁵⁸ Steytler & De Visser (2016) 17-34.

¹⁵⁹ *Rademan v Moqhaka Municipality and Others* [2012] JOL 28591 (SCA) para 2 (*Rademan*).

¹⁶⁰ *Rademan* para 19.

¹⁶¹ *Rademan v Moqhaka Local Municipality and Others* [2013] ZACC 11 para 32.

¹⁶² Roberts (2017).

effective solution where large consumers are concerned, but not a viable option for small consumers and indigent consumers alike. Circumvention as a solution would therefore only be of partial use as it poses challenges to and directly violates local governance and revenue collection.

5. Conclusion

The problem of paying customers' rights being affected by the threats of interruption of supply by Eskom could possibly be addressed and solved by end-users and Eskom circumventing delinquent municipalities and distributing electricity directly to the end-user. It has, however, been found that circumvention provides only a partial solution to the problem as it violates local governance and revenue collection.

A municipality's power of reticulation is provided for and entrenched in Schedule 4B of the Constitution. Eskom does not have any explicit powers to reticulate electricity, save for when it is contracted on behalf of a municipality in terms of service level agreements to do so. This is the only time it would be legal for Eskom to reticulate electricity. However, the pre-1994 practice of electricity distribution still prevails in that we see the function of distribution being shared between municipalities and Eskom. This brings to the fore a constitutional challenge. There has been an attempt at restructuring the electricity distribution industry through the establishment of REDs, but the proposed constitutional amendment to facilitate it has not been enacted as law, still rendering the practice of Eskom distributing electricity unconstitutional unless a service level agreement is in place.

Additionally, even if Eskom circumvents municipalities and distributes on their behalf with a valid service level agreement in place, the solution could only be temporary in nature due to the consequences this method produces. The first of these would be that municipalities would lose much needed revenue garnered from the distribution of electricity, as well as leverage to ensure that municipal accounts are paid. Eskom would too be faced with an administrative burden in that mechanisms would have to be put in place to collect fees for services provided from individual customers. Furthermore, the nature of the possible solution would entail a situation where practically, it may work with large consumers but is not a viable option for small consumers.

These consequences therefore point to the fact that this may not be the best suited and long-term solution to the problem of the rights of paying customers being violated by the threat and possible action of Eskom terminating electricity supply to defaulting municipalities.

Chapter 5

The Mandatory yet Unused Section 139(5) Intervention by Provincial and National Governments

1. Introduction

The three spheres of government in South Africa are interrelated in that each sphere exercises a degree of control over another sphere in the form of supervision.¹⁶³ Supervision is facilitated through monitoring, support and intervention.¹⁶⁴ The hierarchical relationship of supervision entails national government supervising provincial autonomy, while both national and provincial governments have supervisory roles over local government.¹⁶⁵ Provincial government is afforded a supervisory role over local government based on its general oversight responsibility, while national government's supervisory role over the same is confined to financial management.¹⁶⁶

The main reason for instituting intervention powers of one sphere of government over another is a possible deficiency in the carrying out of assigned functions/executive obligations by the latter.¹⁶⁷ The authority for intervention in local government by provincial government is section 139 of the Constitution. Giving effect to the financial interventions provided in section 139 is the Local Government: Municipal Finance Management Act (MFMA).¹⁶⁸

This chapter provides an analysis of whether, in the case where a municipality is unable to pay the monthly bill of Eskom and has accumulated historical debt, the provincial executive is allowed and/or obliged to intervene in terms of section 139 of the Constitution. Furthermore, because the province has a duty to intervene where necessary, if it fails to do so or does so inadequately, the national executive must intervene in its place.¹⁶⁹ It in turn then establishes whether this could prove as a possible solution to the problem of paying

¹⁶³ Steytler & De Visser (2016) 15-5.

¹⁶⁴ Steytler & De Visser (2016) 15-5.

¹⁶⁵ Steytler & De Visser (2016) 15-5.

¹⁶⁶ Steytler & De Visser (2016) 15-6.

¹⁶⁷ Murray C & Ampofo-Anti O 'Provincial Executive Authority' in Woolman S & Bishop M (eds) *Constitutional Law of South Africa* 2 ed (2014) ch 20 30.

¹⁶⁸ Act 56 of 2003.

¹⁶⁹ Steytler & De Visser (2016) 17-20(2).

customers' rights to electricity being violated with the threat of Eskom cutting supply of electricity to delinquent municipalities. This is achieved by taking into account what a section 139 intervention entails, specifically a section 139(5) intervention. It is then assessed whether, based on the facts available of the current situation faced by municipalities failing to pay Eskom, a section 139(5) intervention is appropriate to the situation at hand.

2. Section 139 of the Constitution

2.1. Overview of Section 139

Municipalities are subject to monitoring and intervention procedures by provincial government. Section 139 of the Constitution provides for intervention while section 156(1) thereof speaks to regulation and support of local government by provincial government. Section 139 has been described in the *First Certification* Judgment as a mechanism of 'supervision' available to provincial government, entailing review of local government by ensuring that executive obligations are complied with and corrective measures are put in place should this not be the case.¹⁷⁰ This section is utilised as an instrument to correct serious failures in local government.¹⁷¹ Provinces monitor municipalities by determining whether it meets its executive obligations in terms of legislation, and how well it performs its duties.¹⁷²

Section 139(1) of the Constitution provides that once a municipality cannot or does not fulfil an executive obligation in terms of the Constitution or legislation, the relevant provincial executive may intervene. The provincial executive may then take the necessary steps to ensure fulfilment of that obligation by issuing a directive to the Municipal Council, describing the extent of the failure and stating any steps required to meet its obligations. It too can assume responsibility for the relevant obligation in that municipality to the extent necessary.¹⁷³ The relevant provincial executive may, in exceptional circumstances, also dissolve the Council and appoint an administrator until a newly elected Council has been elected.¹⁷⁴

¹⁷⁰ *Certification of the Constitution of the Republic Of South Africa, 1996* [1996] ZACC 26 Para 370.

¹⁷¹ De Visser J 'Overseeing the Overseers: Assessing compliance with Municipal Intervention Rules in South Africa' *Hague J Rule Law* (2017) 9 109.

¹⁷² Malan L 'Intergovernmental Relations and co-operative government in South Africa: The ten-year review' (2005) *Politeia* 24 239.

¹⁷³ S 139(1)(a)-(b) Constitution.

¹⁷⁴ S 139(1)(c) Constitution.

Section 139(2) prescribes various procedural requirements to be met once a provincial executive intervenes in a municipality, these include notices of intervention to be submitted to the Cabinet member responsible for local government affairs; the relevant provincial legislature and the National Council of Provinces. Should the National Council of Provinces or Cabinet member responsible for local government affairs disapprove the intervention within 180 and 28 days respectively after the intervention began or by the end of that period has not approved the intervention, the intervention must end.¹⁷⁵

Section 139(3) prescribes procedural measures to be complied with once a Municipal Council is dissolved. The provincial executive must then immediately submit a written notice to the Cabinet member responsible for local government affairs as well as the relevant provincial legislature and the National Council of Provinces.¹⁷⁶

Section 139(4) is triggered as a response to a municipality that has budgetary problems such as failure to approve a budget or any revenue raising measures necessary to give effect to the budget by the start of a new financial year. Provincial government must intervene once it is established that a municipality has the above budgetary problems. The measures to be taken by the provincial executive in this instance includes measures such as the mandatory dissolution of the Municipal Council, and adoption of a temporary budget or revenue-raising measures.¹⁷⁷

Section 139(5) is also mandatory once a provincial executive has found that a municipality, as a result of a crisis in its financial affairs, is in serious or persistent material breach of its obligations to provide basic services or meet its financial obligations or commitments. The relevant provincial executive must then impose a recovery plan.¹⁷⁸ Section 139(6) imposes procedural requirements to be complied with once the provincial executive intervenes in terms of section 139(5).

Section 139(7) of the Constitution states that where a province has failed to intervene in local government in terms of section 139(4) and (5), the national government must intervene in place of the provincial government failing to do so.

This chapter focuses on and explores discretionary financial intervention in terms of section 139(1) and the mandatory intervention in terms of section 139(5).

¹⁷⁵ S 139(2)(b)(i)(ii) Constitution.

¹⁷⁶ S 139(3)(a)(i)-(ii) Constitution.

¹⁷⁷ S 139(4)(a)-(b) Constitution.

¹⁷⁸ S 139(5)(a) Constitution.

2.2. The Constitution and the MFMA in terms of Provincial Intervention – Discretionary Financial Intervention in terms of Section 139 of the MFMA

Section 136(1) of the MFMA serves as a precursor in terms of the regulation of section 139 of the Constitution. It states that once the MEC for local government becomes aware of a serious financial problem in a municipality, thorough assessments and consultations must be performed in order to determine whether an intervention in terms of section 139(1) of the Constitution is necessary and justifiable. Section 139(1) of the Constitution provides for regular intervention by the provincial executive in a municipality in response to a municipality's failure to perform in a number of areas, not only in the area of finances.¹⁷⁹

Facilitation of this section is provided for in section 136(2) of the MFMA, which states that if the provincial executive decides that the conditions of a section 139(1) intervention is met, it must decide whether to intervene in the municipality in question, in terms of section 139(1). If the provincial executive decides to intervene, section 137 of the MFMA applies which speaks to discretionary interventions.¹⁸⁰

Section 137 of the MFMA states that once the conditions for provincial intervention in terms of section 139(1) of the Constitution are met, if the provincial executive decides to intervene in terms of section 136(2) of the MFMA it must assess the seriousness of the financial problem in the municipality and seek solutions. It then also has to assess whether the financial problem the municipality is facing requires the implementation of a financial recovery plan.¹⁸¹

On the other hand, section 136(4) speaks to a situation where the conditions of section 139(5) of the Constitution are met. It states that once these conditions are met, the provincial executive must intervene in the municipality in accordance with section 139 of the MFMA, which deals with mandatory interventions arising from financial crises. This was confirmed by the Court in *Ngwathe* where it was held that had the provincial executive been a party to

¹⁷⁹ Steytler & De Visser (2016) 15-18(3).

¹⁸⁰ S 136(2) MFMA.

¹⁸¹ S 137(1)(c) MFMA.

the proceedings at hand, the Court would have forced it by way of a declaratory order to intervene in the municipality.¹⁸²

2.3. Section 139(5) of the Constitution

A serious and/or persistent material breach of obligations to provide basic services or meet financial obligations by a municipality is what warrants a section 139(5) intervention. This type of intervention is utilised in a situation where the seriousness of the problem has resulted in a crisis in the financial affairs of the municipality, thus calling for steps that are intrusive and remedial in nature.¹⁸³ Furthermore, once it has been established that a municipality falls within the category of section 139(5), the Constitution and the MFMA is clear that the duty to intervene by the provincial executive becomes mandatory. It is, however, noted by Steytler and De Visser that this section has seldom, if ever, been used.¹⁸⁴

Either the provincial executive may determine whether the financial state of a municipality meets the conditions of a section 139(5) intervention or the municipality can admit to their financial situation meeting the conditions of section 139(5).¹⁸⁵

Previously, before the amendments of section 139 of the Constitution, which took place in 2003, provinces were not able to intervene in municipalities as far as their legislative power extended (such as the adoption of budgets and collection of taxes). Post-amendment, provinces are now given the power to put a budget in place for a municipality should the need exist or should the municipality fail to do so. Additionally, there are enforcement tools available to the provincial government such as the dissolution of the council should it fail to implement the necessary legislative measures to put a recovery plan into practice (this includes a budget and revenue-raising measures).¹⁸⁶ As a secondary measure, the provincial executive is entitled to assume responsibility to implement the recovery plan itself should the municipality fail to do so.¹⁸⁷

¹⁸² *Ngwathe* para 40.

¹⁸³ Steytler & De Visser (2016) 15-43.

¹⁸⁴ Steytler & De Visser (2016) 15-44(1).

¹⁸⁵ Steytler & De Visser (2016) 15-44.

¹⁸⁶ Steytler N 'Interventions in Municipalities: Amendment to Section 139 of the Constitution' (2003) 5 *Local Government Bulletin* 7.

¹⁸⁷ Steytler (2003) 7.

Section 139 of the MFMA prescribes that the relevant provincial executive must request the Municipal Financial Recovery Service (Recovery Service), which forms part of, and functions within, the NT, to prepare a financial recovery plan.¹⁸⁸

Section 139 of the MFMA provides conditions to be imposed once it is established that a municipality is experiencing a crisis in its financial affairs. This includes the provincial executive requesting the Recovery Service to determine the reasons for the crises in the affairs of the affected municipality, as well as an assessment of the municipality's financial state.¹⁸⁹ It should further be requested of the Recovery Service to 'prepare an appropriate financial recovery plan for the municipality' and 'to recommend appropriate changes to the municipality's budget and revenue-raising measures that will give effect to the recovery plan'.¹⁹⁰ Additionally, the provincial executive should request of the Recovery Service to submit the 'determination and assessment' referred to above to the MEC for finance of the relevant province.¹⁹¹ The recovery plan and recommendations referred to above should also be submitted by the Recovery Service to the MEC for Finance within a period, not exceeding 90 days, determined by the MEC.¹⁹² Further, notification of an invocation of a section 139(5) intervention must be given by the MEC for finance to the following stakeholders: the municipality, the Minister for Local Government, and the Minister of Finance, under whose authority the Recovery Service falls.¹⁹³

2.3.1. Guidelines for Determining Serious or Persistent Material Breach of Financial Commitments

Section 139(5) of the Constitution sets the stage for an intervention by the provincial executive in a municipality facing serious financial problems in that they are unable to provide basic services or meet financial obligations. Section 136(1) and (4) then makes such an intervention mandatory once, after thorough investigation, the provincial executive finds that a municipality meets the conditions set out in a section 139(5) financial intervention. Section 140 of the MFMA then sets out factors to be taken into account in determining whether there is a serious or persistent material breach of financial commitments.

¹⁸⁸ S 139(1)(a) MFMA.

¹⁸⁹ S 139(1)(a)(i)-(ii) MFMA.

¹⁹⁰ S 139(1)(a)(iii)-(iv) MFMA.

¹⁹¹ S 139(1)(a)(v)(aa) MFMA.

¹⁹² S 139(1)(a)(v)(bb) MFMA.

¹⁹³ S 139(2) MFMA.

First, mention is made in section 140(1) that all the relevant facts must be taken into consideration. These factors singly or collectively may determine whether there is a serious or persistent material financial breach of commitments and the list itself is not exhaustive.

The factors in this regard are:

- (a) ‘the municipality has failed to make any payment to a lender or investor as and when due;
- (b) the municipality has failed to meet a contractual obligation which provides security in terms of section 48;
- (c) the municipality has failed to make any other payment as and when due which individually or in the aggregate is more than an amount as may be prescribed or, if none is prescribed, more than two per cent of the municipality’s budgeted operating expenditure;
- (d) or the municipality's failure to meet its financial commitments has impacted or is likely to impact on the availability or price of credit to other municipalities’.¹⁹⁴

Section 140 (2) (a)-(d) of the MFMA depicts a situation where the municipality has failed to make more than one payment to a lender or investor or where the municipality’s indebtedness is severe and excessive. In terms of section 140(2)(c) of the MFMA, a municipality is in serious material breach of its obligations to meet its financial commitments when it fails to ‘make any other payment which individually or in aggregate is more than an amount as may be prescribed, or if none is prescribed, more than two per cent of the municipality’s budgeted operating expenditure’. Section 140 (3) is of particular interest in this situation as it speaks to a situation where a municipality recurrently or continuously fails to ‘meet its financial commitments [and] has [thus] substantially impaired its ability to procure goods, services or credit on usual commercial terms’. This, therefore, could entail a situation where a municipality continuously fails to pay Eskom its dues and thereby impairs its ability to provide a service to residents and paying customers.

2.3.2. The Recovery Plan

Once the province intervenes in terms of section 139(5), a financial recovery plan aimed at securing the municipality’s ability to meet its obligations should be imposed.¹⁹⁵ It is the duty

¹⁹⁴ S 140(2)(a)-(d) MFMA.

¹⁹⁵ S 139(5)(a) Constitution.

of the municipal council to adopt and implement that plan and should the council fail to comply with this duty, the provincial executive could either implement the plan itself or dissolve the council.¹⁹⁶

The financial recovery plan should be establish how the municipality should once again endeavor to meet its financial obligations or commitments and how it should go about being able to fulfil its mandate by once again being able to provide basic services.¹⁹⁷

Further, it is imperative to note the criteria listed in section 142 of the MFMA for financial recovery plans. Section 142(1) of the MFMA states that the financial recovery plan must include the following:

- (i) “identify the financial problems of the municipality;
- (ii) be designed to place the municipality in a sound and sustainable financial condition as soon as possible;
- (iii) state the principal strategic objectives of the plan, and ways and means for achieving those objectives;
- (iv) set out a specific strategy for addressing the municipality’s financial problems, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue, as may be necessary;
- (v) identify the human and financial resources needed to assist in resolving financial problems, and where those resources are proposed to come from;
- (vi) describe the anticipated time frame for financial recovery, and milestones to be achieved; and
- (vii) identify what actions are necessary for the implementation of the plan, distinguishing between actions to be taken by the municipality and actions to be taken by other parties.”

3. Is a Section 139(5) Intervention Applicable?

As of 31 January 2017, municipalities in the Free State, Mpumalanga and the North West hold the bulk of Eskom debt, owing nearly 7.2 billion rand between them.¹⁹⁸ In total,

¹⁹⁶ S 139(5)(b) Constitution.

¹⁹⁷ Steytler (2003) 6.

¹⁹⁸ Magubane (2017).

municipalities around the country owe Eskom about R10 billion as of August 2017.¹⁹⁹ This can be construed as mounted historical debt. The municipalities in question above meet this criterion on the basis that the amounts owed to Eskom reach in excess of millions for certain municipalities and has accumulated over time due to non-payment of monthly bills owed to Eskom. Section 140(2)(c) of the MFMA is therefore complied with.

In *Ngwathe*, the municipality owed Eskom R274.8 million in payment arrears, by September 2014.²⁰⁰ The Court found that the municipality was clearly in a financial crisis and the municipality had admitted that it could not meet its financial commitments.²⁰¹ It is therefore also based on the opinion of the High Court in *Ngwathe* that a section 139(5) intervention is suitable and applicable in the situation where a municipality is unable to pay Eskom and has subsequently accumulated a historical debt.²⁰²

Further, based on the above it can clearly be seen that the cash flow problems faced by various municipalities have made it difficult for them to deliver services and pay creditors, including Eskom.²⁰³ Cooperative Governance Minister, Des van Rooyen has further added that poor revenue management meant that payments due to creditors far exceeded the revenue collected.²⁰⁴ This therefore makes the situation compliant with the wording of section 139(5) of the Constitution.

The threat of Eskom terminating supply as a debt collection measure feeds into the fact that defaulting municipalities are now impairing their ability to procure the service of electricity supply from Eskom. Such a municipality would in turn not be able to fulfil its obligation to provide basic services (such as electricity) and would, therefore, comply with the requirements set out in section 139(5) of the Constitution as well as sections 136(4), 140(2)(c) and (3) of the MFMA.

The content of the recovery plan will form the basis on which a municipality could be returned to financial health by determining whether a section 139(5) intervention could solve the indebtedness of municipalities to Eskom, in light of the fact that some of these municipalities are poorly managed financially, or experience a lack of funds.

¹⁹⁹ Magubane (2017).

²⁰⁰ *Ngwathe* para 4.

²⁰¹ *Ngwathe* para 40.

²⁰² *Ngwathe* para 40.

²⁰³ Phakati B 'Eskom debt-recovery team 'makes progress' with councils' *Business Live* 19 May 2017 available at <https://www.businesslive.co.za/bd/companies/energy/2017-05-19-eskom-debt-recovery-team-makes-progress-with-councils/> (accessed September 2017).

²⁰⁴ Phakati (2017).

Eskom has resorted to threatening defaulting municipalities with power supply interruptions as a measure to effect payment of debt owed. In the case of *Ngwathe*, the municipality found itself indebted to Eskom following which Eskom claimed that the province is obliged to comply with its constitutional duty of intervention in the Ngwathe Local Municipality due to the severity of the situation.²⁰⁵ Ngwathe municipality not only owed Eskom in excess of R274,8 million by September 2014, but ran a deficit in that the municipality clearly spent more than it received, resulting in them not being able to pay their creditors.²⁰⁶

4. Intervention by National Government

The national executive is empowered by the Constitution to intervene in a municipality where the provincial executive either cannot or does not intervene or when the provincial effort is inadequate for the task at hand.²⁰⁷ The Court in *Ngwathe* would have given a declaratory order for the provincial executive to intervene in terms of section 139(5) because the latter failed to do so. It is then by implication in terms of the above section that the national executive should have intervened, however it too failed to do so.²⁰⁸ The national executive instead intervened later when it stopped transfers to Ngwathe and 58 other municipalities, in terms of section 216(2) of the Constitution.

When the national executive undertakes its obligation to intervene, it must first consult with the provincial government prior to its decision to intervene.²⁰⁹ Once it does so, it must take the required intervention measures and assume all the powers of the provincial executive in the role of such an intervention.²¹⁰ Where the provincial intervention was inadequate, the national decision to override that intervention terminates the provincial intervention.²¹¹

5. Conclusion

It has been established that a section 139(5) intervention must be implemented by the provincial executive in a local municipality if a municipality is unable to pay its monthly bill to Eskom and has accumulated historical debt. This has been shown by means of taking into

²⁰⁵ *Ngwathe* para 12.

²⁰⁶ *Ngwathe* para 4.

²⁰⁷ S 139(7) Constitution.

²⁰⁸ *Ngwathe* para 40.

²⁰⁹ Steytler & De Visser (2016) 15-50(1).

²¹⁰ Steytler & De Visser (2016) 15-50(1).

²¹¹ Steytler & De Visser (2016) 15-50(1).

consideration the requirements of such an intervention found in section 140 of the MFMA and the wording of section 139(5) of the Constitution.

The words “breaching its obligations to provide basic services or meet its financial obligations” and the indication of section 140 of the MFMA, stating that the indebtedness should be severe and excessive, is an apt calling for an intervention where a municipality continuously fails to meet the deadline for monthly payments to Eskom. The result of this is that Eskom threatens such municipalities with the termination of supply, in turn creating a plethora of dire consequences for the end-user and the municipality itself. The jurisprudence on the issue is strong in that the courts are of the opinion that the Premier can be forced by means of a declaratory order to intervene in a municipality where there is a tradition of indebtedness to Eskom and historical debt which has subsequently accumulated. This can also be seen by the use of the word ‘mandatory’ in section 139 of the MFMA. As mentioned though, the situation in *Ngwathe* called for the Premier to be joined to the proceedings for such a declaratory order to be granted.

Further, the content of a financial recovery plan provides the best-suited solution to a struggling municipality in that it brings about a restructuring of financial management within the municipality, looking at both revenue and expenditure. It takes into account the current situation in the particular municipality facing a section 139(5) intervention and adapts the plan accordingly, while addressing the financial crisis faced in the municipality based on its own merit and specific needs.

Municipalities facing bankruptcy (such as *Ngwathe*) as well as cash-flow problems would greatly benefit from a section 139(5) intervention as it entails a restructuring of finances. It is clear that based on the above criteria for a financial recovery plan, the rigid requirements of it specifically addressing the root of the financial problem of the affected municipality/ies would greatly assist a municipality that finds itself highly indebted to Eskom. The financial recovery plan is important in aiding municipalities to provide basic services by setting out specific strategies to address specific financial problems faced by a municipality, including a strategy for reducing unnecessary expenditure and increasing the collection of revenue, as may be necessary. This is important in the instance where it is clear that municipalities owing Eskom are running into monthly deficits and are unable to collect revenue. The end-user that dutifully pays his/her municipal electricity account would then be provided with the basic service of electricity being paid for as the finances of struggling municipalities would be structured in such a way that municipal debts would be paid.

A mandatory section 139(5) intervention can thus take place, and could possibly be the best-suited solution to such a crisis. As mentioned (as is the opinion of Steytler and De Visser), this type of intervention is however yet to be seen.

Chapter 6

Conclusion

1. Introduction

The aim of this research paper has been to answer the question as to how the rights of paying customers to electricity can be reconciled with the right of Eskom to be paid. This is done by taking into account whether the solution lies within section 216 of the Constitution. If the solution is not found in a section 216 intervention, it is ascertained whether Eskom can cut off electricity supply to errant municipalities in order to effect payment or provide paying customers with electricity directly. Further, a financial intervention in terms of section 139 of the Constitution is also taken into account as a way forward.

This chapter presents the findings to the research question and concludes with recommendations.

2. Section 216 of the Constitution as a Solution

Section 216(2) of the Constitution allows for the stopping of transfers of all funds from national government to other spheres of government, including their equitable share allocations on the basis that they have not complied with section 216(1) of the Constitution.²¹²

However, the consequence of the implementation of this intervention is that not only does the stopping of transfers create cash flow problems in a municipality; it creates an even bigger backlog in the payment of creditors by municipalities.

Further, the temporary nature of a section 216(2) intervention is not conducive to providing long-term solutions to municipalities who cannot pay their creditors due to underlying factors. For the success to be a reality there has to be a change in financial behaviour of the affected municipality.

It was seen that the stopping of transfers to the 59 municipalities in 2015 was unsuccessful, however, the stopping of transfers to nine municipalities in 2012/2013 was successful. The

²¹² Khumalo, Dawood & Mahabir (2015) 222.

solution should be suitable to the problem of having historical debt as well as being unable to pay creditors due to little to no revenue available to do so. This solution proved unsuccessful in 2015 because it did not address the underlying problem of a majority of the affected municipalities not being able to collect sufficient own revenue.

The impact of using section 216(2) as a method of protecting the rights of paying customers and other customers who are entitled to electricity is suitable in that should section 216(2) have the necessary impact in forcing municipalities to pay its debt owed to Eskom, the threat of electricity supply interruptions would cease. However, it is proven not to be successful in remedying a situation where municipalities find themselves severely indebted and unable to collect own revenue due to lack of sources to do so and/or lack of capacity.

This method therefore does not provide a sustainable solution to the problem.

3. Eskom Cutting Electricity Supply to Effect Payment

Eskom's cutting off of electricity supply to errant municipalities in order to affect payment acts as a partial solution to its own problem, but results in paying customers' right to electricity being violated against that of Eskom's to be paid.

The ERA as well as ESAs entered into between municipalities and Eskom regulates the manner in and basis on which electricity supply is regulated between the two. Section 15 of the ERA and the ESAs point to the contractual nature of electricity supply between Eskom and municipalities. Eskom is therefore entitled, upon a breach in the terms of electricity supply by its customers, to terminate electricity supply in order to effect payment.

This method can be effective in that Eskom would receive the much-needed revenue it garners from the bulk sale of electricity to municipalities in particular, but it produces unavoidable consequences to paying end-users of electricity.

Paying end-users and all those others entitled to electricity have a right to receive such electricity by the municipality, whose right is breached once Eskom decides to terminate supply. The interruption of electricity supply to those municipalities whose sustainability depends on businesses and big production companies, which, in turn, affects their productivity, would pose dire consequences to such a municipality. It is also conceded by the Ngwathe Local Municipality in *Ngwathe* that an order entitling Eskom to interrupt the supply

of electricity would lead to consequences such as serious hardships for the inhabitants of the town affected and possible riots.²¹³

Eskom, however, only owes the end-user fair procedure in terms of PAJA as there is no direct relationship between it and the end-user. The consequence of rights being violated and essential services being interrupted by the termination of electricity supply by Eskom is not an ideal situation. The solution explored therefore only provides a partial solution in that Eskom's right to be paid is preserved while the paying end-users right is violated.

4. Direct Supply of Electricity by Eskom to Paying Customers

The problem of paying customer's rights being affected by the threats of interruption of supply by Eskom could possibly be addressed and solved by end-users and Eskom circumventing delinquent municipalities and Eskom distributing electricity directly to the end-user. It has, however, been found that circumvention provides only a partial solution to the problem as it undermines the fundamental structure of local governance and revenue collection.

There are a number of problems associated with circumvention. The first is that a municipality's power of reticulation is provided for and entrenched in Schedule 4B of the Constitution. Eskom does not have any explicit powers to reticulate electricity, save for when it is contracted to do so on behalf of a municipality in terms of service level agreements.

Additionally, even if Eskom circumvents municipalities and distributes on their behalf with a valid service level agreement in place, the solution does not the gap in revenue collection which could lead to long term damage done to a municipality, amongst others. Municipalities would lose much needed revenue garnered from the distribution of electricity as well as leverage to ensure that municipal accounts on rates, for example, are paid. Eskom too would be faced with an administrative burden in that mechanisms would have to be put in place to collect fees for services provided to individual customers.

5. Financial Intervention in terms of Section 139(5) of the Constitution

Section 139(5) of the Constitution is used as a mechanism to correct serious failures in local government such as serious financial crises. This section makes intervention mandatory by the provincial executive once it has found that a municipality, as a result of a crisis in its

²¹³ Ngwathe para 19.

financial affairs, is in serious or persistent material breach of its obligations to provide basic services or meet its financial obligations or commitments.

This research paper explored the various facets a section 139(5) intervention entails, with the most important facet being that the relevant provincial executive must impose a financial recovery plan. The content of a financial recovery plan provides the best-suited solution to a struggling municipality in that it brings about a restructuring of financial management within the municipality. It takes into account the current situation the particular municipality facing a section 139(5) intervention is in and adapts the plan accordingly, addressing the financial crisis faced in the municipality, based on its own merit and specific needs. The end-user that dutifully pays his/her municipal electricity account would then be provided with the basic service of electricity being paid for as the finances of struggling municipalities would be structured in such a way that municipal debts would be paid.

A mandatory section 139(5) intervention can thus take place, and could possibly be the best-suited solution to such a crisis so far.

6. Recommendations

The solutions explored herein have yielded varying successes. A section 216(2) intervention by provincial government proves only successful in municipalities where revenue is available in the first place. Eskom cutting supply of electricity to errant municipalities and direct supplying electricity to paying customers, bypassing a municipality, does not act to solve the long-term problem due to the consequences it produces. It is therefore recommended that the provincial executive should intervene in errant municipalities in terms of section 139(5) of the Constitution. This could be the closest possible solution to solving the problem taking the above into consideration.

The financial recovery plan imposed by a section 139(5) intervention would be the method yielding the most successes in that it targets and seeks to correct specific financial problems within a specific municipality. It is “personal” in nature, and can therefore assist a municipality according to and with a specific focus on restructuring the finances in such a way that they are likely to avoid facing bankruptcy and once again endeavour to execute their mandate.

Taking the above into consideration, upon the implementation of a successful recovery plan, income and expenditure in municipalities will ultimately be balanced allowing Eskom to receive its dues and consumers their electricity.

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