



***ESKOM HOLDINGS* AND ITS IMPLICATIONS FOR SOUTH AFRICAN  
ADMINISTRATIVE LAW**

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## DECLARATION

I, Lebogang Bongsi Portia Makgwale, declare that this Research Report is my own unaided work. It is submitted in partial fulfillment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

**Lebogang Makgwale**

**19 August 2024**

## ABSTRACT

In this Research Report I look into the implications of the Constitutional Court case of *Eskom Holdings* for administrative law in South Africa. The Constitutional Court handed down a majority judgment by Madlanga J and a minority judgment by Unterhalter AJ. The two judgments differ significantly, with the majority taking a liberal and generous approach to the issues that were before the court while the minority opted for a conservative approach. It is argued that Madlanga J was correct to find that the meaning of ‘rights’ as contemplated in the definition of administrative action in the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as for purposes of an interim interdict is wide enough to include any right in the Bill of Rights. Therefore, an applicant is not required to have a specific right against the administrator, in this instance a right to electricity, in order to claim that its right has been adversely affected by an administrator’s decision or to satisfy the requirement of a prima facie right in interim proceedings. Further, I am of the view that the majority’s finding that in certain instances organs of state may not exercise their contractual rights without due regard to administrative-law principles is a welcome addition to the jurisprudence.

I also argue that Madlanga J ought to have found that the principle of subsidiarity and the duty to exhaust internal remedies as required by PAJA should not find application in interim proceedings. The questions whether an applicant has exhausted internal remedies or whether the principle of subsidiarity is applicable should be left to the review court.

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## I. INTRODUCTION

It is no secret that numerous South African municipalities are on the brink of collapse.<sup>1</sup> An inevitable consequence of municipalities being dysfunctional is that residents of such municipalities are negatively impacted. *Eskom Holdings*<sup>2</sup> is a case that concerned two dysfunctional municipalities who failed to pay Eskom for the provision of bulk electricity. This led to Eskom reducing the electricity supplied to the two municipalities. As a result of Eskom's reduction, the municipalities in turn reduced the supply of electricity to their residents.<sup>3</sup> The adverse effects of this action prompted the residents to litigate against Eskom in particular, on an urgent basis, for an interim order to the effect that Eskom restore electricity supply to the pre-reduction levels.

The case reached the Constitutional Court where it resulted in a majority judgment by Madlanga J and a minority judgment by Unterhalter AJ. The two judgments are significantly different in that the majority took a distinctly generous approach to the issues before the court, while the minority was more conservative. The majority judgment highlights the creativity and legal generosity that may well be required if the courts are to protect innocent parties from the state's dysfunction. Madlanga J arrived at some bold conclusions in his judgment which not only offered the residents relief but also have some significant and potentially far-reaching implications for future administrative-law cases. In this Research Report, I explore the implications of the majority judgment for administrative law.

Section II of this Research Report provides a summary of the *Eskom Holdings* case: the facts, litigation history, and the two judgments of the Constitutional Court. The discussion of the majority judgment here is merely a summary of its most significant findings as I tackle the substantive points in greater detail in subsequent sections. In Section III, I look at the import of 'rights' as envisaged in the definition of administrative action in s 1 of the Promotion of Administrative Justice Act 3 of 2000 (PAJA) as well as the common-law requirement of a prima facie right for purposes of an interdict. In discussing this point, I also look at the majority's reasoning on the prerogative of organs of state to exercise their contractual rights and whether administrative-law considerations should be applicable. Additionally, the discussion includes

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<sup>1</sup> A report by the Department of Cooperative Governance and Traditional Affairs presented in Parliament on 15 November 2023 states that 66 out of 257 municipalities are dysfunctional. Available at *State of local government: Progress on the implementation of Municipal Support and Improvement Plans (MSIP) – Department of Cooperative Governance and Traditional Affairs (cogta.gov.za)*, accessed on 14/01/2024.

<sup>2</sup> *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 (4) SA 325 (CC) (*Eskom Holdings*).

<sup>3</sup> Reference to 'residents' in this Research Report includes the businesses within the municipalities.

whether procedural fairness as contemplated in PAJA applies in a matter where an affected party does not have a specific right, in this instance a right to electricity, or a public-law right against an organ of state. In Section IV, I consider whether a litigant is required to exhaust internal remedies before launching proceedings for an interim order pending a PAJA review. Section V explores whether the principle of subsidiarity applies in interim interdict proceedings. In section VI, I look at the majority's reasoning on the requirements for an interim interdict. Lastly, Section VII offers a conclusion.

## II. SUMMARY OF ESKOM HOLDINGS

### *a) Background facts*

The two municipalities in this case entered into contracts with Eskom for the supply of bulk electricity up to each municipality's Notified Maximum Demand (NMD).<sup>4</sup> After the contracts were concluded, however, Eskom actually supplied electricity in excess of the agreed-upon NMD. The situation changed in 2020, when Eskom no longer supplied excess electricity but restricted supply to the NMD agreed upon with each municipality, after the municipalities failed to pay Eskom for the electricity.

As a consequence of the reduction by Eskom, the municipalities implemented rotational loadshedding within their areas. These reductions inevitably affected the residents negatively.<sup>5</sup> One of effects of the rotational loadshedding was disruption to the water supply. In addition, sewage systems did not function optimally, which led to sewage spilling into the streets and into the Vaal River.<sup>6</sup> Eskom's reduction decisions were communicated to the municipalities but not to the residents.<sup>7</sup> The residents attempted to engage with Eskom, the municipalities, and the relevant Members of the Executive (MECs). However, when these engagements did not result in a favourable outcome for the residents, they launched litigation proceedings.<sup>8</sup>

It had previously been decided by the Supreme Court of Appeal (SCA) in *Resilient*<sup>9</sup> that Eskom's decisions to interrupt the supply of bulk electricity to municipalities constituted administrative action as contemplated in s 1 of PAJA. This therefore meant that the residents could bring an application to review Eskom's decision under PAJA.

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<sup>4</sup> *Eskom Holdings* supra note 2 para 7.

<sup>5</sup> *Ibid* para 9.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* para 15.

<sup>8</sup> *Ibid* para 16.

<sup>9</sup> *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd* 2021 (3) SA 47 (SCA) paras 89-90.

### *b) Litigation history*

The residents launched urgent proceedings in the High Court seeking interim orders, pending a review application, to the effect that Eskom restore electricity supply to the levels enjoyed before Eskom's reduction decision.<sup>10</sup> In order to obtain the interim interdict, the residents had to satisfy the four requirements for such an order. These requirements are: a prima facie right, though open to some doubt; apprehension of irreparable harm; that the balance of convenience favours the granting of interim relief; and that there is no other satisfactory remedy available.<sup>11</sup> The residents argued that Eskom's decision constituted administrative action.<sup>12</sup> The residents further submitted that Eskom did not consult with them or give them notice regarding the reduction of electricity.<sup>13</sup> Eskom's argument was that the obligation to supply electricity did not lie with it but rather with the municipalities, therefore the residents ought to have sought relief against those municipalities.<sup>14</sup> Eskom also averred that it was 'entitled to enforce its rights in terms of the contracts between itself and the municipalities'.<sup>15</sup>

The High Court held that although there is no right to electricity, the supply of electricity is intertwined with the rights to dignity, life, housing, healthcare, food, water and social security.<sup>16</sup> Further, it found that even though the residents were not parties to the contracts between the municipalities and Eskom, 'Eskom's enforcement of the terms of those contracts. . . infringes on the rights of the [residents]'.<sup>17</sup> The court granted the interim interdicts and accordingly ordered Eskom to either increase or restore the supply of electricity to the levels supplied prior to its reduction decision.<sup>18</sup>

Eskom appealed to the SCA. The SCA dismissed the appeals.<sup>19</sup> It referred to a previous High Court decision of *Resilient HC*<sup>20</sup> which found that even though Eskom had the power to interrupt the supply of electricity, the exercise of such power amounted to administrative action for purposes of s 33 of the Constitution and PAJA and consequently, Eskom was constrained

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<sup>10</sup> *Vaal River Development Association (Pty) Ltd v Eskom Holdings SOC Ltd; Lekwa Rate Payers Association NPC v Eskom Holdings SOC Ltd* [2020] ZAGPPHC 429 para 2.

<sup>11</sup> *Ibid* para 30.

<sup>12</sup> *Ibid* para 28.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid* paras 28-9.

<sup>15</sup> *Ibid* para 29.

<sup>16</sup> *Ibid* para 35.

<sup>17</sup> *Ibid* para 39.

<sup>18</sup> *Ibid* paras 51.1-51.2 and 52.1.

<sup>19</sup> *Eskom Holdings SOC Ltd v Lekwa Ratepayers Association NPC and a similar matter* 2022 (4) SA 78 (SCA) para 33 (*Lekwa Ratepayers*).

<sup>20</sup> *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* 2019 (2) SA 577 (GJ) (*Resilient HC*).

either by the requirement of reasonableness or rationality.<sup>21</sup> The court further held that before Eskom exercised its powers under s 21(5) of the Electricity Regulation Act 4 of 2006 (ERA) it was meant to consider its constitutional obligations as an organ of state.<sup>22</sup> The SCA also held that Eskom could not decide to reduce the electricity supply without first making attempts to settle the dispute with the municipalities through the dispute-resolution mechanisms provided for in the Intergovernmental Relations Framework Act 13 of 2005 (IFRA).<sup>23</sup>

*c) The majority judgment*

Eskom sought leave to appeal from the Constitutional Court. The court was divided, with a minority judgment being given by Unterhalter AJ and a majority judgment by Madlanga J. Although Madlanga J granted leave to appeal, he dismissed the appeals.<sup>24</sup> The majority found that it was not necessary for the residents to show that they had a right to be supplied with electricity by Eskom, nor for the court to decide whether there is a constitutional right to electricity.<sup>25</sup> Eskom's reduction decision had undoubtedly affected some of the residents' rights as enshrined in the Bill of Rights: rights to dignity, access to healthcare services, to an environment that is not harmful to health or wellbeing, to basic education and to life.<sup>26</sup> The court found that 'rights' as provided for in definition of administrative action in PAJA is wide enough to include rights entrenched in the Bill of Rights.<sup>27</sup> The court's finding on this aspect also formed the basis on which it concluded that the residents had satisfied the common-law requirement of a prima facie right for purposes of an interim interdict. Once it was found that the reduction decision affected the residents' rights, it followed that the residents were entitled to procedural fairness. Eskom ought to have informed the residents of its intention to reduce the electricity supply and afforded them an opportunity to make representations.<sup>28</sup>

Further to the above, the majority did not agree with the minority that the residents should be non-suited on the basis of the principle of subsidiarity.<sup>29</sup> Madlanga J left open the question of whether the principle of subsidiarity applied in interim interdict proceedings.<sup>30</sup> In addition,

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<sup>21</sup> *Lekwa Ratepayers* supra note 19 para 22.

<sup>22</sup> Ibid para 24.

<sup>23</sup> Ibid paras 29-31.

<sup>24</sup> *Eskom Holdings* supra note 2 para 310.

<sup>25</sup> Ibid para 190 read with para 192.

<sup>26</sup> Ibid para 204.

<sup>27</sup> Ibid para 204 read with para 280.

<sup>28</sup> Ibid paras 209-10.

<sup>29</sup> Ibid paras 231-32.

<sup>30</sup> Ibid para 252.

the majority elected not to definitively answer the question whether the duty to exhaust internal remedies applies in interim interdict proceedings.<sup>31</sup>

d) *The minority judgment*

While this Research Report focuses on the majority judgment, it is important that a summary of the minority judgment be provided for a proper comparison with the bold reasoning of Madlanga J. Only the features of the minority judgment that relate to the subject of this Research Report are highlighted below.

In his minority judgment, Unterhalter AJ wrote that the prima facie right that the residents should have established to secure interim relief pending the adjudication of their review was ‘the prima facie right to review and set aside the reduction decisions made by Eskom’.<sup>32</sup> Further, he opined that the review would be brought on two grounds. The first ground was that the residents had a right to be supplied electricity by Eskom, meaning that Eskom’s reduction decisions were unlawful. The second ground would be an argument that Eskom had breached its constitutional and statutory duties to resolve the dispute with the municipalities.<sup>33</sup> The essence of the argument in the minority judgment was that for the residents to obtain interim relief, they should have established that they had prospects of success in obtaining final relief.<sup>34</sup>

Further, the import of Unterhalter AJ’s judgment in relation to the supply of electricity to the residents is that the duty to supply electricity lay with the municipalities in terms of the Constitution, so there was no obligation on Eskom to supply them with electricity.<sup>35</sup> Unterhalter AJ also held that since the residents did not have any specific right to electricity against Eskom, they were not entitled to procedural fairness.<sup>36</sup> In this regard Unterhalter AJ distinguished *Eskom Holdings* from the Constitutional Court’s decision in *Joseph*<sup>37</sup> on the basis that in *Joseph* the residents had rights emanating from a municipality’s obligation to provide municipal services, which include electricity; therefore they were entitled to procedural fairness.<sup>38</sup> This was, however, not the case in *Eskom Holdings*. The residents did not have such rights *against Eskom*, therefore there was no requirement for Eskom to ‘extend procedural fairness to the residents in taking the reduction decisions’.<sup>39</sup> In addition, the minority found

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<sup>31</sup> Ibid para 227.

<sup>32</sup> Ibid para 63.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid para 66.

<sup>35</sup> Ibid paras 105-6.

<sup>36</sup> Ibid para 127.

<sup>37</sup> *Joseph v City of Johannesburg* 2010 (4) SA 55 (CC) (*Joseph*).

<sup>38</sup> *Eskom Holdings* supra note 2 para 139.

<sup>39</sup> Ibid.

that because the residents did not have any rights against Eskom there was no duty on Eskom to fulfil the obligations in s 7(2) of the Constitution.<sup>40</sup> This duty lay with the municipalities.<sup>41</sup>

Further to the above, Unterhalter AJ found that the residents were non-suited by the principle of subsidiarity because they had failed to seek recourse within ERA.<sup>42</sup> In the result, Unterhalter AJ would have granted leave to appeal and upheld the appeal in both applications.<sup>43</sup>

I now turn to discuss the significant points made by the majority judgment that impact on administrative law.

### III. THE INTERPRETATION OF 'RIGHTS'

#### *a) The nature of the 'right'*

The discussion under this section looks at 'rights' in the definition of administrative action and the common-law requirement of a prima facie right. For an administrative action as defined in PAJA to be present, a litigant must show that his or her rights were adversely affected by the decision made by the functionary.<sup>44</sup> This is what was required of the residents in *Eskom Holdings*. Both judgments accepted that the residents did not have a right to electricity to assert against Eskom.<sup>45</sup> However, the two judgments differed sharply in this regard: the majority judgment accepted that although there is no right to electricity, the substantial reduction in electricity by Eskom adversely affected certain rights protected in the Bill of Rights.<sup>46</sup> These rights included dignity, access to healthcare services, to an environment that is not harmful to health or wellbeing, basic education and the right to life. On this basis, the majority found that the residents had established a prima facie right for purposes of an interim interdict. In contrast, Unterhalter AJ departed from the premise that since the residents did not have a right to be

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<sup>40</sup> Ibid para 146.

<sup>41</sup> Ibid.

<sup>42</sup> The principle of subsidiarity provides that 'a litigant cannot directly invoke a constitutional right when legislation has been enacted to give effect to that right. The litigant must either challenge the constitutionality of the legislation so enacted or rely upon the legislation to make its case'. See *Eskom Holdings* supra note 2 paras 149-50.

<sup>43</sup> Ibid para 188.

<sup>44</sup> Administrative action is defined in s 1 of PAJA as:

'Any decision taken, or any failure to take a decision, by –

- a) an organ of state, when —
  - i. exercising a power in terms of the Constitution or a provincial constitution; or
  - ii. exercising a public power or performing a public function in terms of any legislation; or
- b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect but does not include –
  - ...

<sup>45</sup> *Eskom Holdings* supra note 2 paras 105-06 and 190.

<sup>46</sup> Ibid para 189.

supplied with electricity by Eskom, they could not enforce a right that they did not have. He did not agree with the submission that because the supply of electricity affects other rights in the Bill of Rights, the residents were entitled to claim the right to be supplied with electricity from Eskom.<sup>47</sup> The minority therefore adopted a narrow and strict definition of ‘right’.

The majority further wrote that each infringement of the rights identified constituted an “adverse” and “material and adverse” effect envisaged in ss 1 and 4(1) of PAJA respectively.<sup>48</sup> Madlanga J moreover found that the reduction decision had a direct, external legal effect as required by s 1 of PAJA.<sup>49</sup> Madlanga J took the approach that ‘the nature of a “right” that may be asserted for purposes of a PAJA review is quite extensive in its reach’<sup>50</sup> thus endorsing the interpretation adopted by a number of scholars that ‘right’ as envisaged in PAJA is wide in nature.<sup>51</sup>

The majority further held that Eskom as an organ of state had a duty in terms of s 7(2) of the Constitution to respect the rights in the Bill of Rights.<sup>52</sup> Section 7(2) states that ‘the state must respect, protect, promote and fulfil the rights in the Bill of Rights’. The court averred that it chose to focus on the aspect of ‘respect’ because it did not approach the matter on the basis that Eskom ‘bears a direct, positive duty to supply electricity to the residents’.<sup>53</sup>

The effect of the majority judgment is that a litigant affected by a decision need not have a specific right, in this instance a right to electricity, to assert against the administrator for the litigant to be able to argue that its right has been adversely affected for purposes of launching review proceedings in terms of PAJA. If the decision adversely affected a right protected in the Bill of Rights, that would be enough to satisfy s 1 of PAJA provided that decision also has a direct and external legal effect. This reasoning builds on the approach previously taken by the Constitutional Court in *Joseph*.<sup>54</sup>

In *Joseph*, the applicants were tenants in an apartment building. The tenants were up to date with their electricity payments to the landlord. However, the landlord failed to make the necessary payments to City Power, an entity owned by the City of Johannesburg (the municipality). As a result of the landlord’s defaulting, City Power decided to disconnect the electricity supply to the apartment building. However, City Power gave notice of the

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<sup>47</sup> Ibid paras 99-100.

<sup>48</sup> Ibid para 195.

<sup>49</sup> Ibid.

<sup>50</sup> Ibid para 197 read with para 204.

<sup>51</sup> Ibid paras 280-81.

<sup>52</sup> Ibid 199.

<sup>53</sup> Ibid.

<sup>54</sup> *Joseph* supra note 37 paras 30-2 read with paras 40-8.

disconnection only to the landlord and not the tenants. The tenants approached the High Court for an order compelling City Power to reconnect the electricity and an order that the disconnection was procedurally unfair in terms of s 3(2)(b) of PAJA. This was premised on lack of notice of the disconnection and no opportunity to make representations. They were unsuccessful, hence an application for leave to appeal directly to the Constitutional Court.

As in *Eskom Holdings*, the highest court had to grapple with whether any of the tenants' rights were affected for the purposes of s 3(1) of PAJA.<sup>55</sup> The tenants in *Joseph* were in the same position as the residents in *Eskom Holdings* in that there was no direct contractual relationship between them and the entity from which they sought electricity supply. The court in *Joseph* took a generous and indeed revolutionary approach to resolve the matter. It found that the provision of electricity is a duty of municipalities as part of municipal services.<sup>56</sup> The court held that:

‘When City Power supplied electricity to [the apartment building], it did so in fulfilment of the constitutional and statutory duties of local government to provide basic municipal services to all persons living in its jurisdiction. When the applicants received electricity, they did so by virtue of their corresponding public-law right to receive this basic municipal service.’<sup>57</sup>

In *Joseph* the court did not consider the meaning of ‘rights’ in PAJA based on the rights that the tenants submitted had been adversely affected: the right to adequate housing, the right to dignity and their right to electricity in terms of their contract with the landlord.<sup>58</sup> The court rather located the tenants’ rights in the municipality’s constitutional and statutory obligations, hence the court ultimately held that the tenants were entitled to electricity supply by virtue of a ‘public-law right’. In my view, this is distinctly different from the majority’s approach in *Eskom Holdings*.<sup>59</sup> Even though the court in *Joseph* adopted a somewhat wide meaning of ‘right’, the meaning was linked to a municipality’s constitutional and statutory obligations to supply municipal services including electricity. Notably, the approach in *Joseph* has been hailed as commendable by Quinot.<sup>60</sup> Quinot’s view is that Skweyiya J’s reasoning was ‘a fairly

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<sup>55</sup> Ibid para 24.

<sup>56</sup> Ibid paras 34-9.

<sup>57</sup> Ibid para 47.

<sup>58</sup> Ibid para 12.

<sup>59</sup> It should be noted that the majority added a caveat in fn 128 to the effect that its approach did not derogate from the court’s view in *Joseph* that municipalities have a duty to provide basic services, including the supply of electricity.

<sup>60</sup> Geo Quinot ‘Substantive reasoning in administrative-law adjudication’ (2010) 3 CCR 111 at 122.

innovative and fully justified way of interpreting s 3 of PAJA' because of the manner in which the court used existing law, including jurisprudence, on the relationship between citizens and local authorities to identify a public-law right to receive a basic municipal service.<sup>61</sup> On the other hand, the majority's approach in *Eskom Holdings* was not premised on a statutory or constitutional obligation to supply electricity but merely on Eskom's duty as an organ of state to respect rights in terms of section 7(2) of the Constitution. Therefore, Madlanga J arguably went even further than the court did in *Joseph*.

*b) Enforcement of contractual rights and administrative law*

Another significant finding in *Eskom Holdings* is that for Madlanga J, it did not matter that the contracts were between Eskom and the municipalities and not between the residents and Eskom.<sup>62</sup> The absence of a contract between Eskom and the residents did not mean that the residents were not entitled to assert the constitutional rights that were infringed by Eskom's decision.<sup>63</sup> The majority's conclusion in this regard built on the approach in *Joseph*.<sup>64</sup> However, while Madlanga J's reasoning is founded on *Joseph* he was again somewhat more adventurous than the approach in the earlier case. I say this because in *Joseph*, Skweyiya J criticised the High Court for failing to take into account the role that PAJA 'may play in respect of persons who have no contractual relationship with the service provider'.<sup>65</sup> However, he still recognised that there existed a contractual relationship between City Power and the landlord.<sup>66</sup> According to Skweyiya J, the landlord acted as a conduit between City Power and the tenants.<sup>67</sup> Consequently, the court concluded that the contract between the landlord and City Power was related to the benefits accruing to the tenants under the contract.<sup>68</sup>

By contrast, Madlanga J did not make this connection. For Madlanga J, the contracts were not a factor that influenced his conclusion on the aspect of the prima facie right. This approach is notably generous compared to that taken by the minority. Unterhalter AJ opted for a stricter and more formalistic approach on this issue. His view was that the contracts were an important factor when considering whether Eskom had a duty towards the residents.<sup>69</sup> The minority's

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<sup>61</sup> Ibid.

<sup>62</sup> *Eskom Holdings* supra note 2 para 265.

<sup>63</sup> Ibid.

<sup>64</sup> *Joseph* supra note 37 paras 22-5.

<sup>65</sup> Ibid para 22.

<sup>66</sup> Ibid para 23.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid.

<sup>69</sup> *Eskom Holdings* supra note 2 paras 88-90.

approach was therefore restrictive. Unterhalter AJ did not offer the residents the lifeline of the municipalities acting as conduits between the residents and Eskom, as the court did in *Joseph*.

The importance of *Joseph* and the approach of the majority in *Eskom Holdings* is that they affirm the hard-won principle that even when a public functionary contracts, it is still subject to administrative law. One of the earliest cases upholding this view is the judgment of the SCA in *Logbro*.<sup>70</sup> *Logbro* concerned a decision of a provincial government's tender committee to cancel a tender. In the SCA, the provincial government argued that the tender conditions gave it a contractual right to withdraw a property from tender without having to be subjected to administrative justice.<sup>71</sup> The court, however, did not agree with this proposition. The court said:

'Even if the conditions constituted a contract (a finding not in issue before us, and on which I express no opinion), its provisions did not exhaust the province's duties toward the tenderers. Principles of administrative justice continued to govern that relationship, and the province in exercising its contractual rights in the tender process was obliged to act lawfully, procedurally and fairly. In consequence, some of its contractual rights such as the entitlement to give no reasons would necessarily yield before its public duties under the Constitution and any applicable legislation'.<sup>72</sup>

In addition, Cameron J held that the principles of administrative justice governed the relationship between the tender committee and the tenderers and further continued to govern the province's exercise of its contractual rights.<sup>73</sup> The *Logbro* judgment also clarified the SCA's previous decision in *Cape Metro*.<sup>74</sup> The case concerned a decision of a council to terminate a contract with a private entity.<sup>75</sup> The court held that although the council derived its power to enter into the contract with the private entity from statute, it derived its power to cancel the contract from the terms of contract and the common-law.<sup>76</sup> According to Streicher JA, when the council cancelled the contract, it was not acting from a position of superiority as a public authority nor was it performing a public duty or implementing legislation.<sup>77</sup> Rather, the council

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<sup>70</sup> *Logbro Properties CC v Bedderson NO* 2003 (2) SA 460 (SCA) (*Logbro*).

<sup>71</sup> *Ibid* para 5.

<sup>72</sup> *Ibid* para 7.

<sup>73</sup> *Ibid* para 8.

<sup>74</sup> *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC* 2001 (3) SA 1013 (SCA) (*Cape Metro*).

<sup>75</sup> *Ibid* para 7.

<sup>76</sup> *Ibid* para 18.

<sup>77</sup> *Ibid*.

was exercising a right founded in the contract.<sup>78</sup> The court ultimately found that the cancellation decision did not constitute administrative action.<sup>79</sup> In *Logbro* Cameron J clarified that *Cape Metro* is ‘not authority for the general proposition that a public authority empowered by statute to contract may exercise its contractual rights without regard to public duties of fairness’.<sup>80</sup> The principle established in *Cape Metro* is that where a public authority is on equal footing with a private party when contracting, then its actions do not amount to the exercise of public power.<sup>81</sup>

*Logbro* was affirmed by the majority in *SANP*.<sup>82</sup> The case concerned a decision by SanParks (a government entity) to vary a lease agreement without consulting members of the public.<sup>83</sup> The court held that even though SanParks was acting in terms of a contract, the exercise of this power was subject to administrative law.<sup>84</sup> The court also held that there was a legitimate expectation by the public that SanParks would consult them before it made the decision to vary the lease agreement.<sup>85</sup>

When one looks at the cases above, it is apparent that there is lack of clarity as to when the state’s exercise of power linked to a contract should be subjected to administrative law and when it should not.<sup>86</sup> The minority judgment in *SANP* provided factors that may be helpful in making the determination whether administrative-law principles are applicable in a contract involving the state.<sup>87</sup> First, the minority suggested looking at whether the organ of state is acting from a position of superiority against the private party.<sup>88</sup> A second consideration is whether the public interest is affected by the exercise of the contractual right.<sup>89</sup> Thirdly, the contract should be considered to determine how the parties envisaged disputes arising from the contract would be handled.<sup>90</sup> The minority also made the point that there is no blanket approach

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<sup>78</sup> Ibid.

<sup>79</sup> Ibid para 30.

<sup>80</sup> *Logbro* supra note 70 para 10.

<sup>81</sup> Ibid.

<sup>82</sup> *South African National Parks v MTO Forestry (Pty) Ltd* 2018 (5) SA 177 (SCA) paras 23-9 (*SANP*).

<sup>83</sup> Ibid para 1.

<sup>84</sup> Ibid read with paras 34-5.

<sup>85</sup> Ibid paras 30-2.

<sup>86</sup> Additional cases where the courts have found that administrative law does not have a role to play when a public authority exercises public power linked to a contract include: *Government of the Republic of South Africa v Thabiso Chemicals (Pty) Ltd* 2009 (1) SA 163 (SCA) para 18; *Hibiscus Coast Municipality v Margate Amusement Park (Pty) Ltd* [2016] ZAKZPHC 24 para 19; and *Mayedwa t/a Mayedwa Attorneys v Amatola Water Board* [2020] ZAECELLC 16 paras 12-15.

<sup>87</sup> *SANP* supra note 82 para 37.

<sup>88</sup> Ibid.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

to making the determination. Each matter must be decided on its own facts and the court should exercise a value judgment.<sup>91</sup>

The proposition that administrative-law principles apply even when organs of state act in terms of contract is significant because it ensures that the actions of organs of state are scrutinised not only in terms of the contracts themselves but also in terms of the principles of administrative law. Applying administrative-law principles to contracts entered into by the state also protects the interests of the public by requiring procedural fairness before an organ of state acts. The proposition that administrative-law principles should apply to contracts involving the state has gained favour with scholars. Hoexter hails as admirable the approach taken by Cameron J in *Logbro*, which rejected formalism.<sup>92</sup> She points out that *Logbro* shows that the principles of administrative justice frame contractual relationships involving the state.<sup>93</sup> This ensures that the state cannot escape certain public-law duties: the duty to act lawfully, reasonably and fairly.<sup>94</sup> Cachalia argues that the state as a contracting party is quintessentially different from private parties and should be treated as such by the courts.<sup>95</sup> She does not agree with the approach of focusing on the activities of the state when deciding whether public law should be applicable to state contracts but argues that the focus should be on the state as a unique contracting actor.<sup>96</sup> Her view is that a state contract is a hybrid of contractual rights and duties imposed generally by law.<sup>97</sup>

If the majority judgment in *Eskom Holding* had adopted a legalistic and formal approach and found simply that Eskom was entitled to enforce the contracts by reducing the electricity supply to the NMD levels, it would have meant that Eskom's actions were only considered from a contractual point of view without regard to administrative-law principles. Consequently, it would have meant that the residents were not entitled to procedural fairness despite the extremely adverse effects of the decision.

### *c) Procedural fairness*

The majority in *Eskom Holdings* also dealt with the importance of Eskom giving the residents notice of the impending reduction decision and further allowing the residents to make

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<sup>91</sup> Ibid read with para 38.

<sup>92</sup> Cora Hoexter 'Contracts in administrative law: Life after formalism' (2004) 121 *SALJ* 595 at 613.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid at 613-14.

<sup>95</sup> Raisa Cachalia 'Government contracts in South Africa: Constructing the framework' (2016) 27 *Stell LR* 88 at 88 read with 94-101.

<sup>96</sup> Ibid at 110. Cachalia also relies on *Logbro* to highlight that administrative principles and public law are applicable to contracts involving the state.

<sup>97</sup> Ibid.

representations to Eskom.<sup>98</sup> The right to an administrative action that is procedurally fair is enshrined in s 33(1) of the Constitution which provides that ‘everyone has the right to administrative action that is lawful, reasonable and procedurally fair’. The essence of this right is further entrenched and expanded in ss 3 and 4 of PAJA. For purposes of this Research Report, s 4 which applies when an administrative action affects the rights of the public is most relevant. Section 4(1) provides for various methods that an administrator may employ ‘in order to give effect to the right to procedurally fair administrative action’.<sup>99</sup>

In *New Clicks*, Ngcobo J wrote that the ultimate objective of procedural fairness ‘is to afford persons who may be adversely affected by the decision an opportunity to make representations before the decision is made.’<sup>100</sup> In *Eskom Holdings*, Madlanga J said ‘the opportunity [to make representations] is so important that authority says it must not be denied, even where it is thought the affected person cannot possibly have anything to say or that whatever they may say is not likely to influence the decision.’<sup>101</sup> In line with this, the majority found that even though Eskom’s decision was aimed at averting grave consequences, it was still required to follow the applicable process prescribed by s 4 of PAJA.<sup>102</sup>

The impact of the majority judgment is that when an administrator seeks to make a decision, the administrator must consider whether that decision will adversely affect the constitutional rights of an individual or the public. If so, the administrator ought to give notice to the affected parties and allow them an opportunity to make representations as prescribed by s 3(1) or s 4(1), whichever is applicable.

The majority’s conclusions are consistent with the court’s previous conclusion in *Joseph* even though the court in that case concluded on procedural fairness from the premise of s 3. The court in *Joseph* reiterated the principle that procedural fairness depends on the circumstances of each case.<sup>103</sup> On what adequate notice would look like in the circumstances of *Joseph*, the court stated that the pre-termination notice ought to contain all relevant information. The information would include ‘the date and time of the proposed disconnection, the reasons for the proposed disconnection, and the place at which the affected parties can challenge the basis of the proposed disconnection’.<sup>104</sup> The administrator must give the affected persons sufficient time to, amongst others, conduct the necessary investigations or organise

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<sup>98</sup> *Eskom Holdings* supra note 2 para 207.

<sup>99</sup> These methods include: holding a public inquiry; following a notice and comment procedure.

<sup>100</sup> *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC) (*New Clicks*) para 483.

<sup>101</sup> *Eskom Holdings* supra note 2 para 207.

<sup>102</sup> *Ibid* para 210.

<sup>103</sup> *Joseph* supra note 37 para 56.

<sup>104</sup> *Ibid* para 61.

themselves.<sup>105</sup> Further, the court essentially said the responsibility of making representations lay with the tenants. The tenants ought to use the notice period to approach the city and make the necessary representations.<sup>106</sup> This approach would ensure that the city was not overburdened.

I agree with the approach taken by the majority in *Eskom Holdings*, especially in respect of the definition of ‘right’ in so far as it relates to PAJA and interim interdicts as discussed in section (a) above and the application of administrative-law principles to contracts involving the state. If the matter had been decided on the approach of Unterhalter AJ, the residents would not have had any redress. This is because the municipalities would not have been able to increase the supply of electricity or suspend loadshedding unless Eskom increased the supply of electricity on its part. Therefore the status quo would have been maintained with the residents living in an environment that was harmful to their health and their rights being negatively affected by Eskom’s reduction decision.

Further, the concept of ‘rights’ as envisaged in the definition of administrative action in PAJA is not qualified. It follows that an interpretation that finds that ‘rights’ includes a right in the Bill of Rights is reasonable. It is not only in respect of s 1 that ‘rights’ is unqualified. Sections 3(1), 4(1) and 5(1) of PAJA also do not qualify ‘rights’. It seems to me that the idea of interpreting rights in a wide and purposive sense, without relying on a constitutional or statutory obligation as the court did in *Joseph*, is not necessarily new. In *Grey’s Marine* the court recognised that rights may be interpreted in a wide sense when dealing with procedural fairness in s 3(1) of PAJA.<sup>107</sup> Indeed, Nugent JA was willing to consider a *prospective* right in that context.<sup>108</sup> The fact that his statement was in the context of s 3(1) does not mean that it cannot be equally applied to the definition of administrative action in s 1. Further, Madlanga J’s reasoning on contracts and administrative law is a welcome addition to a discussion that has up to now been dominated mainly by cases concerned with state procurement.<sup>109</sup> The majority judgment opens the door for other forms of contracts, unrelated to procurement, to be assessed for the application of administrative law. This approach is in line with the argument made by Cachalia referred to above, that the state as a contracting party is different from private parties

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<sup>105</sup> Ibid.

<sup>106</sup> Ibid para 63.

<sup>107</sup> *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 (6) SA 313 (SCA) para 29-30.

<sup>108</sup> Ibid para 30.

<sup>109</sup> See *Logbro* supra note 70, *Cape Metro* supra note 74 and listed cases in footnote 86.

and should be treated as such.<sup>110</sup> On this basis I am fully aligned with the approach of the majority.

#### IV. EXHAUSTING INTERNAL REMEDIES

Section 7 of PAJA requires that an affected party exhaust internal remedies before launching proceedings for judicial review. Section 7(2)(a) provides that ‘subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted’. The requirement is so strict that s 7(2)(b) empowers a court or tribunal to direct an affected party to exhaust internal remedies before launching review proceedings if the court is not satisfied that internal remedies were exhausted. Section 7(2)(c), on the other hand, allows a court or tribunal, in exceptional circumstances and on application, to exempt an affected person from exhausting internal remedies if the court or tribunal deems it to be in the interest of justice.

In *Koyabe* the Constitutional Court affirmed that internal remedies are important because they ‘are designed to provide immediate and cost-effective relief, giving the executive the opportunity to utilise its own mechanisms, rectifying irregularities first, before aggrieved parties resort to litigation’.<sup>111</sup> The court found that launching court proceedings before exhausting internal remedies undermines the autonomy of the administrative process and renders the judicial proceedings premature.<sup>112</sup> The court also highlighted that an affected party may be exempted from exhausting internal remedies in exceptional circumstances.<sup>113</sup> The court ultimately held that the applicants in *Koyabe* had failed to exhaust the internal remedies available to them, which rendered their review proceedings premature.<sup>114</sup> The applicants were ordered to exhaust the internal remedies within seven days of the court order before launching a judicial review.<sup>115</sup> It is clear from the provisions of PAJA and the *Koyabe* case that internal remedies are an important aspect of the administrative-law process.

Again, Unterhalter AJ elected to take a strict and legalistic line on the aspect of internal remedies. The minority held that, in line with s 7(2) of PAJA, the residents were required to exhaust internal remedies provided for in ERA before they launched the proceedings. It in essence held this view because s 30 of ERA requires the National Energy Regulator of South

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<sup>110</sup> Cachalia op cit note 95 at 88-9.

<sup>111</sup> *Koyabe v Minister for Home Affairs* 2010 (4) SA 327 (CC) (*Koyabe*) para 35.

<sup>112</sup> Ibid para 36.

<sup>113</sup> Ibid paras 38-9.

<sup>114</sup> Ibid para 82.

<sup>115</sup> Ibid para 83.

Africa (NERSA) to settle disputes between a user of electricity and a licensee such as Eskom. Therefore, the residents should have referred the dispute to NERSA.<sup>116</sup> Unterhalter AJ's argument was that a consideration of whether the residents had exhausted internal remedies as required by s 7(2) of PAJA finds application even in interim proceedings.<sup>117</sup> This argument was also premised on the fact that an applicant seeking an interim order ought to show that there is no other alternative remedy available to him or her. In this matter, s 30 of ERA provided alternative remedies which were available to the residents, yet they had failed to show why the remedies provided in s 30 would not have been sufficient to resolve the dispute with Eskom.<sup>118</sup>

The majority in *Eskom Holdings* opted to leave open the question whether an applicant seeking interim relief pending a PAJA review should be non-suited in the interim relief proceedings where it had failed to exhaust internal remedies as required by s 7(2)(a) of PAJA.<sup>119</sup> However, it is fair to say that the majority judgment leaned towards saying an applicant should not be required to exhaust internal remedies at the stage of interim proceedings. I say this because Madlanga J stated that the minority judgment was mistaken to argue that the residents should not have approached the High Court for the interim relief without first exhausting internal remedies in ERA.<sup>120</sup> The majority emphasised that 'the operative word in s 7(2)(a) is "review"'. Therefore, since the proceedings in *Eskom Holdings* were not review proceedings but rather proceedings for interim relief pending a review, ss 7(2)(a) and 7(2)(c) of PAJA could not feature.<sup>121</sup> The majority's view was that the PAJA provisions concerned with internal remedies would feature in the review proceedings.<sup>122</sup>

The majority judgment also considered that in interim proceedings an applicant has to show that there is no other satisfactory remedy available to it.<sup>123</sup> According to the court, the question whether a remedy is satisfactory depends on the circumstances of each case.<sup>124</sup> The court held that the satisfactory remedy may be an internal remedy; however, this is not mandatory.<sup>125</sup> Madlanga J came to the conclusion that although the common-law requirement that there be no other satisfactory remedy and the PAJA requirement that an affected party must

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<sup>116</sup> *Eskom Holdings* supra note 2 para 158.

<sup>117</sup> Ibid para 162.

<sup>118</sup> Ibid paras 164-5.

<sup>119</sup> Ibid para 227.

<sup>120</sup> Ibid para 216.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

<sup>123</sup> Ibid para 218.

<sup>124</sup> Ibid.

<sup>125</sup> Ibid.

exhaust internal remedies are similar, they are not the same.<sup>126</sup> His view was that requiring an applicant to exhaust internal remedies before launching interim interdict proceedings would be cumbersome and would negatively impact the right of access to court enshrined in s 34 of the Constitution.<sup>127</sup> Madlanga J evidently preferred an interpretation that s 7(2)(a) of PAJA does not apply in interim interdict proceedings pending a PAJA review.<sup>128</sup>

I would argue that Madlanga J should have decided definitively that s 7(2)(a) and (c) do not apply in interim proceedings. The majority had already found, correctly so, that the operative word in the section is ‘review’.<sup>129</sup> This must then mean that the legislature intended the requirement to exhaust internal remedies to be interrogated at review proceedings as opposed to interim proceedings. The minority judgment argued that the aspect of whether internal remedies were exhausted is important in interim proceedings because ‘it bears directly upon the [residents’] likely prospects of success in the review’.<sup>130</sup> Although I accept the minority’s argument on this point, I do not agree that the residents should have been non-suited based on it. In *OUTA* the court said:

‘Yet another important consideration is whether in deciding an appeal against an interim order, the appellate court would in effect usurp the role of the review court. Ordinarily the appellate court should avoid anticipating the outcome of the review, except perhaps whether the review has no prospects of success whatsoever’.<sup>131</sup>

Even though the court was saying this in respect of whether leave to appeal should be granted, I find that it is equally relevant to the present discussion. If the issue of whether internal remedies have been exhausted is left to the review court, it will satisfy the cautions raised by Moseneke DCJ in *OUTA* quoted above. Section 7(2)(a) of PAJA clothes the review court with the powers to interrogate whether an applicant has exhausted internal remedies. It is therefore important that the question be left to the review court to explore. Further, s 7(2)(c) empowers the review court to condone a failure to exhaust internal remedies. No one can predict whether the review court will grant condonation for failure to exhaust internal remedies, in the event that an applicant seeks such condonation. Therefore, it is best to leave such matters to the review court.

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<sup>126</sup> Ibid.

<sup>127</sup> Ibid para 220.

<sup>128</sup> Ibid.

<sup>129</sup> Ibid para 216.

<sup>130</sup> Ibid para 162.

<sup>131</sup> *National Treasury v Opposition to Urban Tolling Alliance* 2012 (6) SA 223 (CC) (*OUTA*) para 26.

Another factor that is important is that interim interdict proceedings are usually urgent, a point that the majority accepted.<sup>132</sup> In view of this, requiring the affected party to first exhaust internal remedies might lead to more harm for the affected party. A more generous approach that permits an applicant to obtain the interim relief without first showing compliance with s 7(2)(a) of PAJA would be more suitable. In any event, in this matter the residents had attempted to resolve the electricity supply issues with Eskom, the municipalities and even the relevant MECs to no avail. The minority argued that the residents could have referred the dispute to NERSA in terms of s 30 of ERA.<sup>133</sup> This is because s 30(1)(b) of ERA requires that NERSA settle disputes between a customer or end user on the one hand and a licensee, registered person, a person who trades, generates, transmits, or distributes electricity on the other hand. However, referring a dispute to NERSA may not have provided immediate relief to the residents. It is common cause that the disruption in electricity supply was having dire effects on the lives of the residents; therefore, it was important that the urgent immediate relief be obtained. The purpose of an interim interdict, after all, is to prevent harm from occurring or from continuing to occur. In *Openshaw* the SCA said:

‘An interdict is not a remedy for past invasion of rights but is concerned with present or future infringements. It is only appropriate when future injury is feared. When a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated’.<sup>134</sup>

Therefore, considering the purpose of an interdict, I reiterate that an approach that does not require an affected party to exhaust internal remedies before instituting interdict proceedings is the most appropriate.

## V. THE PRINCIPLE OF SUBSIDIARITY IN INTERIM PROCEEDINGS

The essence of the principle of subsidiarity, in the context of this matter, is that where legislation has been enacted to give effect to a constitutional right, a litigant may not rely directly on the right but must either rely on the enacted legislation or challenge the constitutionality of that legislation. According to Cachalia, the justification for the principle of subsidiarity is the separation of powers.<sup>135</sup> This entails amongst other considerations, the

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<sup>132</sup> *Eskom Holdings* supra note 2 para 250.

<sup>133</sup> *Ibid* para 158.

<sup>134</sup> *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* 2008 (5) SA 339 (SCA) para 20.

<sup>135</sup> Raisa Cachalia ‘Botching procedure, avoiding substance: A critique of the majority judgment in *My Vote Counts*’ (2017) 33 *SAJHR* 138 at 143.

judiciary deferring to Parliament on certain matters.<sup>136</sup> Cachalia's analysis in this regard is on point. Since Parliament is the body entrusted by the Constitution to enact laws,<sup>137</sup> the courts cannot simply ignore those enacted laws. Klare illuminatingly regards subsidiarity as performing a gate-keeping function.<sup>138</sup> His view is that:

'In principle, subsidiarity analysis tells a court whether to proceed with an action styled as a claim on the Constitution itself (or for Constitution-based remedies); or whether, in the alternative, to limit the claimant to such rights and entitlements as are available within the compass of a pertinent statute giving effect to the constitutional right, if any, or the common law, if not.'<sup>139</sup>

In addition to the above, the principle of subsidiarity has been the subject of quite a few cases, particularly in the Constitutional Court. In *My Vote Counts I*, the judgment of Cameron J stated that:

'Once legislation to fulfil a constitutional right exists, the Constitution's embodiment of that right is no longer the prime mechanism for its enforcement. The legislation is primary. The right in the Constitution plays only a subsidiary or supporting role'.<sup>140</sup>

While this was a dissenting judgment, the majority in *My Vote Counts I* agreed with Cameron J's discussion on the history of the principle of subsidiarity.<sup>141</sup> Cameron J went on to discuss a number of court cases that affirmed the application of subsidiarity.<sup>142</sup> The significance of subsidiarity in so far as it relates to PAJA was highlighted and emphasised by Ngcobo J in *New Clicks*.<sup>143</sup> Before *New Clicks*, O'Regan J in *Bato Star* said that 'the courts' power to review administrative action no longer flows directly from the common-law but from PAJA and the Constitution'.<sup>144</sup> She further recognised that the cause of action for the judicial review now ordinarily arises from PAJA.<sup>145</sup> Even though O'Regan J did not explicitly affirm the principle of subsidiarity, it is apparent from her judgment that she recognised it and applied it.<sup>146</sup>

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<sup>136</sup> Ibid.

<sup>137</sup> See ss 43 and 44 of the Constitution.

<sup>138</sup> Karl Klare 'Legal subsidiarity and constitutional rights: A reply to Van der Walt' (2008) 1 CCR 129 at 138.

<sup>139</sup> Ibid.

<sup>140</sup> *My Vote Counts NPC v Speaker of The National Assembly* 2016 (1) SA 132 (CC) (*My Vote Counts I*) para 53.

<sup>141</sup> Ibid para 121.

<sup>142</sup> Ibid paras 54-64. Footnote 100 provides a comprehensive list of cases where the Constitutional Court considered the principle of subsidiarity.

<sup>143</sup> *New Clicks* supra note 100 paras 437-38.

<sup>144</sup> *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 (4) SA 490 (CC) para 22.

<sup>145</sup> Ibid para 25.

<sup>146</sup> Ibid paras 22-6.

Subsidiarity also found support in *Pillay*, where the court said that claims brought under the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 must be decided within the confines of the legislation.<sup>147</sup> According to the court, to allow a litigant to rely directly on the Constitution where legislation has been enacted to give effect to a right ‘would be to fail to recognise the important task conferred upon the legislature by the Constitution to respect, protect, promote and fulfil the rights in the Bill of Rights’.<sup>148</sup>

Looking at *Eskom Holdings*, the minority was notably strict in applying subsidiarity. According to Unterhalter AJ, ERA is the legislation that regulates the generation, transmission and distribution of electricity; therefore, the residents should have impugned the reduction decision by recourse to ERA.<sup>149</sup> Since the residents had neglected to seek recourse in ERA, this would pose a problem for them in the review itself. Thus this obstacle, too, should have precluded the residents from obtaining the interim relief.<sup>150</sup> He disagreed with the majority that the issue of whether subsidiarity applied in interim proceedings should be left to the High Court to decide in the review application.<sup>151</sup>

The majority, however, reasoned that ERA does not give effect to a constitutional right.<sup>152</sup> Madlanga J conceded that there is scholarly writing to the effect that the principle of subsidiarity may also apply in instances where legislation does not give effect to a constitutional right but still covers the field of a given subject. However, he chose not to express a view on this point on the basis that the Constitutional Court had not pronounced on the relevant scholarly writings.<sup>153</sup> Further, his view was that the impact, if any, of the scholarly writings would merely be to cast doubt on the residents’ prima facie right.<sup>154</sup>

With respect, it would have been ideal if, instead of leaving the question open, the majority judgment had definitively decided whether the principle of subsidiarity applies during interim proceedings pending a PAJA review. It is rather surprising that the majority left this aspect open because its discussion suggested that the court was leaning towards saying the principle

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<sup>147</sup> *MEC For Education KwaZulu-Natal v Pillay* 2008 (1) SA 474 (CC) para 40.

<sup>148</sup> *Ibid.* For more support of the principle of subsidiarity see *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC) para 73 and *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku* 2022 (4) SA 1 paras 98-108. See also fn 177-84 and paras 232-41 of *Eskom Holdings* for a discussion of cases dealing with the principle of subsidiarity.

<sup>149</sup> *Eskom Holdings* supra note 2 paras 148-50.

<sup>150</sup> *Ibid* para 150.

<sup>151</sup> *Ibid* para 157.

<sup>152</sup> *Ibid* para 242.

<sup>153</sup> *Ibid* paras 243-4. See also fn 200-1 for scholarly writings on the principle of subsidiarity, particularly Melanie Murcott & Werner van der Westhuizen ‘The ebb and flow of the application of the principle of subsidiarity – Critical reflections on *Motau* and *My Vote Counts*’ (2015) 7 *CCR* 43.

<sup>154</sup> *Eskom Holdings* supra note 2 paras 243-4.

of subsidiarity does not find application in such proceedings. In my view, this approach would have been appropriate because the interim proceedings were not dispositive of the main issue between the residents and Eskom. In *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* the Constitutional Court, dealing with the appealability of an interim order, stated that an interim order is appealable if, amongst others, it is definitive of the rights of the parties.<sup>155</sup> I would argue that the interim interdict in *Eskom Holdings* did not have this effect. The interim interdict was granted as a temporary measure until the residents sought a review of Eskom's decision to reduce the supply of electricity. Therefore, would still be open to Eskom to argue in the review proceedings that ERA is applicable and as such, the residents were not permitted to rely directly on the Constitution but were supposed to invoke ERA as required by the principle of subsidiarity.

If the majority had settled the issue of subsidiarity in relation to interim proceedings, it would still have been open to the court dealing with the review application to decide whether the residents should have invoked ERA or launched an attack on the constitutionality of ERA rather than relying directly on the Constitution. However, the court's leaving this issue open does not mean that its discussion comes to nought. On the contrary, its insightful dicta are likely to assist any subsequent court seized with the same issue to reach a well-informed decision. Ultimately, however, I do not think that it would be judicious for a court to hold that the principle of subsidiarity is applicable in interim proceedings. That would be an overly strict approach to adopt.

## VI. REMAINING REQUIREMENTS FOR AN INTERIM INTERDICT

The majority's liberal approach to rights was matched by its treatment of the remaining requirements for an interim interdict. It is therefore appropriate also to outline the court's reasoning on the remaining requirements for an interim interdict, as the case was after all concerned with the appeal of an interim interdict.

### *a) Irreparable harm*

In determining whether there was irreparable harm, the court considered the effect of Eskom's decision on the residents' constitutional rights. On this aspect, Madlanga J held that Eskom's decision negatively impacted the residents' constitutional rights and that but for the interim order, the harm would still be continuing.<sup>156</sup> This was because the effect of the interim interdict

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<sup>155</sup> In *United Democratic Movement v Lebashe Investment Group (Pty) Ltd* 2023 (1) SA 353 (CC) para 41.

<sup>156</sup> *Eskom Holdings* supra note 2 para 297.

is to halt the ‘continuation of the offending conduct which – for as long as it continues – exacerbates the rights violation’.<sup>157</sup>

*b) Balance of convenience*

Madlanga J held that the balance of convenience favoured the residents.<sup>158</sup> I agree with the reasoning and conclusion of the majority on this aspect. Madlanga J considered the human-rights violations suffered by the residents against the harm that Eskom would suffer as a result of the interim interdict.<sup>159</sup> In considering this aspect, the majority looked at the decision of *OUTA* where the Constitutional Court said that:

‘The balance of convenience enquiry must now carefully probe whether and to which extent the restraining order will probably intrude into the exclusive terrain of another branch of government . . . a court must keep in mind that a temporary restraint against the exercise of statutory power well ahead of the final adjudication of a claimant’s case may be granted only in the clearest of cases and after a careful consideration of separation of powers harm.’<sup>160</sup>

In essence, *OUTA* requires courts when considering the balance of convenience to weigh the harm suffered by an applicant against potentially offending the principle of separation of powers. However, *OUTA* was concerned with an interim interdict granted in a matter that had to do with a decision connected to executive powers, particularly the formulation of policy.<sup>161</sup> It was not concerned with whether there was an infringement of constitutional rights.<sup>162</sup> Therefore, *OUTA* is distinguishable from *Eskom Holdings*. Crucially, the question of separation-of-powers harm did not arise in *Eskom Holdings* because Eskom’s decision was not a policy-laden executive decision. Furthermore, there was no need for the court in *Eskom Holdings* to consider whether the threshold of ‘clearest of cases’ was met when determining the balance of convenience. This is because *Eskom Holdings* was concerned with a breach of constitutional rights. According to Madlanga J, this is an important consideration when dealing with the balance of convenience.<sup>163</sup> This approach ensures that the ‘clearest of cases’ threshold is not too stringent.<sup>164</sup> The court appears to have approved Hoexter and Penfold’s argument

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<sup>157</sup> Ibid para 298.

<sup>158</sup> Ibid para 305.

<sup>159</sup> Ibid.

<sup>160</sup> *OUTA* supra note 131 para 47. See also *Eskom Holdings* supra note 2 para 299.

<sup>161</sup> *OUTA* paras 67-8.

<sup>162</sup> Ibid para 47.

<sup>163</sup> *Eskom Holdings* supra note 2 para 303 read with para 302.

<sup>164</sup> Ibid.

that the imposition of the ‘clearest of cases’ requirement ‘skews the interim-interdict inquiry in favour of the public authority and does not . . . pay sufficient regard to the (at least) equally important consideration of protecting and vindicating the rule of law and fundamental rights of the applicant’.<sup>165</sup>

Another important factor that swayed the majority to find for the residents on this point is that Eskom was using the electricity reduction as a measure for enforcing debt collection against the municipalities.<sup>166</sup> This indicated that if Eskom were to continue to supply electricity above the NMD levels, albeit on an interim basis, it would not suffer irreparable harm.<sup>167</sup>

The minority did not agree that the balance of convenience favoured the residents. Even though Unterhalter AJ recognised that the harm suffered by the residents without the interim relief might be greater than the issues faced by Eskom, in his assessment the main source of the problem was that the municipalities were not carrying out their constitutional and statutory functions.<sup>168</sup> His view was that the municipalities should be made to fulfil their functions, and should they fail to do so, the national and provincial government should intervene to ensure the municipalities fulfilled their obligations.<sup>169</sup>

The legalistic and rigid approach taken by Unterhalter AJ is consistent with his reasoning throughout the judgment. However, I find it surprising that he would deny the residents relief, even temporarily, on the basis that national and provincial government should intervene to ensure that the municipalities fulfil their obligations, especially when there were submissions that the residents had attempted to engage the respective MECs with no success.<sup>170</sup> In any event, there was nothing prohibiting Eskom, at least on the facts outlined in the judgment, from referring the matter to the relevant structures for intervention through IFRA. This approach was also suggested by the SCA in its judgment.<sup>171</sup> There was also no reason why the residents should not be granted interim relief while Eskom and/or the municipalities engaged the national and provincial governments.

*c) Prima facie right and other satisfactory remedy*

As mentioned in part III above, the majority found that the residents had established a prima facie right. In addition, Madlanga J held that there was no other satisfactory remedy available

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<sup>165</sup> Cora Hoexter & Glenn Penfold *Administrative Law in South Africa* 3 ed (2021) 806. See also *Eskom Holdings* supra note 2 para 302.

<sup>166</sup> *Eskom Holdings* para 306.

<sup>167</sup> Ibid.

<sup>168</sup> Ibid para 182.

<sup>169</sup> Ibid.

<sup>170</sup> Ibid para 16.

<sup>171</sup> *Lekwa Rate Payers* supra note 19 paras 30-1.

to the residents. The court ultimately concluded that the residents had satisfied the common-law requirements for an interim interdict.

## VII. CONCLUSION

As I have argued above, the judgment of Madlanga J is important for the development of our administrative law. Madlanga J's conclusion that 'rights' as contemplated in the definition of administrative action in s 1 of PAJA and the common-law requirement of a *prima facie* right includes a right listed in the Bill of Rights is significant. It means that an applicant seeking relief under PAJA only has to show that its right in the Bill of Rights has been adversely impacted by a decision of an administrator in order to be able to bring a judicial review of that decision. This conclusion is quite different from *Joseph*, which established a public-law right for purposes of PAJA review.

In addition, on the majority's approach, an administrator who seeks to take a decision has to consider whether any person's constitutional right will be impacted by a decision that the administrator seeks to take. If a right will be impacted, then the administrator has to give that person notice of the impending decision and an opportunity to make representations in order to comply with the procedural requirements of PAJA. Furthermore, I have argued that Madlanga J also reaffirmed the position that contracts involving organs of state should not always be looked at from a commercial perspective only. In certain instances, the courts will have to make a value judgment whether the principles of administrative law should be applied to such contracts. This means that organs of state are not always at liberty to exercise their contractual rights without regard to the principles of administrative law. In some circumstances, an organ of state may need to consider PAJA requirements of procedural fairness before it exercises its contractual rights.

I have argued that the majority judgment could have gone somewhat further in its findings and held that neither the principle of subsidiarity nor the requirement to exhaust internal remedies in PAJA applies in interim interdict proceedings pending a PAJA review. After all, Madlanga J had already canvassed the two aspects thoroughly and a close reading of his judgment suggests which side he was leaning towards. It is a pity that he elected to hold back. I am of the view that if Madlanga J had arrived at definitive conclusions in this regard his judgment would not have usurped the powers of the review courts as his conclusion could have been limited to interim proceedings. It would still have been open to the review court to determine whether the residents should have exhausted internal remedies or whether the

principle of subsidiarity should be applied. Nonetheless, the majority's approach on these aspects still provides some insightful and helpful reasoning should the same issues arise again.

It is important to note that had the Constitutional Court adopted the strict and legalistic approach of Unterhalter AJ, the residents would have been stuck in a situation that was not of their own making. The insistence by the minority that the residents should have sought relief from the municipalities and not Eskom is too strict, especially given the dysfunctional state of the municipalities. In any event, as a matter of practicality, the municipalities themselves could not have increased the supply of electricity without Eskom's increasing its supply to the municipalities.

The judgment of Madlanga J is not only significant for the development of administrative law but also for the socio-economic prospects of citizens, because the generous approach he took offers citizens a lifeline in instances where organs of state are failing them. My point is not that organs of state are not entitled to enforce the law, as Eskom sought to do in this instance. However, at a time of chronic state dysfunction, the enforcement of the law cannot be allowed to have such dire consequences for innocent parties as they did in *Eskom Holdings*.

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