



THE ESKOM DECLARATOR APPLICATION



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Introduction

- The 1996 Constitution introduced the concept of a wall-to-wall local government system, which provided that municipalities be established for the whole of the territory of South Africa. The wall-to-wall government system meant that there could no longer be a distinction between municipal and non-municipal areas, with the result that former non-municipal areas that Eskom had been distributing electricity to, now fell within one of the established municipalities boundaries.
- This resulted in a situation where both Eskom and some municipalities were distributing electricity within the same jurisdictions.
- SALGA has since 2014 been in discussions with Eskom for the formulation of a Service Delivery Agreement (SDA) template which would give municipalities, on account of their executive authority, the power to enter into an SDA with Eskom wherein it would be entitled to reticulate electricity within their respective jurisdictions, even those jurisdictions under the control of Eskom. Such SDA was envisioned under Section 76(b)(iii) of the Municipal Systems Act in terms of which a municipality may provide a municipal service in its area or a part of its area entering into an SDA with an organ of state.

Introduction

- These negotiations were at an advanced stage, with the parties having produced numerous drafts which were the centre of continued debates, with some even having been tabled and debated at Parliamentary level.
- In 2019, a group of businesses in the Free State Province brought an application in the High Court, against the Maluti-A-Phofung municipality (MAP), which saw the municipality being placed under administration at the time, due to the fact that it had not paid Eskom who had in turn refused to supply electricity to their respective businesses. In the court application, the businesses obtained an order that Eskom deliver electricity to them and in turn that they pay Eskom directly thereby excluding the municipality. It is our understanding that based on this judgment, Eskom then took a view that it was entitled to reticulate electricity throughout the country, thereby bypassing municipalities and receiving payments directly.

Introduction

- Following the MAP court order and in 2020, Eskom then issued an application in the Pretoria High Court in which it sought an order to reticulate electricity directly to consumers and receive payment based on the MAP municipality judgment. SALGA was not joined as an interested party to these proceedings, despite the previous ongoing negotiations and SALGA's standing within the municipal sphere. At the time that SALGA became aware of such application, the matter was already at an advanced stage and our instructions was at that point to intervene in the proceedings. We then took the liberty of writing to Eskom's attorneys informing them of SALGA's stance with the application and requested that they withdraw such application. To date, they have not responded or withdrawn their application, but we are aware that they have not persisted with their application since.
- Shortly thereafter, negotiations between Eskom and SALGA broke down and Eskom indicated its intention to withdraw from such SDA negotiations. This prompted SALGA to instruct us to approach the court to obtain a court order which would entrench municipalities rights to reticulate electricity and govern the affairs within their respective jurisdictions.

SALGA 2021 Application

- In 2021, SALGA issued an application in the Pretoria High Court seeking a declarator that:
 - *Municipalities have exclusive executive authority to reticulate electricity within their jurisdictions;*
 - *The distribution and supply of electricity by Eskom in municipal jurisdictions amounts to reticulation of electricity and the provision of a municipal service which requires a Service Delivery Agreement to be entered into between Eskom and the respective municipalities, in terms of Section 76 of the Local Government Systems Act 32 of 2000;*
 - *On account of their executive authority to reticulate electricity, and their right to govern the affairs of their communities, municipalities have the power to request Eskom to enter into Service Delivery Agreements within the municipalities in order for the former to reticulate electricity within Eskom's jurisdiction.*

SALGA 2021 APPLICATION

- Eskom, the Minister of Public Enterprises, Sasol, Damplaas Kragbron (Pty) Ltd and AECI (the Respondents) have since opposed the matter, with NERSA electing to abide by the court's final ruling.
- Following such opposition, SALGA's legal representatives became inundated with requests from Eskom's direct clients, indicating their intentions to be joined to these proceedings. These requests were initially declined due to the fact that these organisations had no direct and substantial interest in the proceedings.
- SALGA then approached the office of the Deputy Judge President of the Pretoria High Court requesting his intervention, given the surmounting interests and unnecessary applications its legal representatives had been receiving. Following a meeting with the Deputy Judge President it was agreed that only 2 such applications would be considered and heard, that being The Minerals Council of South Africa and the Energy Intensive Users Group (joinder applications), during which time, the Respondents to the main application were directed to file their respective answering affidavits.

SALGA 2021 APPLICATION

- The joinder applications were heard in October 2022 and by December 2022, the Pretoria High Court handed down an order dismissing the joinder applications and awarding costs in favour of SALGA, thereby confirming the stance that such entities have no legal standing in this matter between SALGA and Eskom.
- Unsatisfied by the initial ruling as handed down by the Pretoria High Court, the Minerals Council of South Africa and Energy Intensive Users Group then filed an application for Leave to Appeal the judgment of December 2022, on the basis that the court had erred in its judgment that they and other direct clients of Eskom have no legal standing in this matter. At time in which the Application for Leave to Appeal was filed, SALGA's legal representatives then received a further joinder application from Bertie Van Zyl (Pty) Ltd (the ZZ2 tomato supplier) also requesting that the court allow it to intervene in these proceedings due to the fact that it is a consumer of electricity.
- On 28 March 2023, the application for leave to appeal was heard in the Pretoria High Court. The Court having again dismissed such applications for lack of direct and substantial interest in the main application involving SALGA and Eskom, with legal costs granted in favour of SALGA once again.

SALGA 2021 APPLICATION

- In April 2023, the Minerals Council of South Africa and Energy Intensive Users Group petitioned the Supreme Court of Appeal for leave to appeal the Pretoria High Court's decision, citing that the Pretoria High Court erred in its two (2) findings and requesting leave to argue that such court orders be overturned.
- In August and September 2023, the Supreme Court of Appeal handed down judgment setting aside the two (2) court orders of the Pretoria High Court and directing that a Full Bench of the Pretoria High Court (consisting of three (3) judges) hear the respective Applications for Leave to Appeal.
- In a separate application as brought by Bertie Van Zyl (Pty) Ltd, they are persisting with their application to be joined to the main application, despite the fact that the Minerals Council of South Africa and Energy Intensive Users Group joinder applications are awaiting a hearing before the Full Bench of the same division.
- They referred their request for a hearing to the Office of the Deputy Judge President who directed that their hearing be heard as a separate application to that of the Minerals Council of South Africa and Energy Intensive Users Group. A date is currently awaited from the Office of the Deputy Judge President regarding Bertie Van Zyl (Pty) Ltd joinder application.

Conclusion

- Given these current applications as brought by the Minerals Council of South Africa, Energy Intensive Users Group and Bertie Van Zyl (Pty) Ltd, the main application between SALGA and the Respondents continues to remain suspended pending the outcome of the respective joinder application hearings.
- Both the Minerals Council of South Africa and Energy Intensive Users Group have filed their Appeal Applications to the Full Bench of the Pretoria High Court, which date has been set down for hearing in May 2025
- We are approaching the Office of the Deputy Judge President for a truncated date for the hearing of the Leave to Appeal to the Full Bench given that the main application still stands to be determined.



Thank You



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