

The Right to Electricity in South Africa

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Abstract

In this note, we examine access to electricity as a right in South African law. We also consider whether deprivations, interferences and disruptions of electricity supply are justifiable limitations of the right. While recent court decisions view access to electricity as a supplement to the Bill of Rights, judicial treatment of electricity as a right precedes the *Constitution of the Republic of South Africa*, 1996. Prior to the adoption of the Constitution, the courts treated access to electricity as a common law right in the context of servitudes and personal and contractual rights. Under the Constitution, the right to access to electricity flows from the constitutional and statutory obligations of Eskom, South Africa's power utility, to provide reliable electricity supply and to ensure just administrative action when taking actions that result in the deprivation of electricity. From a Bill of Rights perspective, the cases show that the right to electricity, albeit not expressed in the text of the Constitution, is a condition for the exercise of other rights, including the rights to human dignity and access to adequate housing, water and health care. We conclude that the deprivation of electricity through loadshedding and other interruptions by Eskom, landlords and body corporates are violations of the right to access to electricity. These violations could be remedied through spoliation and constitutional remedies.

Keywords

Right to electricity; loadshedding; possession; spoliation; South Africa.

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1 Introduction

Access to electricity is necessary in the modern era. Not only does electricity outpace natural gas, coal and wood in that it provides clean energy for cooking and heating but also because it powers installations, devices and appliances that define the Fourth Industrial Revolution. As such, electricity has a direct impact on modern communication, education, transport and security. However, international law and domestic legal systems do not specifically prescribe a right to electricity. In international law, the implied right to electricity is viewed as an add-on to the right to development, which encompasses access to clean and efficient energy.¹ Löfquist says that the language used in human rights law provides a route to protect and promote access to electricity.² Notwithstanding this proposition, the question whether access to electricity is (or should be) a human right is contested, particularly in South Africa. The *Constitution of the Republic of South Africa, 1996* (the Constitution) does not expressly provide for a right to electricity. There is a paucity of scholarship on whether, in the absence of a constitutional provision, access to electricity could be interpreted as a right. At present, South Africans are "entitled" to electricity as a basic municipal service.³ Some judges say that access to electricity is a privilege, not an absolute right.⁴ This has implications for the conduct of municipalities, Eskom, landlords and body corporates, all of whom exercise some degree of control over the supply of electricity.

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¹ Dugard "Power to the People?" 267. See *CESCR General Comment No 4: The Right to Adequate Housing* UN Doc E/1992/23 (1991), which includes access to energy as part of the right to adequate housing. Also see World Bank 2018 <https://www.worldbank.org/en/news/feature/2018/04/18/access-energy-sustainable-development-goal-7>.

² Löfquist 2020 *Intl J Hum Rts* 711.

³ See Steytler and De Visser *Local Government* § 2.3.2; *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) (hereafter *Joseph v City of Johannesburg*) para 34; Schedule 4 Part B of the *Constitution of the Republic of South Africa, 1996* (the Constitution); s 4(2)(f) of the *Local Government: Municipal Systems Act* 32 of 2000.

⁴ See *Darries v City of Johannesburg* 2009 5 SA 284 (GSJ) (hereafter *Darries v City of Johannesburg*) para 39.

In this note, we examine access to electricity as a right in South African law. We also consider whether deprivations, interferences and disruptions of electricity supply are justifiable limitations of the right. We start by discussing what could be perceived as the sources of the right to electricity in South African law. We examine the common law, legislation and the Bill of Rights. Under the common law, we discuss the judicial interpretation of the right to electricity in the context of servitudes and personal and contractual rights, all of which include incidents of possession. From a statutory viewpoint, we discuss the duty of Eskom to supply electricity. We argue that the *Electricity Regulation Act*⁵ bestows an obligation on Eskom to provide a reliable electricity supply. Concerning the Constitution, we briefly examine the duty of municipalities to supply electricity as a basic municipal service. We also discuss the Bill of Rights, from which the right to electricity could be inferred as a prerequisite and as a supplement to the enjoyment of the rights to human dignity and access to housing, water and health care, among others. We proceed to examine limitations of the right to electricity through deprivations such as loadshedding, interruptions to municipalities for non-payment, and disconnections by landlords and body corporates who attempt to enforce evictions and to compel tenants to comply with contractual obligations. We also present two remedies for deprivation of electricity, namely, spoliation relief and constitutional remedies.

2 Sources of the right to electricity

2.1 Common law

At common law, the right to electricity emanates from alleged servitudes and personal rights and contractual rights.⁶ A servitude is a part of the law of property and is defined as a limited right that entitles its holder to the use or enjoyment of the property of another or to the right to insist that the owner of such property must refrain from exercising some of the privileges of ownership.⁷ A person who alleges the existence of a servitude need not prove the right but should merely allege its existence to get a remedy.⁸ An alleged servitude leads to quasi-possession, meaning that a person who claims a right to electricity through a servitude should be in quasi-

⁵ *Electricity Regulation Act* 4 of 2006 (the *Electricity Regulation Act*).

⁶ *Wilrus Trading CC v De Street Properties* 2021 JOL 49563 (GP) (hereafter *Wilrus v De Street Properties*) para 23; *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 3 All SA 234 (WCC) (hereafter *Makeshift v Cilliers*) para 32.

⁷ *Muller et al Silberberg and Schoeman's Law of Property* 371.

⁸ *Muller et al Silberberg and Schoeman's Law of Property* 371.

possession of the property at which the deprivation of electricity occurred.⁹ In *First Rand v Scholtz*, the court held that a right that is held in quasi-possession must be *gebruiksreg*, i.e. right of use, or an incident of the possession or control of the property in question.¹⁰ The court held that when it comes to legal proceedings to remedy deprivations of property, a court need not concern itself with whether a right is proven but that the facts must show that before the deprivation, the applicant had enjoyed undisturbed quasi-possession of the right.¹¹ The supply of electricity is an incident of possession.¹²

In *Makeshift v Cilliers*, the court considered whether an occupier of the property had, in terms of a contractual relationship, possession of the supply of electricity. The court held that if the supply of electricity is an incident to the contractual relationship for the occupation of the property, the right to electricity is protected. The basis of the court's reasoning was that the supply of electricity is a practical necessity for the occupation of a dwelling. Modern housing cannot be conceived without electricity. Therefore, the discontinuation of an electricity supply significantly disturbs the occupation of the dwelling. However, the court was not convinced that a contractual relationship for the supply of electricity converts the right to electricity into an incident of the possession and control of property. The court arrived at this conclusion by considering the authorities on the subject. The parties before the court had a dispute on whether the respondent had possession of electricity.¹³ The court resolved the dispute by relying on *Eskom v Masinda*, in which it was confirmed that some incorporeal rights are subjects of quasi-possession.

The *Makeshift v Cilliers* court was satisfied that the right to electricity could be properly characterised as either a right of use or an incident to the possession or control of property.¹⁴ However, the court said that such a right "may be no more than a 'mere' personal right".¹⁵ In several other cases, the

⁹ For a discussion of quasi-possession, see *Impala Water Users Association v Lourens* 2004 2 All SA 476 (SCA); *Sebastian v Malelane Irrigation Board* 1950 2 All SA 351 (T).

¹⁰ *First Rand Ltd t/a R Merchant Bank v Scholtz* 2008 2 SA 503 (SCA) (hereafter *First Rand v Scholtz*).

¹¹ *First Rand v Scholtz*, quoted in *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA) (hereafter *Eskom v Masinda*) para 14 and *Makeshift v Cilliers* para 21.

¹² See *Eskom v Nikelo* (CA38/18) [2018] ZAECMHC 48 (21 August 2018) (hereafter *Eskom v Nikelo*). However, this case was cited disapprovingly in *Eskom v Masinda* para 16.

¹³ *Makeshift v Cilliers* para 20.

¹⁴ *Makeshift v Cilliers* para 24.

¹⁵ *Makeshift v Cilliers* para 23.

courts held that a right to electricity might flow purely from personal rights.¹⁶ However, these cases did not involve quasi-possession.¹⁷ There was no service, and no similar rights were alleged. The issue of whether the right to electricity is personal arose in *Wilrus De Street Properties*. The applicants sought, *inter alia*, the restoration of electricity supply to their premises and asked the court to order the respondent to cancel and rectify the negative and arrear balances loaded on their pre-paid electricity meters.¹⁸ Although *Wilrus v De Street Properties* was not against the landlord, *per se*, a court may order the restoration of the supply not in its own right but as a means to protect possession of the immovable property at which the interference occurred.¹⁹ As an incorporeal right, the right to electricity must be viewed in the context of whether it is a right of use or whether it is "an incident of the possession or control of the property"²⁰ served by the supply of electricity.

In *Makeshift v Cilliers*, the court did not agree that the right to electricity is an incident of the possession or control of the property. The court chose to view a contractual relationship (*precarium*) as the correct basis upon which to interpret the right to electricity. In earlier cases, the courts had concluded that a right to electricity could arise from an alleged personal contractual right.²¹ When the right to electricity arises from a contractual relationship, it is a supplement to or part of the alleged right of the person claiming such a right to occupy the property. However, the right to electricity in terms of a contractual relationship is not available to third parties, as confirmed in *Tshumisano Trading v Bronkhorst*,²² in which the court dismissed an application to order the respondents to reinstate electricity supply to business premises. The court said that since the contractual arrangement with the respondents was entered by a close corporation that the applicant controlled, the applicant lacked *locus standi*.²³ Without a contract for the supply of electricity, the applicant could not prove a right to electricity.

¹⁶ Examples include *Telkom SA Ltd v Xsinet (Pty) Ltd* 2003 5 SA 309 (SCA); *Zulu v Minister of Works, KwaZulu-Natal* 1992 1 SA 181 (D); *Eskom v Nikelo*; *Eskom v Masinda*; *First Rand v Scholtz*.

¹⁷ *Makeshift v Cilliers* para 32.

¹⁸ *Wilrus v De Street Properties* para 4.

¹⁹ See *Nienaber v Stuckey* 1946 AD 1049.

²⁰ *Makeshift v Cilliers* para 24.

²¹ See *Naidoo v Moodley* 1982 4 SA 82 (T); *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W).

²² *Tshumisano Trading v Bronkhorst* 2017 JOL 38104 (LT).

²³ *Tshumisano Trading* para 9.1.

2.2 Legislation

The right to electricity can also be implied from the *Electricity Regulation Act*, which seeks, *inter alia*, to "facilitate universal access to electricity".²⁴ The statute safeguards the rights of consumers by prohibiting suppliers of electricity from reducing or terminating the supply of electricity except when the consumers are insolvent, fail or refuse to pay for the supply of electricity, and when the consumers have violated payment conditions imposed by the licensees.²⁵ In most instances, Eskom does not directly contract with household consumers for the supply of electricity but enters into electricity supply agreements with municipalities and commercial clients.²⁶ However, something could be said about the fact that Eskom does not always owe household consumers a duty to provide electricity, since it does not often contract with individual household consumers but with municipalities.²⁷ It is common cause that when Eskom supplies electricity to municipalities, municipalities do not use all the electricity received but instead reticulate it to consumers. The reticulation of electricity is listed in Part B of Schedule 4 of the Constitution as an exclusive functional area of municipalities.²⁸ Notwithstanding, the inclusion of local government as the go-between in the supply of electricity does not recuse Eskom, a state entity, from its constitutional obligation to provide electricity.²⁹

When Eskom interrupts electricity supply to a municipality for failure to pay, it deprives consumers in that municipality of electricity. Since such drastic action adversely affects consumers, Eskom must not act arbitrarily but must ensure just administrative action in the process. This is because a decision to cut off electricity supply is an administrative one.³⁰ Although Eskom bears a legal duty to provide electricity on the basis that it is a state entity

²⁴ See s 2(d) of the *Electricity Regulation Act*.

²⁵ Section 21(5) of the *Electricity Regulation Act*.

²⁶ Electricity supply agreements regulate issues such as the commencement of supply and technical, legal and financial aspects. See, for instance, the electricity supply agreement between Eskom and Mbombela Municipality (Eskom 2002 https://www.mbombela.gov.za/ns0374_mbombela_mc_new.pdf). Electricity supply agreements are often invoked when there is non-payment for supply of electricity - see ss 21(5)(a)-(c) of the *Electricity Regulation Act*.

²⁷ See Du Plessis "Energy" 877-905 on the legal framework for the provision of electricity in South Africa.

²⁸ For a discussion, see *Rademan v Moqhaka Local Municipality* 2013 7 BCLR 791 (CC) para 17.

²⁹ See *Cape Gate (Pty) v Eskom Holdings SOC Ltd* 2019 1 All SA 141 (GJ) para 127.

³⁰ See *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd* (2018/11316) [2018] ZAGPJHC 527 (14 September 2018) para 69. The right to just administrative action is enshrined in s 33 of the Constitution. The *Promotion of Administrative Justice Act* 3 of 2000 gives effect to this right and stipulates conduct which constitutes administrative action (see s 1).

established to provide electricity, its duty to provide electricity is extended by the fact that it holds a near-monopoly on the supply of electricity.³¹ If it fails to provide electricity, consumers suffer. Given that most consumers exclusively rely on electricity (particularly in cities), Eskom's duty to supply electricity should be interpreted as a duty to provide, subject to narrow limitations, a reliable and uninterrupted supply of electricity.

The right to electricity is part of the corresponding duty of municipalities to provide basic services, which include but are not limited to electricity.³² When residents receive electricity from their municipalities, they do so because they have a public law right to receive electricity.³³ In *Joseph v City of Johannesburg*, the court said the following about the municipal obligation to provide electricity and the corresponding right of the community to receive electricity:

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 service provider. The respondents 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 the 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.³⁴

The court also relied on section 4(2)(f) of the *Local Government: Municipal Systems Act*, which stipulates that municipalities must provide members of their communities with services to which they are entitled. Although the right to receive electricity appears to be accepted by the courts, it is not immediately clear whether there is an "entitlement to electricity".³⁵ This is problematic, given that in South Africa, the discourse on human rights does not use the term "entitlement".

³¹ However, it should be noted that not all electricity is generated by Eskom. Some municipalities generate some electricity – see Du Plessis "Energy" 879.

³² See s 152(1) of the Constitution.

³³ *Joseph v City of Johannesburg* para 47. Also see *Afriforum NPC v Eskom Holdings SOC Ltd* 2017 3 All SA 663 (GP), in which the dispute centered on ss 152(1) and 153 - on the obligation to provide basic services.

³⁴ *Joseph v City of Johannesburg* para 34 (references omitted). Du Plessis *Energy Law* 21-22 observes that *Joseph v City of Johannesburg* was the first case to be decided by the Constitutional Court on energy with specific reference to access to electricity.

³⁵ Section 9(1)(a)(iii) of the *Housing Act* 107 of 1997 imposes an obligation on municipalities to "ensure that service in respect of water, sanitation, *electricity*, roads, stormwater and transport are provided in a manner which is economically efficient" (our emphasis).

Steytler and de Visser submit that the reliance on the *Systems Act* in *Joseph v City of Johannesburg* was misplaced for two reasons.³⁶ First, they argue that the statute does not list the services which community members are "entitled" to receive from their municipality. Their argument in this regard should be viewed in the context of Part B of Schedule 4 of the Constitution, which lists electricity reticulation as one of the functional areas of local government. The schedule does not refer to entitlement but merely to functional areas.³⁷ Secondly, they point to section 73 of the *Systems Act*, which stipulates that the provision of services is based on equitable access as opposed to "entitlement". Steytler and de Visser further argue that the court's argument would have been tenable if reliance was placed on section 139 of the Constitution.³⁸ This section provides that a provincial executive or national executive may intervene in a municipality if the municipality fails to supply basic services. In this light, one may point to the failure of the eMalahleni and Makana municipalities to supply electricity, water and sewage disposal - all of which are basic services - which led the courts to order provincial governments to intervene in these municipalities.³⁹

We argue that as a state entity, Eskom is bound to observe the principles of cooperative governance and engage in amicable dispute resolution with municipalities before interrupting electricity supply to the detriment of consumers.⁴⁰ This implies that Eskom must not make it unduly difficult for other organs of state, such as municipalities, to deliver on their constitutional mandate to provide basic services such as electricity. Besides constitutional provisions on basic services, just administrative action and cooperative governance, the Bill of Rights holds rights whose enjoyment depends on the supply of electricity.

³⁶ Steytler and De Visser *Local Government* § 2.3.2.

³⁷ In this regard, one may refer to the distinction between municipal services and basic municipal services in the *Local Government: Municipal Systems Act* 32 of 2000. Nel, Du Plessis and Retief "Key Elements for Municipal Action" 79-80 say that a basic municipal service is "a municipal service that is necessary to ensure an acceptable and reasonable quality of life for the public and that, if not provided, would endanger public health or safety or the environment".

³⁸ Steytler and De Visser *Local Government* § 2.3.2.

³⁹ See *Coetzee v The Premier, Mpumalanga Province* (unreported) case number 2799/2017 and *Unemployed Peoples' Movement v Premier, Province of the Eastern Cape* 2020 3 SA 562 (ECG).

⁴⁰ The resolution of intergovernmental disputes is regulated by ch 4 of the *Intergovernmental Relations Framework Act* 13 of 2005 and s 41 of the Constitution. For a discussion of the principles of cooperative governance between organs of state, see Du Plessis 2008 *SAPL* 110.

2.3 *The Bill of Rights*

The Constitution does not stipulate a right to electricity. Notwithstanding, the courts infer the right to electricity from a "cluster of rights"⁴¹ in the Bill of Rights. This inference is not peculiar to electricity. The courts have observed that certain "rights" which are not specifically inscribed in the Constitution could be treated as rights if they supplement rights that are expressly provided in the Constitution. An example is *Stransham-Ford v Minister of Justice and Correctional Services*,⁴² in which Fabricius J recognised the right to die with dignity as a supplement to the right to human dignity. While we accept that the judicial discretion to recognise "new rights" could be problematic for several reasons (such as legal certainty), we believe that what the courts term as rights should be regarded as such. We also believe that in the context of socio-economic rights, the constitutional drafters neither had the time nor the foresight to include all necessities that should have been included in the Bill of Rights – such as access to electricity. In our view, the right to electricity should be understood in the context that electricity stands to improve the socio-economic rights situation in South Africa. Our understanding is that the effective enjoyment of some constitutional rights depends on access to electricity, without which life would be difficult.

The list of rights which are affected by the deprivation of electricity is long.⁴³ In this note, we do not focus on all the rights but point out that these rights could be linked to the right to electricity through the right to human dignity, which is the basis for the enjoyment of most constitutional rights. It is difficult, if not impossible, to envisage how in the modern era one could live a dignified life without access to electricity. Many aspects of contemporary life depend on access to electricity, whose availability facilitates clean and efficient energy and access to the internet by powering electronic devices. Access to the internet, in turn, enhances the enjoyment of the right to education, among others. Although the right to electricity is not specifically included in the Constitution, we argue that the Constitution must be interpreted to suit the circumstances of the day and that the fulfilment of socio-economic rights requires a constitutional interpretation that implies a right to electricity. The courts have already done so about rights such as

⁴¹ *Makeshift v Cilliers* para 34.

⁴² *Stransham-Ford v Minister of Justice and Correctional Services* 2015 6 BCLR 737 (GP).

⁴³ See Dugard "Power to the People?" 265, who argues that the right to electricity could be implied from the Constitution, particularly from the right to equality.

access to adequate housing, water and healthcare. These rights are intricately linked to electricity.

In the context of the right to access to adequate housing, the question remains on what one could consider as a satisfactory definition of an "adequate" house in the modern era. The requirements for an adequate house are well-formulated in various cases. However, the courts do not include electricity as a requirement for an adequate house but say that a house or dwelling used as a house must have "a toilet, a shower, a standard tap with washing facilities for clothes, and a hand basin and sink unit".⁴⁴ This follows *Government of the Republic of South Africa v Grootboom*, in which the court pointed out that the requirements of an adequate house differ depending on the circumstances of each person and the environment in which they live.⁴⁵ They also depend on whether the issue is an emergency or concerns long-term planning.⁴⁶ The court noted that:

The state's obligation to provide access to adequate housing depends on context, and may differ from province to province, from city to city, from rural to urban areas and from person to person. Some may need access to land and no more; some may need access to land and building materials; some may need access to finance; some may need access to services such as water, sewage, electricity and roads. What might be appropriate in a rural area where people live together in communities engaging in subsistence farming may not be appropriate in an urban area where people are looking for employment and a place to live.⁴⁷

In *Joe Slovo Community*,⁴⁸ the court laid down the requirement for suitable alternative accommodation. It said that such accommodation must include ablution facilities, sewage facilities and fresh water. The absence of electricity from this list is conspicuous. However, in *Daniels v Scribante*, Zondo J (as he then was) did not subscribe to the idea of listing the requirements of suitable accommodation but said that the test was a simple one: whether the dwelling concerned did not cause the occupier to live in indignity.⁴⁹ When he put human dignity at the centre of the inquiry into what constitutes a proper dwelling, Zondo J effectively left the door open to expand the requirements of an adequate house to include access to electricity. This should be understood in the context that:

⁴⁴ *Beja v Premier of the Western Cape* 2011 10 BCLR 1077 (WCC) para 115.

⁴⁵ See *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 37.

⁴⁶ See *Beja v Premier of the Western Cape* 2011 10 BCLR 1077 (WCC) para 114.

⁴⁷ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) para 37.

⁴⁸ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes* 2010 3 SA 454 (CC) para 10.

⁴⁹ See *Daniels v Scribante* 2017 4 SA 341 (CC) paras 209-210.

A supply of electricity and water to a residential property is a practical necessity in order for an occupant to use the property as a dwelling. When such supply is terminated, the occupant experiences a significant disturbance in his/her occupation.⁵⁰

When a person occupies immovable property and uses it as a dwelling, the person benefits from several services which make such a property habitable, including water and electricity. In this context, the occupation of a residence does not merely mean physical presence but the use of the appurtenances in that dwelling, such as electrical installations.⁵¹ The right to access adequate housing goes in tandem with the right to access to clean drinking water and ablution facilities, whose functioning depends on the availability of running water. Running water, in turn, safeguards the right to an environment that is not detrimental to health. In hospitals, access to electricity is not only necessary to the performance of the medical processes which fulfil the right to access to healthcare but is also critical to powering systems that supply water. Thus, without electricity, hospitals will be unable to provide patients and staff with an environment that is not harmful to their wellbeing.⁵²

The benefits of access to electricity are not limited to human beings but also extend to juristic persons who depend on its availability to conduct their businesses. Since the Constitution enshrines a right to practise one's profession and to conduct a lawful business of one's choice,⁵³ and given that juristic persons are entitled to all the relevant rights to which natural persons are entitled,⁵⁴ the right to electricity is an incident of the right to carry on a business or occupation. In *Wilrus v De Street Properties*, the court considered a contention in this regard:

The applicants state in their papers that the right to access to electricity supply is an incident to the possession of the property from which they conduct their businesses. Without electricity, they say, it is impossible for them to conduct their businesses. They further tell the court that without electricity their businesses came to a complete standstill: The second applicant's dry cleaning and laundromat machines and equipment are dependent on electricity. The first applicant is a filling station and without electricity it is not able to operate the fuel pumps. There is also a convenience store on the premises which requires electricity in order for the refrigerators, ovens, cash registers and computers to function properly. Without electricity both businesses will not be able to conduct business and will suffer irreparable harm.⁵⁵

⁵⁰ *Makeshift v Cilliers* paras 25, 37.

⁵¹ *Naidoo v Moodley* 1982 4 SA 82 (T) 84.

⁵² *Afriforum NPC v Eskom Holdings SOC Ltd* 2017 3 All SA 663 (GP) paras 68-69.

⁵³ Section 22 of the Constitution.

⁵⁴ For a full discussion of the rights of juristic persons, see Pienaar 1998 *PELJ*.

⁵⁵ *Wilrus v De Street Properties* para 24.

Although a Bill of Rights argument is made about access to electricity as a right, the absence of an express constitutional provision in this regard creates opportunities for Eskom to deprive people of electricity through loadshedding and other interruptions to non-paying municipalities. The treatment of electricity as a privilege also enables landlords and body corporates to disconnect electricity supply as a means of forcing evictions and to compel compliance with contractual obligations to pay levies for water and electricity, respectively. In the following section, we discuss these deprivations, interferences and disruptions of electricity supply.

3 Deprivation, interference and disruption of electricity supply

Like all rights, the right to electricity is not absolute. The first limitation is that enjoyment of electricity depends on the principle of progressive realisation enunciated in *Grootboom*. Access to electricity also depends on the ability of consumers to pay for electricity as a service.⁵⁶ The payment of consumption charges as a prerequisite for the supply of electricity was confirmed in *Mkontwana v Nelson Mandela Municipality*.⁵⁷ These limitations give Eskom legal authority to deprive people of electricity. Deprivation of electricity manifests through loadshedding and scheduled power interruptions to municipalities that owe money to Eskom. Loadshedding is the scheduled interruption of power due to constraints on the national grid, which occur when power plants break down or when coal and water supplies for powering and cooling the turbines are in short supply. Load shedding is a "deliberate reduction in electrical load disconnecting customers at selected points on the transmission or distribution systems".⁵⁸ It is a load reduction process.⁵⁹ Recently, loadshedding has become a national inconvenience.⁶⁰ The courts cannot interdict load shedding but can interdict planned interruptions of electricity to municipalities that owe money to Eskom.⁶¹

Scheduled interruptions of the supply of electricity to municipalities also occur as part of Eskom's strategy to recoup monies owed to it by

⁵⁶ *Darries v City of Johannesburg* para 39.

⁵⁷ *Mkontwana v Nelson Mandela Municipality* 2005 1 SA 530 (CC) para 1. Also see *Darries v City of Johannesburg* para 19.

⁵⁸ *Pioneer Foods (Pty) v Eskom Holdings SOC Ltd* 2019 JDR 0564 (GJ) (*Pioneer Foods v Eskom I*) para 4.

⁵⁹ *Pioneer Foods (Pty) Ltd v Eskom Holdings SOC Ltd* 2020 JDR 2110 (GJ) (*Pioneer Foods v Eskom II*) para 14.

⁶⁰ *Pioneer Foods v Eskom II* para 14.

⁶¹ See *Pioneer Foods v Eskom I* para 20.

municipalities.⁶² Some municipalities receive a bulk supply of electricity from Eskom, reticulate it to consumers at a profit, but do not pay Eskom. For instance, the Makana Local Municipality was

... diverting funds collected for electricity and due to Eskom, to pay salaries and other unaffordable expenditure. As Eskom calls in the debt which Makana owes it (approximately R58 million) and threatens to cut off power supply, the municipality uses money received from National Treasury via the Equitable Share to pay Eskom debt. This is hugely problematic as the Equitable Share is supposed to pay for service delivery to the poor. The ongoing misappropriation of funds to cover up historical maladministration results in ongoing prejudice to the most vulnerable.⁶³

In the result, the municipality was ringfencing its budget "to pay off Eskom, otherwise electricity will be cut off".⁶⁴ Scheduled interruptions of power supply to municipalities that owe Eskom punish all residents of those municipalities, whether their electricity accounts are paid up or not. It also disrupts industrial activities and drives the costs of doing business as businesses have to look for alternative energy supplies.

The deprivation of electricity also manifests when Eskom and municipalities remove illegal connections to the grid. Eskom disconnects illegal connections to the grid on the pretext of promoting the environmental right in section 24 of the Constitution. The courts have observed that Eskom is entitled and mandated to disconnect unauthorised connections because:

A safe and healthy environment includes one that is free from dangerous illegal connections for the supply of electricity, which often cause dangerous power surges.⁶⁵

Besides disconnections by Eskom, the case law is replete with many cases in which landlords and body corporates cut off power supply to dwellings to force evictions and to enforce contractual obligations to pay rentals and levies. The deprivation of electricity in this way is a deprivation of quasi-possession and could be remedied using common law remedies.⁶⁶

⁶² In 2018, municipalities owed Eskom more than R13,5 billion – see Department of Mineral Resources and Energy 2019 <http://www.energy.gov.za/IRP/2019/IRP-2019.pdf> 8. In *Pioneer Foods v Eskom II* and *Afriforum NPC v Eskom Holdings SOC Ltd* 2017 JOL 37929 (GP), the issue was Eskom's plans to introduce scheduled interruptions to coerce the defaulting municipalities into paying it.

⁶³ *Unemployed Peoples' Movement* para 7.

⁶⁴ *Unemployed Peoples' Movement* para 69.

⁶⁵ *Darries v City of Johannesburg* para 19.

⁶⁶ See, in general, *Queensgate Body Corporate v Claesen* (A3076/98) [1998] ZAGPHC 1 (26 November 1998), quoted in *Niehaus v High Meadow Grove Body Corporate* 2019 JOL 45297 (GJ) (hereafter *Niehaus v High Meadow*) para 9.

4 Remedies for deprivation, interference and disruption of electricity

There is no judicial consensus on the nature of remedies for deprivation of electricity. Since the right to electricity derives from various sources of law such as the common law, legislation and the Constitution, the nature of the remedies varies according to the circumstances of each case and the applicable law. At common law, the remedy was put in *Eskom v Masinda* as follows:

[I]n the context of a disconnection of the supply of [electricity], spoliation should be refused where the right to receive it is purely personal in nature. The mere existence of such a supply is, in itself, insufficient to establish a right constituting an incident of possession of the property to which it is delivered. In order to justify a spoliation order the right must be of such a nature that it vests in the person in possession of the property as an incident of their possession. Rights bestowed by servitude, registration or statute are obvious examples of this. On the other hand, rights that flow from a contractual nexus between the parties are insufficient as they are purely personal and a spoliation order, in effect, would amount to an order of specific performance in proceedings in which a respondent is precluded from disproving the merits of the applicant's claim for possession. Consequently, insofar as previous cases may be construed as holding that such a supply is in itself an incident of the possession of property to which it is delivered, they must be regarded as having been wrongly decided.⁶⁷

The cutting of an electricity supply is an act of spoliation which interferes with the occupation of the premises. The *mandament van spolie* is the most proper remedy for such deprivation.⁶⁸ In its essence,

A mandament van spolie is available where a person has been deprived unlawfully of his or her possession of movables or immovable property, as well as where a person has been deprived unlawfully of his or her quasi-possession of other incorporeal rights. A spoliation order is meant to prevent the taking of possession otherwise than in accordance with the law. Its underlying philosophy is that no one should resort to self-help to obtain or regain possession. The main purpose of the mandament van spolie is therefore to preserve public order by restraining persons from taking the law into their own hands and by inducing them to follow due process. This applies equally if the despoiler is an individual or a government entity or functionary.⁶⁹

Since the foundation of the common law right to electricity is the right of possession, interference with the supply of electricity may materially interfere with the right of possession of the property at which the interference occurs.⁷⁰ However, this presents difficulties, as seen in the differing judicial decisions on the issue. In *Naidoo v Moodley*, the court said that it was protecting the right of the claimant to occupy the property,

⁶⁷ *Eskom v Masinda* para 22, quoted with approval in *Makeshift v Cilliers* para 29.

⁶⁸ Daniels *Beck's Theory and Principles of Pleadings*.

⁶⁹ *Eskom v Nikelo* para 32.

⁷⁰ See *Wilrus v De Street Properties* para 25.

whereas in *Froman v Herbmores*, the court alluded to the right to electricity as a means of protecting the quasi-possession of the incorporeal right to obtain electricity from the respondent.⁷¹ Regardless of the differing judicial decisions, it remains that remediating the deprivation of possession protects all real rights, including the common law right to electricity.⁷²

When electricity is reduced to enforce a contractual obligation, spoliation relief is still available.⁷³ In *Niehaus v High Meadow*, the applicant had fallen into arrears in her payments for levies to the body corporate. The body corporate decided to compel payment by reducing her supply of electricity, making it impossible for her to cook with the stove, use the oven, boil water or even use the geyser. Her only choice was to bath with cold water, while her children could not study for exams.⁷⁴ This action was drastic and certainly not in the best interests of the applicant's young children, who had to endure the difficulties brought by not having electricity. The court treated the matter as one of urgency and spoliation. It said that the applicant had an incorporeal right to the use of electricity in that she could not live in her apartment and attend to the needs of her minor children without access to electricity.⁷⁵

Niehaus v High Meadow can be contrasted with *Zungu v Nilgra*,⁷⁶ in which the court held that since the supply of electricity is a personal contractual right, the spoliation remedy is not available when electricity is terminated. The court took no regard of the Bill of Rights, particularly given that the applicant's child was writing examinations at the time and could not study due to the interruption. The court also overlooked the common law exception that the *mandament van spolie* is available when the supply of electricity is incidental to the possession of the immovable property in question such that the deprivation of electricity partially dispossesses the person of the immovable property.⁷⁷ This is the case for urban dwellers. Cutting off electricity to a tenant who lives in an apartment in a city defeats the purpose of the occupation of such a dwelling, as electricity is one of the most essentials of living in a city. From a procedural perspective, it will be noted that when an applicant approaches the court on an urgent basis seeking spoliation relief, it is crucial to raise the essential allegation, in the

⁷¹ See *Makeshift v Cilliers* para 35.

⁷² *Niehaus v High Meadow* para 15.

⁷³ *Burger v Van Rooyen* 1961 1 SA 159 (O).

⁷⁴ *Niehaus v High Meadow* para 2.

⁷⁵ *Niehaus v High Meadow* para 25.

⁷⁶ *Zungu v Nilgra Flats CC* (2017/44199) [2017] ZAGPJHC 417 (23 November 2017) paras 10-12.

⁷⁷ See *Niehaus v High Meadow* para 19.

founding affidavit, that the applicant was in possession of the municipal service in question (be it electricity or otherwise).⁷⁸

Cutting off electricity has a retrogressive impact on the enjoyment of socio-economic rights, which are linked to the right to electricity. Since these constitutional rights are justiciable, it follows that there are constitutional remedies for the deprivation of electricity. From a constitutional perspective, protecting the right to electricity requires constraining the capacity of those who bear the obligation to provide it (Eskom, municipalities and landlords and body corporates) to act arbitrarily. It is a matter of the rule of law, incorporated into the legal system to prevent the powerful from taking the law into their hands. The courts must vindicate the rule of law.⁷⁹ In the case of Eskom, this entails holding Eskom to follow the principles of legality, rationality and proportionality when rolling out blackouts through loadshedding and scheduled interruptions for municipalities that fall behind in their payments. Constraining Eskom from acting arbitrarily also entails ensuring that Eskom does not deny affected communities and individuals the right to fair administrative action. As an organ of state, Eskom derives its powers from the *Electricity Regulation Act*, which is the enabling statute and according to which it must act.

It stands to be seen whether interrupting the supply of electricity to a whole municipality, whose community includes people who have paid for their electricity and those who have not paid, merely because of the failure by the municipality to pay Eskom, satisfies the constitutional standards for rationality and proportionality. We argue that such conduct would fall foul of these standards and that such a blanket punishment is excessive and unconstitutional. Steytler and de Visser argue that when a municipality does not fulfil the conditional right to electricity, the court will have to consider whether, within its available resources, the municipality has taken reasonable measures to fulfil the right progressively.⁸⁰ This standard was set in *Grootboom*. However, the authors argue that since it is not mentioned in the Constitution, the right to electricity "is perforce of a lesser order"⁸¹ in the obligation to fulfil socio-economic rights. Our view is that electricity has become so integral in the "new normal" brought by the COVID-19 pandemic that everything depends on access to electricity, be it schooling or remote

⁷⁸ *Irene Land Corporation Ltd v HTC Construction & Management* CC 2004 JOL 12414 (T).

⁷⁹ *Corruption Watch NPC v President of the Republic of South Africa; Nxasana v Corruption Watch NPC* 2018 10 BCLR 1179 (CC) para 88.

⁸⁰ Steytler and De Visser *Local Government* § 2.3.2.

⁸¹ Steytler and De Visser *Local Government* § 2.3.2.

work. This elevates access to electricity to the status of a right as opposed to an entitlement.

5 Conclusion

The right to electricity is not new in South African law. Prior to the adoption of the Constitution, it existed as a procedural right protected by the law of property on possession, servitudes and personal and contractual rights. In the last five years, the case law on the right to electricity has ballooned as more people turn to the courts to challenge the deprivation of electricity by Eskom (through loadshedding and scheduled electricity supply interruptions to municipalities that owe Eskom money for electricity) and by landlords and body corporates seeking the eviction of tenants and the payment of levies. The cases show that while more people use the Constitution to seek judicial protection of their right to access to electricity, the common law is still at play, as the courts continue to apply the *mandament van spolie* to restore the supply of electricity. However, there is no judicial consensus on whether the courts should grant the spoliatio remedy to protect access to electricity or whether they should do so as a means of protecting the rights and privileges which accrue to the occupation of a dwelling. Where electricity is cut off by a landlord to force a tenant out, the cases show that the tenant can obtain relief on the grounds of possession of the property, as opposed to quasi-possession of the electricity supply.

Besides the common law and its spoliatio remedy for deprivation, the right to electricity also derives from legislation. The *Electricity Regulation Act* sets permissible limits within which consumers may be deprived of electricity. Although the Constitution does not expressly provide for a right to electricity, the right arises as part of a collection of constitutional rights centred on the right to housing. The protection of human dignity depends, to a substantial extent, on access to adequate housing, which entails access to a dwelling that does not cause the occupier to live in indignity. To live dignified lives, people need certain amenities and services like electricity. Also, the right to electricity is integral to the enjoyment of other constitutional rights such as the right to access to information or freedom of expression, and to practice a profession or occupation of one's choice. The cases discussed in this note also link the right to electricity to the right to education.

Regarding persons who do not receive electricity directly from Eskom, the constitutional duty to provide electricity does not lie with Eskom but with municipalities. This is because the obligation to supply electricity as a basic service is a functional area of local government. However, the failure by Eskom to provide a reliable and consistent supply of electricity, as seen from

loadshedding and scheduled interruptions, makes the right to electricity lose its purpose if it is not interpreted to mean access to an uninterrupted supply of electricity. As an organ of State and a key player in the State's fulfilment of the obligation to supply services, Eskom is in breach of its constitutional obligations by its failure to address its problems of supply, which result in persistent loadshedding. Eskom is also in breach of its constitutional obligations when it decides to punish all consumers in a municipality *carte blanche* simply because the municipality has become delinquent and does not pay its dues to Eskom.

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List of Abbreviations

CESCR	United Nations Committee on Economic, Social and Cultural Rights
Intl J Hum Rts	International Journal of Human Rights
PELJ	Potchefstroom Electronic Law Journal
SAPL	Southern African Public Law