

Linking the Right to Electricity as a Contractual, Derivative and Human Right through the Undisclosed Principal Agency Law

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Abstract

The South African *Constitution* in its Bill of Rights does not explicitly detail a human right to electricity, as with other socio-economic rights. This, however, does not change the fact that electricity is a sought-after commodity that is essential to the everyday life of people in the modern era and essential to the development of a nation's economy. The only instruments that detail electricity as a right are international instruments such as the *Convention on the Elimination of All Forms of Discrimination Against Women* and the United Nations Sustainable Developmental Goals, that emphasise electricity as a right that states must fulfil towards their citizens. This discussion hypothesises that the company law agency model of the undisclosed principal can be used to better explain the relationship between Eskom, municipalities or private municipal service providers and citizens. It discusses a three-way legal relationship among these stakeholders when providing electricity. Due to the three-way legal relationship, three forms of rights exist: contractual, derivative and human rights. By using undisclosed principal agency law, this discussion will explain how the legal relationship between the state, municipalities and citizens, and the resultant duties herein, create contractual, constitutional and human rights duties for the state to adhere to for the ultimate benefit of citizens.

Keywords

South African *Constitution*; Bill of Rights; human rights; socio-economic rights; economy; undisclosed principal agency law.

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1 Introduction

In *Joseph v City of Johannesburg* Judge Skweyiya refers to a link between a duality of relationships, one between a landlord and the residents as applicants on the one hand, and the other between the landlord and the municipality (City Power), on the other hand.¹ In these facts the court avers that the landlord is a conduit who concluded a contract as a "customer" with City Power to facilitate electricity supply to the tenants in his building.² In taking consideration of this duality of relationships he identifies, he further holds the view that this case is about the "special cluster of relationships" that exists between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the *Constitution* and legislation in respect of the persons living in its jurisdiction. At this level, administrative law principles govern these relations beyond the law of contract.³

It therefore becomes essential to consider this special cluster of relationships, the link that binds them, the incumbent role the state plays in relation to them, and the rights and duties borne by all parties – all of whom allow the residents procedural fairness from City Power without the existence of any contractual privity.⁴

In *Joseph* Judge Skeyiya identifies a duality of relationships among the tenants, the landlord, and the power service provider. The first relationship is a contractual relationship between the tenants and the landlord, which is a contractual relationship of lease. Herein personal rights are borne between the landlord and the tenant. The second relationship is the relationship between the landlord and City Power, which, in terms of the Credit Control by-laws, names him as a customer and whom the court, however, identifies as a conduit facilitating the supply of electricity to the tenants. Although Mr Nel was concluding a contract in his name as a customer with City Power, he was merely aiding the supply of a municipal service to benefit third parties, the residents. By its decision in *Joseph* the court establishes a new relationship in addition to the two already mentioned: a public law relationship between the citizens and the state borne by the state's duty to provide municipal services to the citizens.⁵ The duty in question is sourced in constitutional requirements relating to the nature of local government and the duty of municipalities to service delivery

¹ *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) para 23 (hereafter the *Joseph* case).

² *Joseph* case para 23.

³ *Joseph* case para 25.

⁴ Bilchitz 2010 CCR 47.

⁵ Bilchitz 2010 CCR 55.

contained in the *Municipal Systems Act*,⁶ the *Housing Act*,⁷ section 152 and section 153 of the *Constitution*.⁸ The court further comments that the residents have a concomitant public law right to receive municipal services in terms of the obligations placed on the state.

Based on this third relationship, the court finds the *Promotion of Administrative Justice Act* applicable.⁹ The discussion to follow seeks to identify in law a rational exposition of the underlying jurisprudential philosophy in the court's connection of the special cluster of relationships it identifies in the *Joseph* case. This paper proposes that the link between these relationships and the rights each party bears is agency law through the doctrine of the undisclosed principal. It is argued that the link connecting the special cluster of relationships between the state, the power service providers and the residents in *Joseph* would be better understood by using the abovementioned agency relationship. Due to the three-way legal relationship between the state, power service providers and residents, three forms of rights exist in the provision of electricity: contractual, derivative and human rights.

1.1 Why is there a need to explain the link through agency law?

Cuervo-Cazurra *et al*, in their "Governments as Owners: State-owned Multinational Companies" article, highlight the triple agency conflict in managing relationships between the State, State-owned companies with a public service mandate, and citizens.¹⁰ They too, like Skweyiya, diagnose the conflict of the existence of two agency relationships in state-owned enterprises and explain it as follows:

First, the company is nominally owned by the citizens of the country who, as principals, task politicians, as agents, to achieve the social and economic objectives for which the SOE has been created. However, citizens do not have contractual mechanisms such as incentive systems or statutory limitations that enable them to align the objectives of politicians with their own objectives. In the case of SOEs, politicians are not controlled contractually by citizens. At most, citizens can replace politicians who fail to achieve their objectives after an election, and this happens only in democratic systems and for elected politicians. Second, politicians, as principals, task the managers of the SOE, who act as agents appointed by the politicians, to achieve their own objectives. The objectives of politicians are likely to differ from those of citizens, with politicians wanting to remain in power and citizens seeking better performance from SOEs. Both citizen and politician objectives are likely to differ from the SOE managers' objectives, who, rather than helping politicians obtain their own goals, are likely to be guided by their own career progression and preferences. The result is that SOEs suffer from a dual agency problem. Citizens do not have good control mechanisms over the misbehaviour of firm

⁶ *Local Government: Municipal Systems Act* 32 of 2000.

⁷ *Housing Act* 107 of 1997.

⁸ Bilchitz 2010 CCR 55.

⁹ *Promotion of Administrative Justice Act* 3 of 2000

¹⁰ Cuervo-Cazurra *et al* 2014 *J Int Bus Stud* 931.

managers and often have little control over the misbehaviour of the politicians with SOE authority.¹¹

The first agency problem that they diagnose is not as troublesome as the second, which is the main focus of this discussion. The first issue can be resolved by examining the old traditional democratic view of the state-citizen relationship of the social contract. Bilchitz points out that the state-citizen relationship, as identified by Hobbes through the idea of a social contract, involves citizens transferring their natural rights to the state. Although the formation of the social contract was for protection against harm, he argues that it could also be said that in a more modern context the theory of the social contract could be conceived of as also involving inherent insecurity, where each is not guaranteed the essential goods necessary to survive and flourish.¹² A more appealing averment to this argument is held by Locke, whose argument is used by Bilchitz to contend that perhaps the state of nature involves a scenario wherein citizens were uncertain, unsafe, and very insecure about their enjoyment of the property.¹³ They, therefore, joined together in societies for the mutual preservation of their lives, liberties and estates. Both arguments, Bilchitz holds, display the uncertainty that may arise in a state of nature and that individuals may face when attempting to meet their needs. He theorises on the divesting of citizenry power to the state as a sovereign in the modern world as follows:

Collective services ... require large capital infrastructure. It is not strange to imagine that a more modern Lockean could well reason that without a government in modern conditions, the provision of basic goods such as water, sanitation and electricity would be inherently uncertain and unlikely. Part of the very advantages of government involves the provision of these goods and this is one of the key modern reasons for entering into society.¹⁴

Based on this understanding, as advanced by Bilchitz, it is argued for the purpose of this discussion that the first problem is solved through the notions of a social contract. The state remains the sovereign, and the citizens may see the mandate of service delivery, which is one of the key reasons for creating a social contract, as a good enough reason to accept the state as a principal.¹⁵

The second agency conflict Cuervo-Cazurra *et al* identify, which is the main focus of this discussion, is the agency relationship conflict between the state (as the principal), state-owned company or private municipal service provider (as the agent) and the citizens (as third parties).

¹¹ Cuervo-Cazurra *et al* 2014 *J Int Bus Stud* 931.

¹² Bilchitz 2010 *CCR* 60.

¹³ Bilchitz 2010 *CCR* 60.

¹⁴ Bilchitz 2010 *CCR* 61.

¹⁵ Bilchitz 2010 *CCR* 61.

The discussion to follow seeks to use the doctrine of the undisclosed principal as a philosophical, jurisprudential conceptual framework that could better explain the three-party relationship between the state and the municipalities, municipalities and citizens, and citizens and the state. The proposed agency conceptual framework of the undisclosed principal should be utilised as an aid to the caution observed by authors that advocate the need to extend an agency model, contrary to the traditional private one, that could be used to account for the interactions among the objectives of each party in this three-party relationship.¹⁶ Such discourse is essential, given that the objectives of the state as the principal are not just those of a performance measure but also developmental goals, such as the mandate to deliver public services.¹⁷

1.2 The application of undisclosed principal agency law

The following scenario illustrates the doctrine of the undisclosed principal: An agent acting on behalf of a potential party to a contract (for the sake of this explanation, referred to as "A"), enters into an agreement with another ("B"). When entering into the contract, A's identity is unknown to B. Rather than entering into the agreement on A's behalf, A's agent concludes the agreement with B in his (the agent's) own name.¹⁸ The undisclosed principal is a principal whose existence is not known to the third party, and not a principal who, known to be existent by the third party, is nevertheless not identified by name.¹⁹ "Agent" means a person who in his own name contracts ostensibly for his account but behind whom stands an undisclosed principal.²⁰

Furthermore, by operation of the doctrine of the undisclosed principal, A is allowed to take action against B in the case of the non-fulfilment of the latter's obligations agreed upon in the contract concluded between A's agent and B. Similarly B can also institute action against A once he or she comes to know of the existence of the latter, which will occur only in the instance when A decides to hold B liable based on the non-performance of the contract initially concluded between A's agent and B.²¹

1.3 Application of the undisclosed principal agency law to Joseph

In Joseph's case the state was not a contracting party in the agreement between City Power and the landlord, who was acting as a conduit for the benefit of the residents. However, the judgement found that the ultimate

¹⁶ Cuervo-Cazurra *et al* 2014 *J Int Bus Stud* 931.

¹⁷ Cuervo-Cazurra *et al* 2014 *J Int Bus Stud* 931.

¹⁸ Senokoane *Doctrine of the Undisclosed Principal* 9.

¹⁹ Goodhart and Hamson 1932 *CLJ* 320.

²⁰ Goodhart and Hamson 1932 *CLJ* 320.

²¹ Senokoane *Doctrine of the Undisclosed Principal* 9.

duty to serve the residents was with the state. The court came to this decision despite the fact there was no contractual nexus between the state and the residents. The *vinculum iuris* existed only between City Power and the residents, as represented by the landlord. City Power and the residents were the only entities in law with a distinct relationship; however, the ultimate responsibility to ensure that the residents had their municipal service need of electricity provided was that of the state.

In terms of the constitutional imperatives implied by the rights expressed in the Bill of Rights and in the *Constitution* itself, the undisclosed principal agency law can therefore be used as the legal basis to demonstrate how the state can have legal proceedings instituted against it by citizens in the case of load-shedding or the failure to supply electricity.

As an undisclosed principal in a contract between the municipality and the residents, the state will ultimately have a public duty to satisfy the municipal service needs of its citizens. The rights that will therefore arise from such an agency law relationship will be contractual, derivative and applicable to all humans under the state's authority.

2 A discussion of the rights

The issue of whether there is a right to electricity in South Africa is widely debated. Although the South African *Constitution's* Bill of Rights does not explicitly mention this right, it is an essential commodity for modern-day life and a crucial factor in a nation's economic development. International instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Sustainable Development Goals recognise access to electricity as a right, and states are responsible for ensuring it.²² However, there is still a debate regarding first whether the right to electricity is a universal human right, a derivative right or a contractual right. Löfquist concludes that it should be considered as a derivative human right, as such a view supports the idea that access to electricity is often needed by humans, but that it avoids the stronger claim that all humans should have this access, which would be the case if it were recognised as a contractual or a universal human right.²³ Secondly, if such a right exists, who is responsible for its provision, and who is entitled to receive it?

Providing the answers to these questions is imperative, as they would inform all energy stakeholders in all the spheres of a society of the nature of such a right, what obligations it creates and what expectations it should

²² Article 14 of the *Convention on the Elimination of All Forms of Discrimination against Women* (1988).

²³ Löfquist 2020 *Intl J Hum Rts* 711.

consequently fulfil. Walker elaborates on this concern and states that when a social norm is elevated to the status of a right, this means that someone has a claim to it and someone else must provide it.²⁴ It therefore becomes imperative to ascertain what (contractual, human and/or derivative) the claim is, who the claimant is and to whom such a claim should be made.

The foundation of the right to electricity needs consideration. Whether such a right is contractual, constitutional or has its origin in human rights law is an important question to answer. In addition, the question of whether the existence of all these rights is evident in the special cluster of relationships referred to in *Joseph* will be analysed.

2.1 The right to electricity is contractual

There is no judicial consensus on the nature of the remedies applicable for electricity deprivation.²⁵ This confusion can be attributed to the fact that the right to electricity emanates from various sources of law.²⁶ These include the common law and the legislation.²⁷ The confusion surrounding spoliation versus contractual remedies in enforcing the right to electricity requires clarification.

In the case of *Naidoo v Moodley* the concept of access to electricity as a contractual right was discussed. The court held that the right to use electricity is inherent in the right to occupy premises. It was emphasised that this right is not limited to physical presence alone but also includes using all the accessories that come with the premises, including its power supply.²⁸

The *Makeshift v Cilliers* case affirmed the decision in *Naidoo*, and the court ruled that occupying a property also entitled one to use the electricity supplied to the premises.²⁹ Therefore, when owning or renting a property one must have the right to use the electricity provided to it, but the same right does not exist if the electricity supply is illegally connected.³⁰

Therefore cutting off the electricity supply would partially deprive the occupiers of their property rights, as electricity is necessary for the possession of immovable property.³¹ Additionally, the dispossession of the incorporeal right to electricity is also protected by the spoliation remedy.³²

²⁴ Walker 2015 *L'Europe en Formation* 26.

²⁵ Dube and Moyo 2022 *PELJ* 14.

²⁶ Dube and Moyo 2022 *PELJ* 14.

²⁷ Dube and Moyo 2022 *PELJ* 14.

²⁸ *Naidoo v Moodley* 1982 4 All SA 564 (T).

²⁹ *Makeshift 1190 (Pty) Ltd v Cilliers* 2020 5 SA 538 (WCC) (hereafter the *Makeshift* case) para 44.

³⁰ *Eskom Holdings SOC Ltd v Masinda* 2019 5 SA 386 (SCA) (hereafter the *Masinda* case) para 27.

³¹ *Niehaus v High Meadow Grove Body Corporate* 2020 5 SA 197 (GJ) para 9.

³² *Froman v Herbmore Timber and Hardware (Pty) Ltd* 1984 3 SA 609 (W) para 291.

Rogers J held that the quasi-possession of such a supply enjoys possessory protection despite being contractual in nature.³³ It has been held elsewhere that a breach of such a contractual agreement would require a contractual remedy and that specific performance would remedy such a breach of contract, not a spoliation remedy.³⁴

The court has therefore attempted to make a clear distinction between the instances when the spoliation remedy can be ordered and when it should not be. In the case of *Eskom v Masinda* it was held that the spoliation order would not be granted if the right to receive the supply of electricity was personal in nature.³⁵

Therefore it is crucial to identify the source of the right to supply electricity, as this distinction is necessary to prevent the spoliation remedy from replacing a claim of specific performance, which would blur the line between contract and property law.³⁶ The spoliation remedy applies only if the right incidental to the possession of the property emanates from either a servitude, registration or legislation.³⁷

In *Lateovitsa (Pty) Ltd v Ekurhuleni Metropolitan Municipality* the court stated that it would be only the landlord who could institute an action of specific performance and not his tenants.³⁸ It is important to note that there exists a personal right between the landlord and the tenants for the supply of electricity on the one hand and a personal right between the landlord and the municipality for the supply of electricity on the other hand.

Two problems arise from this, however.

First, in many of the disputes that arise due to the reduction or termination of an electricity supply, the residents tend to seek relief from the courts for the restoration of the electricity supply and not from the landlord, who is the ultimate reason for the nonpayment of the municipal rates that the residents gave him to pay to the municipality. Therefore, the landlord would have no urgency to approach the municipality to restore the electricity supply, except if he went there to pay the defaulted amount in arrears. If he doesn't do this the tenants are left to their own devices.

The *Joseph v City of Johannesburg* matter is an example of a case where the landlord defaulted on paying the electrical bill even though the tenants

³³ Marais 2020 *De Jure* 91.

³⁴ *Zungu v Nilgra Flats CC* 2019 JOL 40895 (G) para 11.

³⁵ *Masinda* case para 22.

³⁶ Marais 2020 *De Jure* 95.

³⁷ *Masinda* case para 22.

³⁸ *Lateovitsa (Pty) Ltd v Ekurhuleni Metropolitan Municipality* (2023-007015) [2023] ZAGPJHC 163 (27 February 2023) para 15.

had paid their monthly electrical bill to him.³⁹ The matter was brought before the Constitutional Court for leave to appeal the High Court decision in *Darries v City of Johannesburg*, and the setting aside of that decision in that matter. City Power is a Parastatal that provides power to the area under its jurisdiction.⁴⁰ It decided to terminate the power supply to a block of flats, Ennerdale Mansions, wherein the appellants resided.⁴¹ Using the Credit Control By-laws, the High Court found that the residents did not have any contractual relationship with the municipality and, as a result, did not qualify to be regarded as customers, and a pre-termination notice of the interruption of the power supply was not necessary.⁴² City Power also indicated that the residents' rights were not adversely affected because there was no direct link, as they did not have a contract with the residents. The residents approached the Constitutional Court for relief. They relied on their rights to adequate housing and human dignity,⁴³ and their contractual right to electricity regarding their lease with the landlord.⁴⁴

The question was considered whether the residents had a right to make an appeal to the Constitutional Court for their claim against City Power to restore electricity. This was the case even though they shared no contractual relation with the public service provider. In its decision the Constitutional Court defended the residents' claim by stating that such a matter also involved provisions of administrative and constitutional law, not simply those of the law of contract.⁴⁵ It observed that the *Promotion of Administrative Justice Act* may play an important role in instances wherein individuals are not contracted with the service provider and whom the service provider does not regard as the customer due to the absence of a contractual relationship. The connection between the contractual relationships between the landlord and the residents, on the one hand, and the contractual relationship between the landlord and the service provider is not mutually exclusive.⁴⁶ The Constitutional Court granted leave to appeal the High Court's decision to allow City Power to terminate the power supply to Ennerdale Mansions. The court declared the termination of the power supply unlawful and ordered the reconnection to the residents. The Credit Control By-law that authorised City Power to terminate the power supply without notice to anyone who is not its customer was declared unconstitutional.⁴⁷

³⁹ *Joseph case*.

⁴⁰ *Joseph case* para 4.

⁴¹ *Joseph case* para 7.

⁴² *Joseph case* para 11.

⁴³ *Joseph case* para 10.

⁴⁴ *Joseph case* para 12.

⁴⁵ *Joseph case* para 18.

⁴⁶ *Joseph case* para 23.

⁴⁷ *Joseph case* para 78.

The decision of the Constitutional Court in *Joseph* above illustrates that the courts consider far broader considerations beyond contractual considerations when dealing with a dispute arising from a right to electricity. The rights that residents hold to such a claim as that for the restoration of electricity include a broader spectrum of public law considerations. The outcome of the *Joseph* case suggests that it is more than just the contracting party that has the right to institute legal action against a power provider who has the public service mandate to deliver municipal services. The tenants of Ennerdale Mansions, albeit not considered customers as per the Credit Control By-laws, could also rely on what the court considers their public law right to receive the electricity supply.

The second problem is that even when it is not the landlord who is the defaulting party but the municipality, the citizens who rely on the municipality for electricity are mostly those who seek legal relief. In many cases where the residents sue Eskom as the power supplier, Eskom claims that it has no contractual obligation to the residents and owes such an obligation only to the municipality.⁴⁸ The contract for supplying electricity is between the municipality and Eskom instead of between the municipality and the tenants.

The contracts concluded by Eskom and municipalities usually oblige Eskom to supply electricity to the extent of each municipality's Notified Maximum Demand.⁴⁹ The Notified Maximum Demand is a contractual value of demand that binds Eskom and the municipality. Such "supply agreements" entail that Eskom will provide approved bulk electricity to municipalities.⁵⁰ Due to Eskom's contractual obligation, the terms and conditions cannot be altered without consultation. However, this takes place in practice. Eskom has been providing municipalities with electricity beyond the agreed quantities and demanding payment.⁵¹ For this reason Eskom has limited its electricity supply to municipalities due to "rotational load reduction".⁵² This, according to Eskom, is due primarily to the municipalities' failure to pay Eskom for all the electricity it provided, their failure to prohibit illegal connections, and their failure to provide the infrastructure necessary for the supply of electricity.⁵³ Further, it also seems that Eskom does not respect its contractual obligations towards municipalities in that it unilaterally varies the terms and conditions of its supply agreement without consultation or following proper dispute resolution mechanisms.

⁴⁸ *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* 2023 4 SA 325 (CC) para 18 (hereafter the *Vaal River* case).

⁴⁹ *Vaal River* case para 7.

⁵⁰ *Vaal River* case para 7.

⁵¹ *Vaal River* case para 7.

⁵² *Vaal River* case para 8.

⁵³ *Vaal River* case para 8.

It is therefore evident that Eskom tends to disregard the law governing its conduct while dealing with municipalities. Rather than genuinely complying with the applicable sections of the Act, it relies on breach of only the minimum requirements to eventually cut off the electricity supply. This was found to be the case in *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Ltd*,⁵⁴ wherein the court stated that the signing of an acknowledgement of debt by a municipality did not permit Eskom to terminate the supply of electricity should the municipality fail to comply with the said acknowledgement.⁵⁵ Even in such an instance, it was still constitutionally required to find an amicable resolution to the matter and to exhaust all other remedies before a municipality or other stakeholders could take the matter to court.⁵⁶

According to the court, the relationship between Eskom and municipalities is more than just contractual. Since Eskom provides bulk electricity to municipalities, which are then responsible for supplying electricity to its citizens, it is necessary to find a fair and reasonable way to resolve the dispute over nonpayment by the municipality, as required by sections 40 and 41 of the *Intergovernmental Relations Framework Act*.⁵⁷

Insofar as other stakeholders are concerned *vis-a-vis* Eskom and its duty to supply electricity, the context of the standard contractual relationship is often blurred. In the first instance, Eskom's response to most inquiries relating to its decision to terminate supply is generally a defence of privity.⁵⁸ It contends that it has no contractual obligation to any stakeholder except the municipality and that stakeholders should institute legal proceedings against the municipality instead.⁵⁹ Even though the courts have highlighted the importance of Eskom's constitutional duty as an organ of the state, as stated above,⁶⁰ it would seem that in matters instituted by stakeholders other than a municipality the courts tend to emphasise Eskom's power to negotiate its terms and conditions freely.⁶¹ Ceasing to perform pending payment of the services it renders to municipalities has yielded success over many defaulting municipalities. The courts must be cautious not to dictate substantive outcomes.⁶² The courts have likened this to withholding

⁵⁴ *Eskom Holdings SOC Limited v Resilient Properties (Pty) Ltd and Others* 2019 2 SA 577 (GJ) (hereafter the *Resilient Properties* case).

⁵⁵ *Resilient Properties* case para 76.

⁵⁶ *Resilient Properties* case para 78.

⁵⁷ *Resilient Properties* case para 79.

⁵⁸ *Afriforum NPC v Eskom Holdings* 2017 3 All SA 663 (GP) (hereafter the *Afriforum* case) para 4.

⁵⁹ *Afriforum* case para 4.

⁶⁰ *Afriforum* case para 68, where the court held that there was a lack of merit in Eskom's contention that because it has no contractual relationship with the applicants in any of the applications it is immunised by the doctrine of privity.

⁶¹ *Afriforum* case para 68.

⁶² *Afriforum* case para 68.

contractual performance following the doctrine of reciprocity and said that by doing this Eskom is refusing to supply goods and services for which it has not received payment.⁶³ Eskom is merely suspending the performance of its obligations in the face of non-performance or non-reciprocity by the municipalities.⁶⁴ This view held by the court endorses the notion that Eskom owes a contractual duty towards municipalities only, to the exclusion of other stakeholders.

The predicament faced by end-users in the event of a non-supply of either municipal services or electricity is therefore compounded as they cannot use their bargaining power to demand delivery of the service that they paid for. Should they do this, they stand a good chance of having their electricity supply terminated.⁶⁵ As a contracting party the municipality has the power to circumvent its noncompliance with the obligation to pay by making use of legislation. Should a consumer withhold payment for the receipt of one municipal service and pay for all the others, as we have seen in *Rademan v Moqhaka Municipality*,⁶⁶ the legislation authorises the municipality to consolidate the accounts of all the services the municipality provides into a single account.⁶⁷ Added to this is clause 18 of Eskom's Standard Conditions of Supply for Small Supplies with Prepayment Metering, which excludes Eskom's liability towards the consumer from various scenarios.

It follows from the discussion above that the recognition of the right to access to electricity solely as a contractual right is not inclusive of all the rights and duties of the different stakeholders present in the supply-demand chain of the process of delivering electricity. Whereas a contractual relationship between citizens and the municipalities on the one hand and between municipalities and Eskom on the other may exist, the rights and duties that arise from these dual relations are not purely contractual. Legislative and constitutional imperatives are considered in addition to the contractual terms and conditions that bind the relations between citizens, municipalities and the state.

For this reason the discussion around the right to electricity must also include the constitutional duties borne by the state in having to provide electricity and the concomitant constitutional rights of residents to the supply of electricity. Such a discussion is necessary, even without a clear right in the Constitution to access to electricity.

⁶³ *Afriforum* case para 147.

⁶⁴ *Afriforum* case para 147.

⁶⁵ *Rademan v Moqhaka Municipality* (173/11) 2011 ZASCA 244 (1 December 2011) (hereafter the *Rademan* case).

⁶⁶ *Rademan* case para 19.

⁶⁷ *Rademan* case para 19.

2.2 *The right to electricity is derivative*

The *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd* case highlighted the importance of having access to electricity by stating that it is self-evident that the supply of electricity is the cornerstone upon which the realisation of other rights is based.⁶⁸ The courts have also held that the preventable failure to provide electricity was a constitutional breach.⁶⁹ Although the Constitutional Court has this view on the imperativeness of providing electricity, the *Constitution* in itself does not guarantee the right to electricity. However, it guarantees other aspects of life that cannot be provided for or function properly without electricity.⁷⁰ Access to electricity is an implicit attribute of a preexisting right and is called a derivative right because it is a right that is derived from other rights.⁷¹

Although the *Constitution* does not expressly protect the right to access electricity as it does other socio-economic rights, in the *United Democratic Movement v Eskom Holdings SOC Ltd*⁷² the court found load shedding to be a breach that constitutes an unjustified infringement of other rights that the *Constitution* protects. The court held that this infringement affects the enjoyment of the rights to human dignity,⁷³ life,⁷⁴ freedom and security of the person,⁷⁵ the right to an environment that is not harmful to health and well-being,⁷⁶ the right to health care services,⁷⁷ the right to access sufficient food and water,⁷⁸ and the right to education.⁷⁹ The court instructed the Minister of Electricity to ensure that there is an adequate generation of electricity to prevent any interruptions of supply as a result of load shedding to all healthcare facilities, schools and police stations.⁸⁰

Although the High Court did not intentionally name and classify the right to access electricity as a derivative right, its decision to order the government and Eskom to ensure a constant and uninterrupted supply of electricity to the establishments mentioned above was based on the constitutional imperative to protect, respect, promote and fulfil the rights that the

⁶⁸ *Vaal River* case para 37.

⁶⁹ *United Democratic Movement v Eskom Holdings SOC Ltd* (005779/2023;003615/2023;022464/2023) [2023] ZAGPPHC 1949 (1 December 2023) (hereafter the *UDM* case) para 5.

⁷⁰ *UDM* case para 16.

⁷¹ Löfquist 2020 *Intl J Hum Rts* 719.

⁷² *UDM* case para 120.

⁷³ *Constitution of the Republic of South Africa*, 1996 s 10 (hereafter the *Constitution*).

⁷⁴ *Constitution* s 11.

⁷⁵ *Constitution* s 12.

⁷⁶ *Constitution* s 24.

⁷⁷ *Constitution* s 27(1)(a).

⁷⁸ *Constitution* s 27(1)(b).

⁷⁹ *Constitution* s 29.

⁸⁰ *UDM* case para 120.

Constitution safeguards. This clearly indicates that the courts at the least recognise and protect the derivative nature of the right to access electricity.

The existence of a protected right in the *Constitution* that requires the provision of another right in order for the protected right to be exercised efficiently is the very reason behind the recognition of derivative rights. Many of the socio-economic rights enshrined in the *Constitution* require the use of electricity to be fully or partially realised. It is therefore not surprising that the discussion of the right to access electricity includes that of the human settlement agenda.⁸¹

The non-realisation of the rights recognised by the *Constitution*, such as that of the right to housing, leads to the non-realisation of citizens' access to electricity. The United Nations has addressed this issue by observing that national and local governments are often reluctant to extend essential services to illegal or informal settlements precisely because they are informal. As a result, informal settlement dwellers often do not have access to safe drinking water, adequate sanitation or electricity, and refuse collection is also limited or non-existent.⁸² This would then mean that when they are denied their constitutionally legitimate expectation to a house they are simultaneously being denied access to electricity.

In the *Government of the Republic of South Africa v Grootboom* case⁸³ the court recognised that access to electricity may be included in the duty to provide access to housing.⁸⁴ Should disputes lead to an order that requires the demolition of an informal settlement, the government must provide adequate alternative housing, which includes enjoying access to electricity.⁸⁵ Part of the state's duty to provide housing, which is dual in nature, not only encompasses ensuring that residents are placed in formal settlements but also that they are placed in formal settlements that allow for the provision of municipal services by the state. One such municipal service, relevant for this discussion, is the supply of electricity. In the *Grootboom* case the court highlighted that occupying a house goes beyond occupying a structure and that the right to adequate housing includes the right to receive appropriate municipal services.⁸⁶ Only when a person has land, a

⁸¹ Tully 2006 *NQHR* 565.

⁸² UN Human Settlements Programme/Office of the High Commissioner for Human Rights 2001 https://www.ohchr.org/sites/default/files/Documents/Publications/FS21_rev_1_Housing_en.pdf 21.

⁸³ *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) (hereafter the *Grootboom* case) para 37.

⁸⁴ *Grootboom* case para 37.

⁸⁵ Tully 2006 *NQHR* 566.

⁸⁶ *Grootboom* case para 35.

dwelling, and the requisite services that go with them can it be said that the right to adequate housing has been sufficiently satisfied.⁸⁷

In *Joseph v City of Johannesburg* the constitutional court noted the importance of delivering basic municipal services, including electricity. It expressed the view that although the *Constitution* contains no provision that expressly protects the right to access to electricity, electricity is an important municipal service that the local government is ordinarily obliged to provide. When the state fails to provide its citizens with adequate housing, it will inevitably be unable to provide these basic services, including an adequate electricity supply.⁸⁸

This dual understanding of the right to access adequate housing and the right to electricity also operates in the converse. That is, the omission to provide electricity will also lead to the deprivation and lack of enjoyment of one's house.⁸⁹ A structure used for human habitation must have electricity for the occupant to be able to use such a structure as a dwelling.⁹⁰ A supply of electricity is an important basic amenity enabling an occupant to use and enjoy the property for the purpose for which it was provided.⁹¹ Therefore, for a property to be adequately used and enjoyed as a dwelling, it must have an electricity supply.⁹² The *International Covenant on Economic, Social, and Cultural Rights* deems a house to be adequate if there is:

Availability of services, materials, facilities, and infrastructure. An adequate house must contain certain facilities essential for health, security, comfort, and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating, and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage, and emergency services.⁹³

Electricity is considered to be an essential element that ought to be supplied to a house for it to be regarded as adequate.⁹⁴ It would, therefore, seem that the human settlement agenda is a compelling catalyst for the provision of electricity for all. As discussed above, a house without electricity cannot be considered habitable or adequate.⁹⁵

Another dimension added to access electricity as a derivative right is the argument that modern life necessitates access electricity. It is held that

⁸⁷ *Grootboom* case para 35.

⁸⁸ Tully 2006 NQHR 566.

⁸⁹ Tully 2006 NQHR 566.

⁹⁰ *Makeshift* case para 25.

⁹¹ Ngwenyama 2023 PELJ 5.

⁹² Ngwenyama 2023 PELJ 5.

⁹³ *CESCR General Comment No 4: The Right to Adequate Housing (Article 11(1) of the ICESCR)* UN Doc E/1992/23 (1991) para 8(b).

⁹⁴ Tully 2006 NQHR 570.

⁹⁵ See para 2.2 above.

electricity access is included in the modern-day concept of life, which is closely connected to improved living conditions.⁹⁶ Dube and Moyo note the inherent need for electricity in the modern era and point out the impossibility of living a life with dignity without access to electricity.⁹⁷ They argue that the availability of electricity facilitates clean and efficient energy, allowing access to the internet by powering electronic devices which facilitate access to education.⁹⁸ Furthermore, the modern-day developmental agenda for the fourth industrial revolution encompasses the need for a regular supply of electricity for the successful adoption of new technologies and to facilitate IT infrastructure.⁹⁹ Eskom's inability to provide a constant supply of electricity may impede the country's ability to utilise such new technologies.¹⁰⁰

However, in a country that is still developing, the most basic needs that require a constant supply of energy are of pivotal importance. Therefore, it is the most basic standard of living that most developing countries aim to attain. Access to energy services is a crucial component in addressing the primary challenges of development, which include providing adequate food, shelter, clothing, water, sanitation, medical care, education and information. Energy plays a crucial role in determining poverty and development, and it is vital in supporting these determinants.¹⁰¹

It is worth noting that the argument that advocates categorising or recognising the right to the supply of electricity as a right that exists based on other constitutionally protected rights is not without criticism. In a minority decision, Judge Unterhalter in the *Vaal River* case provides a detailed critique against a claim by the applicants who relied on the existence of other constitutionally protected rights to protect the otherwise constitutionally "unprotected" right to electricity.¹⁰² His argument against the recognition of the right to the supply of electricity as a derivative right in the South African legal system can be found in the following remarks, which are elaborated on in their numbered form:

*2.2.1 There are no rights in the Bill of Rights that provide for the supply of electricity as a prerequisite.*¹⁰³

- a. The argument that the supply of electricity is a means by which other rights can be achieved cannot stand because such a means cannot

⁹⁶ Löfquist 2020 *Intl J Hum Rts* 716.

⁹⁷ Dube and Moyo 2022 *PELJ*.

⁹⁸ Dube and Moyo 2022 *PELJ* 9.

⁹⁹ Olaitan, Issah and Wayi 2021 *SAJIM* 8.

¹⁰⁰ Olaitan, Issah and Wayi 2021 *SAJIM* 8.

¹⁰¹ Bradbrook and Gardam 2006 *Hum Rts Q* 391.

¹⁰² *Vaal River* case.

¹⁰³ *Vaal River* case para 110.

be the subject matter of the right.¹⁰⁴ The means that the content of the right could be entirely different yet equally permissible means used to realise or acquire the same right.¹⁰⁵ A right must have a defined content. Therefore, the reasoning that access to electricity is a means for realising other rights cannot be sustained.¹⁰⁶

*2.2.2 The enablement argument cannot prevail as it does not rely on section 7(2) of the Constitution:*¹⁰⁷

- a. Section 7(2) obliges the state to respect, protect, promote and fulfil the Bill of Rights, and it does not apply to rights that derive from elsewhere in the *Constitution* outside the Bill of Rights itself.¹⁰⁸ Municipalities' constitutional duty to provide basic services does not rest on the Bill of Rights.¹⁰⁹
- b. Section 7(2) cannot be taken as an all-encompassing section that can be used to impose unexplained rights and duties that emanate from the air.¹¹⁰ Should a claimant fail to prove the existence of a right in the Bill of Rights, the state will have nothing to respect.¹¹¹ The duty arises in section 7(2) only if there is a right within the Bill of Rights. If there is no right, there is no duty.¹¹²

*2.2.3 Residents cannot claim a right to the supply of electricity from Eskom on the basis that electricity has utility in the securing of the rights under section 26 and section 27 of the Constitution:*¹¹³

- a. This would be to disintermediate the state and the decisions that the state must make as to how to realise these rights.¹¹⁴ Citizens cannot require a particular organ of the state to provide a certain resource, in this case, electricity, which would secure them better access to health, housing, food and water.¹¹⁵
- b. Applicants who claim an uninterrupted electricity supply from Eskom could use other rights in the Bill of Rights to make their claim. Section 27(1)(c) of the *Constitution*, which affords everyone the right to social security, could be used as the right that claimants seeking an

¹⁰⁴ *Vaal River* case para 113.

¹⁰⁵ *Vaal River* case para 113.

¹⁰⁶ *Vaal River* case para 112.

¹⁰⁷ *Vaal River* case para 110.

¹⁰⁸ *Vaal River* case para 110.

¹⁰⁹ *Vaal River* case para 110.

¹¹⁰ *Vaal River* case para 126.

¹¹¹ *Vaal River* case para 126.

¹¹² *Vaal River* case para 126.

¹¹³ *Vaal River* case para 114.

¹¹⁴ *Vaal River* case para 114.

¹¹⁵ *Vaal River* case para 114.

uninterrupted electricity supply could utilise to make their case against Eskom.¹¹⁶

2.2.4 *The content of the right to the supply of electricity is not defined.*

- a. We can decide whether a right has been infringed only if we know the content of the right to which a right holder has a claim. Upon whom lies the duty to secure the content of the right? Eskom cannot have a legal duty to supply electricity or restore a supply to residents if the residents have no right to claim such a supply.
- b. The arguments that existing constitutional rights should be the focus of the courts and not that of the right to electricity do not stand. The consequence that load reduction leads to deplorable conditions that affect constitutionally protected rights cannot stand.¹¹⁷ The question should be whether the residents enjoyed the right to electricity supply from Eskom under their constitutionally protected rights.¹¹⁸

2.2.5 *A right held by one person must give rise to a duty held by another person towards the right holder:*¹¹⁹

- a. When some person holds rights against another,¹²⁰ they may permit one person to do something and forbid the other from disallowing the rights holder from exercise his or her right.¹²¹ The contents of a right must specify the right held and the incumbent duty to be exercised.¹²² A decision on whether a right has been infringed can be made only once we know the content of the right.¹²³ Therefore, if residents have no right to claim an electricity supply, Eskom will not have a duty to supply the electricity.¹²⁴ As stated in the *Joseph* case, this right lies only against the municipality as per section 152 of the *Constitution*.¹²⁵

This is a summary of Judge Unterhalter's argument against the recognition of the right to electricity as a derivative right, which is well known. By relying on both the existence of other constitutionally protected rights and section 7(2) of the *Constitution* the courts have however interdicted and given the interim relief of power supply for the sudden interruption of electricity caused by either load shedding¹²⁶ or the termination of an electricity supply due to

¹¹⁶ *Vaal River* case para 111.

¹¹⁷ *Vaal River* case para 122.

¹¹⁸ *Vaal River* case para 123.

¹¹⁹ *Vaal River* case para 118.

¹²⁰ *Vaal River* case para 118.

¹²¹ *Vaal River* case para 119.

¹²² *Vaal River* case para 119.

¹²³ *Vaal River* case para 126.

¹²⁴ *Vaal River* case para 121.

¹²⁵ *Vaal River* case para 123.

¹²⁶ *UDM* case.

nonpayment by the municipalities to Eskom.¹²⁷ In doing so the courts have not found it necessary to decide whether residents have a specific right to electricity or not, nor did they require residents to prove the same.¹²⁸ The courts relied on the fact that the residents made use of their constitutionally protected rights in making their claim.¹²⁹ The absence from the *Constitution* of a direct right to an electricity supply has not deterred the court from providing interim relief and simply disallowing the horrendous violation of fundamental rights caused by Eskom's conduct in reducing an electricity supply without giving notice to residents.¹³⁰ The courts argue that a single action can violate multiple rights, and the only way to stop the violation is to reverse the conduct that caused the violation.¹³¹

This means that if the sudden reduction of the electricity supply by Eskom leads to a reduction of the standard of living of residents, which subsequently leads to the infringement of their constitutionally protected rights, that would amount to a constitutional breach the only remedy to which would be the restoration of the electricity supply to its erstwhile level. The focus should be less on questions of Eskom's duty to supply electricity and the residents' right thereto than be on Eskom's impermissible conduct. The impermissibility arises from Eskom's substantially reducing supply, resulting in the infringement of citizens' constitutionally protected rights.¹³² In the *Vaal River* case Madlanga J further held that:

It defies logic how the causative act – the substantial reduction of electricity supply – should suddenly be taken out of the equation and be completely irrelevant in redressing the rights violations.

The state and organs of the state, of which Eskom is one, must respect the rights in the Bill of Rights.¹³³ They must do so by refraining from unreasonable conduct that infringes the rights in the Bill of Rights. If a rights violation arises from the action of an organ of the state section 7(2) of the *Constitution* will have been violated.

The majority decision in the *Vaal River* case highlights the importance of accepting the existence of derivative rights, with the right to access electricity being one of them. The rights enshrined in the *Constitution* cannot be attained or enjoyed adequately without access to electricity. Although electricity is not a basic requirement for human survival, modern living necessitates using electricity to achieve ends that lead to self-actualisation. The objection to seeing access to electricity as a right based on its

¹²⁷ *Vaal River* case.

¹²⁸ *Vaal River* case para 194.

¹²⁹ *Vaal River* case para 190.

¹³⁰ *Vaal River* case para 191.

¹³¹ *Vaal River* case para 194.

¹³² *Vaal River* case para 195.

¹³³ *Vaal River* case para 199.

nonexistence in the *Constitution* is not substantial; however, due regard should be paid to the need for legal certainty in future matters concerning the exact nature of the right to electricity.

The majority judgment in the *Vaal River* case endorses the belief that a duty that requires Eskom's continued supply of electricity exists beyond contractual and constitutional obligations. Such a belief is not based on concluded contracts or the *Constitution*. The courts have found for the inclusion of the state's obligation to supply electricity beyond these spheres of law. They have done this by relying on different legislative authorities such as the *Promotion of Administrative Justice Act*,¹³⁴ the *Local Government: Municipal Systems Act*,¹³⁵ and sections 152 and 153 of the *Constitution*. However, although the courts have found the state's obligation to supply electricity to its citizens to be based on these authorities, this still leaves open the question of where the state has found legal leeway to intervene in contractual agreements existing between Eskom and municipalities, or between municipalities and citizens, or even between Eskom and citizens without having contractual privity; and to what it is owed that the state is obliged to provide such a service, even though it is not constitutionally required to so.

One argument holds that this is due to the states' sovereignty and its resultant power over its subjects, such an intervention being founded on its obligation to protect the human rights of all under its governance. The state being sovereign has the right to intervene in all these contractual relationships as the ultimate principal. Such a right to intervene exists because municipalities or private service providers with a public mandate would as agents have concluded such contracts in the pursuance of fulfilling the state's public law duty of providing municipal services to its citizens. The state, as the principal, is the ultimate duty bearer towards its citizen. The state is also bound by international human rights law to provide access to electricity to its citizens.

2.3 The right to electricity as a basic human right.

The right to electricity was first mentioned in the 1950s by the United Nations.¹³⁶ However, it is a social norm that has not been elevated to the status of being a right, despite its long history.¹³⁷ Based on the obligations the United Nations places on member states in developing countries, it is only in its Sustainable Developmental Goals that one can observe the concept of a right to electricity.¹³⁸ The abovementioned goals oblige

¹³⁴ *Promotion of Administrative Justice Act* 3 of 2000.

¹³⁵ *Local Government: Municipal Systems Act* 32 of 2000.

¹³⁶ Shyu 2021 *ERSS* 1.

¹³⁷ Shyu 2021 *ERSS* 1.

¹³⁸ Shyu 2021 *ERSS* 5.

member states only to create access to modern renewable energy and to expand infrastructure and clean energy technology to do so. The existing international legislation regulating energy provision does not place a duty on a member state to provide energy or energy services free of charge on the demand of a citizen. What international legislation does, however, is to state that member states must create access to energy. However, saying only that this is what is expected of states is to over simplify. Walker argues that the existence of infrastructure is only the beginning of what is required if the beneficial outcomes of the use of energy are to be the eventual outcomes of the process.¹³⁹ He evaluates the nature of a right to energy and states that should there be a right to access energy; that the state should indeed be expected to provide the necessary infrastructure.¹⁴⁰ The state has an obligation to ensure that the demand of people to sustain basic levels of well-being through the use of energy is always maintained.¹⁴¹ Walker concludes that two duties arise from this duality of the state's obligations. These are the duty to create access to electricity and the duty to supply energy.

2.3.1 *The duty to create access to electricity*

Access to energy has not been recognised as a right by the *Universal Declaration of Human Rights*.¹⁴² However, as mentioned above, many other international instruments have implicitly recognised energy access as a human right. Applying the normative content of international human rights law, access to electricity supports the principles of non-discrimination, equality, empowerment, participation and accountability.¹⁴³ Article 25 of the *Universal Declaration of Human Rights* states that every human being has a right to an adequate standard of living, including food, clothing, housing, medical care and social services.¹⁴⁴ Tully argues that considerations of universal socio-economic human rights include access to electricity.

Additionally, Article 23 states that all human beings have the right to work under fair and satisfactory conditions, and lastly Article 26 of the Declaration affords all humans the right to education.¹⁴⁵ Deprivation in living standards often contributes to poverty.¹⁴⁶ One phrase often used that contributes to the discussion around the right to access energy is energy poverty, which is often understood to imply the lack of energy access and energy services,

¹³⁹ Walker 2015 *L'Europe en Formation* 32.

¹⁴⁰ Walker 2015 *L'Europe en Formation* 32.

¹⁴¹ Walker 2015 *L'Europe en Formation* 32.

¹⁴² Zepeda and Zepeda 2017 *JERL* 378.

¹⁴³ Tully 2006 *NQHR* 584.

¹⁴⁴ Zepeda and Zepeda 2017 *JERL* 378-379.

¹⁴⁵ Zepeda and Zepeda 2017 *JERL* 379.

¹⁴⁶ Alkire and Santos 2010
https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1815243 8.

that leads to poverty.¹⁴⁷ The link between poverty and energy access was made as early as 1986 in the Report of the World Commission on Environment and Development.¹⁴⁸

In a sustainable developmental agenda this would mean that states must recognise energy as a basic need that should be safeguarded and regulated with relevant policies.¹⁴⁹ The pragmatic nature of this right necessitates that households be connected to the national grid.¹⁵⁰ The state must provide infrastructure services that ensure continued access to electricity.¹⁵¹ The infrastructure requirement goes beyond merely connecting families to the national grid; modern-day energy needs also require states to provide infrastructure that meets modern renewable energy standards. This is a particular predicament and a contentious issue, considering that many households in developing states depend on fossil fuels for their day-to-day energy needs.¹⁵² What further complicates the issue is the viewpoint that developing countries play a crucial role in the global energy transition to renewable energy as most of the remaining renewable energy potential lies in them, and that the demand for energy is projected to increase in these regions.¹⁵³

It is argued that the modern-day agenda of switching to renewable energy constrains the ability of populations in developing countries from benefitting from opportunities for economic development and improving their living standards.¹⁵⁴ This slow rate of development can be attributed to their inadequate access to modern energy use due to developing countries' lack of funding, their lack of technology and expert know-how, their lack of infrastructure, and their lack of relevant policy reform.¹⁵⁵ This further extends the disparity in development between developed and undeveloped countries.¹⁵⁶ Additionally, the increase in the global population necessitates a concomitant increase in energy consumption. For the population in developing countries, this means that they have to rely more fully on biomass energy, which is the cheapest solution for heat and cooking.¹⁵⁷

¹⁴⁷ Shyu 2021 *ERSS* 4.

¹⁴⁸ Bradbrook and Gardam 2006 *Hum Rts* Q 393.

¹⁴⁹ Demski *et al* 2019 *ERSS* 36.

¹⁵⁰ Walker 2015 *L'Europe en Formation* 31.

¹⁵¹ Tully 2006 *NQHR* 563.

¹⁵² Löfquist 2020 *Intl J Hum Rts* 718.

¹⁵³ Cantarero 2020 *ERSS* 1.

¹⁵⁴ Löfquist 2020 *Intl J Hum Rts* 718.

¹⁵⁵ Mohammed, Mustafa and Bashir 2013 *Renew Sust Energy Rev* 453.

¹⁵⁶ Mohammed, Mustafa and Bashir 2013 *Renew Sust Energy Rev* 453.

¹⁵⁷ Mohammed, Mustafa and Bashir 2013 *Renew Sust Energy Rev* 454.

2.3.2 *The duty to supply electricity.*

It is widely accepted that the state must create infrastructure to supply energy and an enabling environment that allows private market players to supply and demand electricity.¹⁵⁸ The nature of electricity as a commodity is also an important factor herein. In most instances, electricity relies on the use of non-renewable fossil fuels. Providing it freely is therefore impossible.

When it is stated that there is a right to something, someone has a claim to it and someone else must create or provide it.¹⁵⁹ Furthermore, that which is claimed is also of particular importance. This means that should there be a right to electricity, it should be clear on the one hand whether the claim the right creates is to access to electricity or, on the other hand, to the use of it. In regards to the former, access to electricity demands that a state ensure the adequacy of living conditions.¹⁶⁰ This is an obligation that is primarily placed on the state. However, the state can outsource such an obligation to private service providers. The United Nations has a negative outlook on the privatisation of service delivery.¹⁶¹ It has, however, adopted a broader approach to different political and economic systems.¹⁶² Therefore, states may privatise their service delivery duties, provided that states monitor how private companies execute their service delivery mandate.¹⁶³

The need to develop and determine the scope, nature and consequences of a right to electricity is necessary today. As it is essential to eradicating poverty, access to electricity should be a fundamental human right. In this instance, the state must take a proactive stance by enacting public policy, utilising policy instruments and pursuing policy action that enables access to energy and energy services.¹⁶⁴ As the lawmaker, it is incumbent on the state to take the central role and take measures that ensure that such access is delivered to its citizens.

3 Conclusion

The discussion above shows that the right to electricity is a contractual, derivative and human right. The coexistence of all three of these spheres of law is founded on the special cluster of relationships that exists when a state has a public services mandate, taking into consideration the different role players in each special cluster. The link that binds the interrelations in these special clusters is agency law in the form of undisclosed principal agency

¹⁵⁸ Tully 2006 *NQHR* 565.

¹⁵⁹ Walker 2015 *L'Europe en Formation* 36.

¹⁶⁰ Tully 2006 *NQHR* 567.

¹⁶¹ Hesselman "Energy Poverty and Household Access" 698.

¹⁶² Hesselman "Energy Poverty and Household Access" 698.

¹⁶³ Hesselman "Energy Poverty and Household Access" 698.

¹⁶⁴ It becomes incumbent on the state to take measures to ensure that such access is delivered to its citizens.

law. Although a contract can be concluded between the parties on the delivery of public services, the state's intervention, as the principal, will still be possible – as with the case of the undisclosed principal.

Although the right to electricity is not enshrined in the *Constitution*, the existence of other rights enshrined in the *Constitution* implies the existence of a right to electricity, as the realisation of those protected rights depends on the utilisation of electricity. The South African courts have shown that the absence of the right to electricity from the *Constitution* is not a deterrent to its protection. Furthermore, by using constitutional imperatives such as sections 7, 152 and 153 of the *Constitution* the courts have found that the state is obliged to supply electricity to its citizens and that the failure to do so is a breach of its constitutional duties.

Additionally, international obligations require states to establish and maintain adequate living conditions for their citizens beyond constitutional imperatives. To achieve this, a reliable electricity supply must be guaranteed. The state must provide the requisite infrastructure to achieve such provision. In addition, the renewable energy mandate also requires states to progressively achieve low carbon-emitting forms of electricity production. This should mainly be the objective of developing countries that still have the most to contribute to lowering global carbon emissions by decreasing their fossil fuel energy production. These obligations apply only to the state, which, as the sovereign, exercises sovereign power over its citizens and institutions. The state remains the ultimate principal in the duty to supply public municipal services to its citizens, whose concurrent right to receive such services is contractual, derivative and human rights-based.

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List of Abbreviations

CCR	Constitutional Court Review
CLJ	Cambridge Law Journal
ERSS	Energy Research and Social Science
Hum Rts Q	Human Rights Quarterly
Intl J Hum Rts	International Journal of Human Rights
J Int Bus Stud	Journal of International Business Studies
JERL	Journal of Energy and Natural Resources Law
NQHR	Netherlands Quarterly of Human Rights
PELJ	Potchefstroom Electronic Law Journal
Renew Sust Energy Rev	Renewable and Sustainable Energy Reviews
SAJIM	South African Journal of Information Management
UN	United Nations