

Watt's at Stake: A Legal Lens on Load Shedding, Load Limiting and Load Reduction in South Africa

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INTRODUCTION

This article looks at the legal regulation of electricity in South Africa with an emphasis on understanding and analysing the approach of the regulators and service providers (mainly Eskom and the municipalities) towards “loadshedding”, “load reduction” and “load limiting”.

WHAT IS “LOAD SHEDDING”, “LOAD REDUCTION” AND “LOAD LIMITING”?

Load Shedding:

Concept:

Load Shedding is a controlled and intentional interruption of electrical supply to specific areas or consumers during periods of high demand or when there is a shortage of power generation.

Purpose:

The primary aim is to prevent a complete system collapse by balancing the available power generation with the demand.

Implementation:

Utilities or grid operators may have predefined schedules or use real-time monitoring to determine when and where to implement load shedding. It is implemented by interrupting the supply of electricity to certain areas on a rotational basis.

Load Reduction:

Concept:

Load Reduction involves intentionally decreasing the overall demand for electricity in a specific area.

Purpose:

The goal is to reduce the total power consumption temporarily, usually during peak demand periods, to avoid overloading the power grid.

Implementation:

According to Eskom spokesperson, Sikonathi Mantshantsha¹, Load Reduction involves switching off localised areas where illegal connections cause overload and damage infrastructure.

Load Limiting:

Concept:

Load Limiting involves restricting the amount of electricity consumed by a specific device, equipment, or consumer to avoid exceeding a predefined threshold. Load limiting is a demand management solution that allows Eskom to load limit the maximum output power of a smart meter for a pre-defined period for the purpose of controlling demand in consultation with customers².

Purpose:

The goal of Load Limiting is to prevent individual loads from consuming more power than allocated, especially during periods of high demand or when the overall system is stressed.

Implementation:

Load Limiting is achieved through the use of devices like load limiters or by implementing smart grid technologies that can remotely control or adjust the power consumption of certain loads. To activate load limiting, a schedule is sent remotely to the meter during the beginning of the pilot and is set to expire after a pre-determined period. Customers are encouraged to switch off high consuming appliances like geysers, stoves, washing machines and pool pumps during this period. If such appliances are not switched off, the meter will disconnect supply for a period (configured) and display reasons on the meter for the disconnection. In this case the meter will display “Power overload”³.

CONSUMER'S RIGHTS TO ACCESS TO ELECTRICITY

The provision of basic municipal services is a cardinal function, if not the most important function, of every municipality. The central mandate of local government is to develop service delivery capacity in order to meet the basic needs of all inhabitants of South Africa.⁴ In *Mkontwana*⁵, Yacoob J held that “municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty.”

The Local Government: Municipal Systems Act 32 of 2000 (“**the Systems Act**”) gives legislative authority as to the duties of local government. In particular, section 4(2) of the Systems Act sets out the duties of municipal councils, which exercise the executive and legislative authority at municipal level, and specifically section 4(2) (f) provides as follows:

(2) The council of a municipality, within the municipality's financial and administrative capacity and having regard to practical considerations, has the duty to—

(f) give members of the local community equitable access to the municipal services to which they are entitled;

Section 73 of the Systems Act further provides that municipalities have a general duty to give effect to the provisions of the Constitution and to inter alia ensure that all members of the local community have access to at least the minimum level of basic municipal services.

Further, Chapter 7 of the Constitution of the Republic of South Africa, 1996 (“**The Constitution**”) sets out the objects of local government generally, as well as dictating its Constitutional obligations. Section 152(1) of the Constitution provides that one of the objects of local government is to ensure the provision of services to communities in a sustainable manner... within its financial and administrative capacity (writer's emphasis).

Based on the provisions as they have been drafted, it is clear that while citizens have a right to access to electricity, actually receiving that electricity is not an absolute right. In terms of section 36 of the Constitution, any right can be limited in terms of a law of general application, and section 152(1) clearly dictates this limitation in that the right to access to electricity may be limited if provision thereof is not within the financial and administrative capacity of the municipality.

Accordingly, there is no direct legal obligation on Eskom, City Power, or your municipality to ensure that you receive electricity if this is not within your municipality's financial or administrative capacity. South Africans are only entitled to be supplied with electricity to the extent that there are sufficient resources available in any particular jurisdiction to supply such resources.

WHICH ONE IS LEGAL, AND WHICH ONE ISN'T?

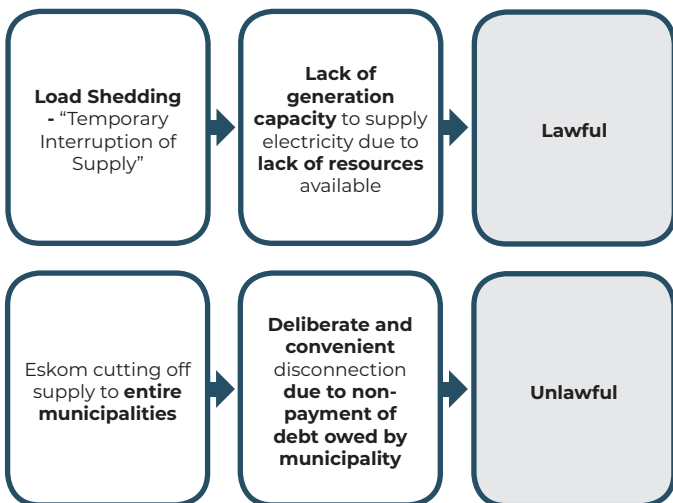
Eskom supplies municipalities (and their subsidiaries, such as City Power in Joburg) in bulk at a pre-determined tariff, and the municipalities then re-sell electricity to end-users within their municipal borders at a mark-up. Section 27 of the Electricity Regulation Act 4 of 2006 (“the ERA”) provides that, in relation to the exercise of its powers in respect of the supply of electricity, a municipality must, inter alia, provide basic reticulation services free of charge, or at a minimum cost, to certain classes of end-users.⁶ While Eskom may be obliged to comply with section 154(1) of the Constitution (in supporting and strengthening the capacity of municipalities to exercise their powers and perform their functions) the ERA also expressly permits Eskom, as a licensee, to interrupt the supply of electricity for non-payment.

In terms of section 22(5), a licensee (Eskom) may not reduce or terminate the supply of electricity to a customer, unless (a) the customer is insolvent; (b) the customer has failed to honour, or refuses to enter into, an agreement for the supply of electricity; or (c) the customer has contravened the payment conditions of that licensee. In *Afriforum NPC and Others v Eskom Holdings SOC Ltd and Others*⁷ the decision of Eskom to implement scheduled interruptions of electricity supply to three municipalities was ventilated, with the applicants seeking to inter alia establish that Eskom was not permitted to interrupt the supply of electricity as a means to collect debts owed to it. The court held that in terms of the doctrine of necessity as recognized by the Constitution,

“...where Eskom lacks the generation capacity to supply the entire country, it is entitled to put in place load shedding arrangements on a temporary basis to avert the collapse of the grid. However, when the issue is one, not of necessity, but of convenience or expedience, the Constitution does not permit Eskom deliberately to disconnect a defaulting municipality and thus to ensure that the constitutional rights of its residents to electricity will be violated. Eskom took the disconnection decision in order to pressurise the municipalities to pay their outstanding arrears. This, says Mediclinic, amounts to self-help which is constitutionally prohibited. The resort to self-help will inevitably result in a violation of the constitutional rights of innocent third parties who have dutifully been paying for municipal services.”

Having regard to the foregoing, Afriforum directly confirms that Load Shedding is not necessarily illegal and that the temporary termination or interruption of supply of electricity to consumers is indeed lawful, in cases where there are just not enough resources available to supply same.

One must, however, draw a distinction between what is considered Load Shedding, and what is the deliberate and convenient disconnection of supply to a municipality for non-payment of debt owed by that municipality. Of course, the interruption or disconnection of services to a municipality, which supplies a substantial vicinity of consumers, will have an adverse effect by infringing on the rights of those consumers and accordingly, remains unlawful.



In respect of Load Reduction, in *Resilient Properties (Pty) Ltd v Eskom Holdings SOC Limited and Others*⁸ the court held that Load Reduction affects the rights of the poor because they are deprived of their right to access electricity, and that Eskom’s implementation of Load Reduction to non-paying municipalities is unlawful and can be challenged in Court.

The matter went on appeal by Eskom in the SCA, and the court found that:

*“It is correct... that s 22(5) of the ERA empowers Eskom to reduce or terminate the supply of electricity to its customers in the circumstances spelt out in the section. And that it may exercise that power without prior authorisation by a court... To conclude, there can be no doubt that s 22(5) was adopted with the manifest purpose of obviating obstacles that distributors of electricity would encounter if, in the circumstances spelt out in the section itself, they were required to seek prior judicial authorization before interrupting or terminating the supply of electricity to a customer who refuses or is unable to pay for it...”*⁹

The court dismissed the appeal on the basis that:

*“...when it comes to municipalities as distributors of electricity, further considerations would come into play. Terminating the supply of electricity to an entire municipality in the circumstances provided for in s 22(5) would be a **radical step**.*

*Such **reduction or termination of the supply of electricity would adversely affect every consumer within the affected municipality. Indeed, it would have the effect of collapsing the entire municipality, rendering it unable to fulfil its constitutional and statutory mandate to provide basic services. The objects of local government spelt out in s 152 of the Constitution would be subverted. And a municipality whose electricity supply is terminated by Eskom would not be able to ‘give members of the local community equitable access to the municipal services to which they are entitled’ as required by s 4(2)(f) of the Municipal Systems Act. Nor would such a municipality be able to provide services in respect of water, sanitation and electricity in terms of s 9(1)(a)(ii) of the Housing Act as these services rely on electricity for their functionality.”***¹⁰

Accordingly, it would appear that a temporary disruption of services (Load Shedding) is lawful, but the termination of services to areas due to non-payment (Load Reduction) is not lawful. One might argue that this is due to the discriminatory nature of the concept of Load Reduction. Load Shedding is implemented as a law of general application, which affects each and every person in South Africa, in that the load is “shared” (by being shed on rotation) and therefore, because it affects everyone equally it is not discriminatory.

In contrast, Load Reduction cuts off whole areas due to non-payment by a municipality, where there are both paying and non-paying consumers resident in that area. The paying residents are thus forced to grapple with having no electricity supply due to a deliberate cut off, notwithstanding the fact that their accounts are up to date, which proves that the concept of Load Reduction is devoid of reasonableness. In addition, when looking at non-paying consumers or consumers who have resorted to illegal connections, one may argue that the illegal connections are the only way for the majority of the poor to have access to electricity daily.

Load Reduction would have an adverse effect on the rights of the poorest people in our country who have no other option but to resort to illegal connections to survive, and accordingly the concept of Load Reduction is discriminatory and not in accordance with the provisions of our Constitution.

Now to the newly introduced notion of “Load Limiting” – is it lawful? Essentially what Eskom is trying to achieve, is that by reducing the overall load on the power grid, there can be a reduction of Load Shedding stages, a continuation of essential appliances (lights, televisions, cell phones and chargers) during Load Shedding periods, and the utility will be assisted with balancing the required load against available supply in an effort to reduce the impact of Load Shedding.¹¹

CAN ESKOM OR A MUNICIPALITY INSIST THAT A CUSTOMER AGREE TO THE NEW “LOAD LIMITING” RULES?

The first factor for consideration would be who the lawful owner of the meter is. Property owners do not necessarily own the meters on their properties. There are instances where private prepaid meters can be installed for landlords and body corporates who have a bulk supply meter and need to sub-meter their tenants. In these cases, the prepaid meter is owned by or registered to the landlord or body corporate, however, the main bulk council meter may not be removed and the electricity bill from the municipality does not fall away.

Essentially, the sub-meters will still feed from the main council meter, and the monies paid to the landlord or body corporate (from the readings recorded on the sub-meters) are collected to purchase units on the council prepaid meter.

In Johannesburg, the City of Johannesburg's electricity bylaws (“**the bylaws**”) find application. In terms of the bylaws, the municipality is indeed entitled to install, recode, inspect, control, limit, switch off (during periods of stress of peak load) a property owner's council meter for such length of time as it deems necessary. An extract of section 32 of the bylaws are annexed hereunder:

SECTION 32

Control Apparatus

(1) The engineer shall have the right to install a control relay on any water heater, space heater of the storage type or any other apparatus and thereafter at any time to switch off the said apparatus during periods of stress or peak load for such length of time as he may deem necessary.

(2) The engineer may upon written request by a consumer consent to any apparatus not being connected to a control relay, in which event the consumer shall for the period during which such apparatus is not so connected, pay a monthly charge determined by the council in respect of the kVA loading of such apparatus.

(3) The engineer may provide a set of electrical contacts which will close when the relay contemplated in subsection (1) is operative and which will enable the consumer to operate load control apparatus and warning devices.

It is not permissible for a property owner to deny officials access to his/her property who attend for purposes of inspecting and reading meters. Section 23 of the ERA specifically outlines that authorized persons are allowed, at reasonable times, to enter any premises to which electricity has been supplied by the licensee (the COJ / City Power).

The only right that a property owner has, is that necessary arrangements must be made with the occupants of the Property prior to inspection (where reasonably practicable), the inspector must adhere to reasonable security measures, and the Property owner or occupant may request the inspector to present his/her authorisation.

Powers of entry and inspection

23. (1) Any person authorised thereto by a licensee may at all reasonable times enter any premises to which electricity is or has been supplied by such licensee, in order to inspect the lines, meters, fittings, works and apparatus belonging to such licensee, or for the purpose of ascertaining the quantity of electricity consumed, or where a supply is no longer required, or where such licensee may cut off the supply, for the purpose of removing any lines, meters, fittings, works and apparatus belonging to such licensee.

(2) Any person wishing to enter any premises in terms of subsection (1) shall—
(a) if possible, make the necessary arrangements with the legal occupant of the premises before entering such premises and shall adhere to all reasonable security measures, if any, of the occupant or owner of the premises;
(b) exhibit his authorization at the request of any person materially affected by his activities.

(3) Damage caused by such entry, inspection or removal shall be repaired or compensated for by the licensee.

Therefore, the municipality (or Eskom, as the case may be) is still the overarching owner of the main council meter feeding any Property in the jurisdiction of that municipality. The ownership of the meter at the point where the electricity supply enters the boundary of the property lies with the municipality or Eskom, and therefore they are entitled in law (should they so choose) to change their meter to supply electricity to the customer through the use of a different form of electrical infrastructure. This is beyond question from a legal perspective.

But does this mean that a customer must accept the unliteral imposition of the new Load Limiting rules, if they don't like them? Practically speaking, the answer is yes, because the supply to the property is being offered on different terms to that which it was before, and either the customer takes it or leaves it, meaning that either they accept the Load Limiting limitations or they don't get supply at all.

The second factor to consider is whether the supply of electricity in any particular factual scenario is the carrying out of a function by an organ of state (in which case it might not be subject to the normal rules of contract), or the supply of a service to a customer (in which case it would likely be subject to the normal rules of contract). In any particular case, it might be both and it might be that some aspects of the supplier-customer relationship are governed by contract and others are governed by legislation.

SO, WHAT ABOUT MY CONTRACT WITH THE MUNICIPALITY, AND THE TERMS OF MY END-USER LICENCE AGREEMENT?

In some instances, municipalities enter into licence agreements with consumers/end-users, described as an “Application for the Supply of Water and Electricity” (known by most as a “pink slip”) which ordinarily stipulates the following standard clause:

10. It is acknowledged that failure to effect payment of amounts due in respect of services rendered in terms of this agreement or the furnishing of incorrect information in this agreement may lead to summary discontinuation of the supply of such services without notice to the consumer, although the City of Johannesburg will not be obliged to discontinue such services.

This would mean that the municipality is indeed empowered to discontinue services in instances of non-payment, as a term of the contract.

However, where does this leave the consumer/end-user when it comes to Load Limiting? Electricity suppliers must supply and can only discontinue services either (i) in terms of section 22(5) of the ERA and/or (ii) in terms of the licence conditions with their end-users. If there is a formal written end-user licence agreement (contract) between the municipality and the consumer, the imposition of Load Limiting may very well violate the terms of that contract given that it is essentially a set of new use terms unilaterally imposed without the consumer's consent. This exposes the imposition of Load Limiting to possible court action by consumers who actually hold valid contracts with the municipality.

To the extent that it is found that any aspect of the relationship is governed by contract, one can easily conceive of a number of hypothetical situations in which a customer might need to maintain a higher level of usage of electricity than the municipality or Eskom is making available to it through the new Load Limiting rules – for example, a hospital that requires a full and large power supply to keep oxygen machines pumping all hours of the day. Legally, therefore, there might be an argument to be made to the effect that Eskom and/or municipalities are not lawfully entitled to unilaterally, without the customer's agreement, apply new supply conditions (namely, by providing a lesser supply which is automatically limited in certain instances). Any customer who is aggrieved by this situation could attempt to negotiate with the supplier but failing that, they might need to approach a court for relief if damages to life and/or property are being incurred.

WHAT IF THERE IS NO END-USER LICENCE AGREEMENT?

In most cases, there will be no physical signed contract in existence between the consumer and the municipality. If no formal agreement has been entered into, the relationship between the consumer/end-user and the municipality would continue to be governed by statute and the municipal bylaws promulgated. In this instance, the position would be to revert to section 32 of the bylaws which permit install, recode, inspect, control, limit, switch off (during periods of stress of peak load) a property owner's council meter for such length of time as it deems necessary.

In each case, the complex contractual and/or legislative regulations that apply will have to be analysed and applied to the facts in order to arrive at a legally sound conclusion. There can be no "one size" or "one concept" fits all solution.

CONCLUSION

The fact of the matter is that while Load Reduction may not be permissible (due to constitutional considerations

as discussed herein), Load Shedding is entirely lawful. Load Limiting, on the other hand, has not yet been tested in our courts. In terms of the legislation, there is nothing that precludes Eskom/municipalities/City Power from installing, inspecting, recoding, restricting, limiting, or temporarily switching off electricity supply to properties, save for instances of the existence of a valid contract between the parties, in which case, the veracity of such contract vs. existing legislation vs. the rights of the municipality and the consumer, still needs to be tested in our courts. Property owners in the Johannesburg area are encouraged to liaise with the municipality/Eskom to recode their meters in terms of the initiative introducing Load Limiting before the November 2024 deadline. If property owners do not comply, their old, coded meters will no longer be functional. The idea of Load Limiting is laudable, but whether the introduction of Load Limiting will actually result in what it claims to and assist with the current power crisis that the nation is battling, remains to be seen.

Disclaimer: This is a legal research topic which the author has compiled and accordingly any information contained in this opinion solely represents the views and opinions of the author and does not necessarily represent the views and opinions of Schindler's Attorneys and Notaries.



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¹Tweet by Sikonathi Mantshantsha dated 21 June 2020, Sikonathi Mantshantsh on X: "@Unathi_Kwaza @Eskom_SA Loadshedding = @Eskom_SA does not have enough capacity to generate electricity. Load reduction = switch off localised areas where illegal connections cause overload and damage infrastructure."/X (twitter.com).

²Eskom Load Limiting Project", Load Limiting-Distribution (eskom.co.za)

³Supra note 2

⁴Joseph and Others v City of Johannesburg and Others (CCT 43/09) [2009] ZACC 30; 2010 (3) BCLR 212 (CC) ; 2010 (4) SA 55 (CC) (9 October 2009) at para 34.

⁵Mkontwana v Nelson Mandela Metropolitan Municipality and Another; Bissett and Others v Buffalo City Municipality and Others; Transfer Rights Action Campaign and Others v MEC, Local Government and Housing, Gauteng, and Others (KwaZulu-Natal Law Society and Msunduzi Municipality and Amici Curiae) [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

⁶Schulze H, De Rebus, "The Law Reports – November 2017" The law reports - November 2017 - De Rebus

⁷[2017] 3 All SA 663 (GP)

⁸(2019) 2 All SA 185 (GJ) para 74

⁹Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others; Eskom Holdings SOC Ltd v Sabie Chamber of Commerce and Tourism and Others; Chweu Local Municipality and Others v Sabie Chamber of Commerce and Tourism and Others (663/2019; 664/2019; 583/2019) [2020] ZASCA 185; [2021] 1 All SA 668 (SCA); 2021 (3) SA 47 (SCA) (29 December 2020) at para 55

¹⁰Supra note 7 at para 58

¹¹Supra note 2