

Does a Customer Have a Right to Choose Whether They Want to be Supplied With Electricity by Either Eskom or City Power, in the Johannesburg Area?

By **Chantelle Gladwin-Wood** (Partner),
and **Karabo Kupa** (Candidate Attorney)

05 May 2025

CITY POWER'S ROLE

In *Mkontwana v Nelson Mandela Metropolitan Municipality*², 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'.³

Municipalities play a critical role in distributing electricity both in practice and legally speaking. Although municipalities are empowered by the Constitution with regards to electricity reticulation, their powers are further regulated by the ERA and Municipal Systems Act.⁴ Local government is authorized in terms of part B of schedule 4 of the Constitution to undertake electricity reticulation. Presently, 178 out of 278 Municipalities provide electricity (which they purchase mostly from Eskom) and are required to have a distribution license in accordance with s7(1)(c) of the Electricity Regulations Act⁵ (ERA).

So how do we know, in relation to any one particular property, which organization (Eskom or the local municipality) the property must take its electricity supply from?

THE SUPPLY LANDSCAPE

While Eskom produces 96% of the electricity generated in South Africa and owns and operates the national grid transmission which transports electricity from the power stations to the main load centers, Eskom **and** several municipalities distribute electricity. Eskom produces the electricity, and on-sells it to municipalities and customers directly across the country.

Generally, Eskom is licensed to supply electricity **directly to customers** in areas where municipalities do **not** supply customers.⁶ In general Eskom does not engage directly with residential consumers for electricity supply. Instead, it establishes electricity supply agreements with municipalities and commercial clients.⁷

INTRODUCTION

City Power is a subsidiary of the Johannesburg Metropolitan Municipality ("the COJ") and constitutes the "arm" of the municipality that deals with the bulk distribution of electricity supply to residents of the Johannesburg area. But City Power itself does not produce power – it obtains it from Eskom and then distributes it to the residents in COJ.

It is no secret that City Power and the COJ are faced by notable challenges that significantly affect its ability to deliver reliable electricity. Aging infrastructure, financial constraints, workforce shortages, contractor disputes, and rampant cable theft all contribute to frequent power outages and service disruptions. These issues raise concerns about the reliability of electricity supply when coming from City Power and raise the question of whether electricity consumers have the option to choose between Eskom and City Power for their electricity supply.

ESKOM'S ROLE

Eskom is not only responsible for operating facilities that generate electricity but also manages the transmission grid and substantial sections of the electricity distribution network across the whole of South Africa (sometimes on its own, and sometimes in partnership with other electricity-related businesses, such as City Power). Eskom supplies electricity to municipalities, large consumers such as mining and industrial sectors and a notable number of residential customers especially those in rural and economically disadvantaged areas connected to its distribution system.¹

Due to the restricted capacity of municipalities to generate electricity, municipalities largely purchase from Eskom the electricity they supply to their residential customers in their area. The sale of electricity considerably boosts the municipal revenue as a result of additional surcharges added to Eskom prices.⁸

Therefore, in the electricity supply industry the customer base is divided between Municipalities and Eskom. Eskom generally supplies to large customers and to residential customers that are not already supplied by municipalities or private distributors.

THE RIGHT TO CHOOSE

The electricity regulatory framework does not expressly state whether a customer has a right to choose to be supplied with electricity either by a municipality or Eskom. However, it provides a clear relationship between relationships between Eskom, municipalities, and residents. While Eskom primarily supplies bulk electricity to municipalities, municipalities are responsible for ensuring that electricity reticulation services are provided to all customers within its area/s of jurisdiction.⁹

The South African Local Government Association (SALGA), a voluntary body representing all nine provincial local government associations, has concluded a partnership with electricity distributors which include Eskom in municipal areas through a Memorandum of Understanding and active partnering agreement to promote a cooperative and collaborative working relationship with respect to the supply of electricity.¹⁰

Additionally, in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others*¹¹ the court highlighted the general absence of a direct contractual relationship between Eskom Holdings SOC Limited and the individual residents of a municipality. This principle, discussed extensively by the court, underpins much of the legal debate surrounding Eskom's obligations and the rights of residents when electricity supply is disrupted.

The fundamental reason for this lack of direct contractual ties lies in the established structure of electricity supply within South Africa. Eskom primarily contracts with municipalities to supply bulk electricity. These agreements, as seen in the case with Lekwa and Ngwathe Municipalities, outline the terms of supply up to a Notified Maximum Demand (NMD). The residents, on the other hand, enter into a contractual relationship with their local municipality for the provision of electricity. The municipality, therefore, acts as an intermediary, purchasing bulk electricity from Eskom and then distributing it to its constituents.

The court explicitly recognised this structure and hierarchy. The High Court acknowledged that there was “no contractual relationship between the residents of the municipalities and Eskom”. Similarly, Eskom itself contended that it had “no obligation to the residents of the municipalities”. As Justice Unterhalter AJ pointed out, “It is not in the contracts for the supply of electricity that subsist between the municipalities and Eskom. The residents are not parties to those contracts”.

This is not a situation unique to the Lekwa and Ngwathe municipalities. The legal discussions within the judgment suggest that this model of Eskom contracting with municipalities, who then supply residents, is the generally prevailing framework across South Africa. Justice Madlanga J's reference to the Joseph case¹², which involved tenants and City Power (the electricity provider for Johannesburg), further illustrates this common scenario where end users of electricity lack a direct contract with the primary supplier. In the Joseph case, the tenants had no direct contractual link with City Power, yet the court considered the relationship between the service provider and the users.

ELECTRICITY REGULATIONS AMENDMENT ACT

The Electricity Regulations Amendment Act¹³ was signed into law by the president of South Africa on 16 August 2024 and came into force on 01 January 2025. This amendment Act sets out major reforms in the electricity sector which strive to create a competitive electricity market. Amongst its objectives, the Amendment Act aims to gradually address the challenges that are currently faced by the electricity sector, paving a way for an increased competition and lower energy costs amongst other objectives. It seeks to provide an open market platform that will enable competitive buying and selling of electricity at wholesale and retails levels.

The Electricity Regulation Amendment Act introduces transformative measures to establish a competitive electricity market in South Africa. According to S34A of the Act the Minister of Public Enterprises must establish a juristic person “Transmission System Operator SOC Limited” in order to provide and promote an open market platform that will encourage a competitive electricity trading. Section 34A establishes the Transmission System Operator (TSO), which oversees the multi-market platform encompassing segments such as the Day-Ahead, Intra-Day, and Balancing markets. This ensures fair and transparent financial transactions between electricity buyers and sellers.

Section 34B outlines the TSO's responsibilities, including transmission planning, operational management, and guaranteeing equitable grid access for third parties. These reforms enable participation from private generators and traders in electricity production and trading, fostering competition.

The transition is structured through phased implementation, with the system fully operational by May 2031. Throughout this period, regulatory oversight by the National Energy Regulator of South Africa (NERSA) aims to ensure fairness and stability within the evolving market.

WHAT DOES THE ELECTRICITY REGULATIONS AMENDMENT ACT MEAN FOR SOUTH AFRICAN ELECTRICITY CONSUMERS?

With respect to promoting an open market it means that different companies and not just Eskom, the main electricity supplier, will be allowed by the law to sell electricity. Thus, people including businesses will have more option for where they get their electricity. However, the National Energy Regulator of South Africa (NERSA) will regulate the operation and sale of electricity by the respective companies.

CONCLUSION

In South Africa, it appears at this stage that customers do not have the right to choose to be supplied with electricity either directly by Eskom or the municipality. Who the supplier of electricity to a customer is in any particular area will depend on the area they live in. If that area is serviced by the municipality then they have to get their supply from the municipality and they can't get it from Eskom directly.

While Eskom is not allowed to supply electricity in areas where Municipalities supply with the aim of boosting municipal revenues, the Electricity Regulation Amendment Act aims to shift the electricity industry market to a more open market. In the long run electricity consumers will (hopefully) be able to choose the electricity supplier of their choice with the aim to ensure reliable supply of electricity.

¹Klees Electricity law in South Africa (2014) 45.

²Mkontwana v Nelson Mandela Metropolitan Municipality 2005 (1) SA 530 (CC).

³Mkontwana v Nelson Mandela Metropolitan Municipality and Another para 38.

⁴Municipal Systems Act 32 of 2000.

⁵Electricity Regulations Act 4 of 2006.

⁶The National Treasury Chapter 11: Electricity <<https://www.treasury.gov.za/publications/igfr/2004/12.%20Chapter%2011%20-%20Electricity.pdf>> (accessed 20 January 2025) 146.

⁷Dube F & Moyo CG "The Right to Electricity Supply in South Africa" (2021) 24 PELJ 6.

⁸Klees Electricity law in South Africa (2014) 53.

⁹National Energy Regulator of South Africa Guidelines on Electricity Resale <<https://www.eskom.co.za/distribution/wp-content/uploads/2021/06/GuidelinesElectricityResale.pdf#:~:text=This%20means%20that%20the%20municipality%20is%20responsible,electricity%20in%20its%20area/s%20of%20jurisdiction'%203.3>> (accessed 20 January 2025) 2.

¹⁰National Energy Regulator of South Africa Guidelines on Electricity Resale <<https://www.eskom.co.za/distribution/wp-content/uploads/2021/06/GuidelinesElectricityResale.pdf#:~:text=This%20means%20that%20the%20municipality%20is%20responsible,electricity%20in%20its%20area/s%20of%20jurisdiction'%203.3>> (accessed 29 January 2025) 2.

¹¹Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and 2023 (4) SA 325 (CC).

¹²Joseph and Others v City of Johannesburg and Others 2010 (4) SA 55 (CC).

¹³Electricity Regulation Amendment Act, No. 38 of 2024



Chantelle Gladwin-Wood
(Partner)



Karabo Kupa
(Candidate Attorney)