

Strained Relations in the Provision of Electricity Services: *City of Cape Town v National Energy Regulator of South Africa and Minister of Energy*

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Abstract

This note considers the judgment in *City of Cape Town v National Energy Regulator of South Africa (NERSA) and Minister of Energy* (unreported case number 51765/17 of 11 August 2020), which attracted much attention for its challenge of the constitutionality of section 34 of the Electricity Regulation Act, 4 of 2006. Although the question of constitutionality was not discussed in the judgment, it is argued that this was an oversight and a missed opportunity to unpack the role of municipalities in the provision of sustainable electricity services. Further, the note considers the challenges of intergovernmental relations in co-operative government (from a conceptual and practical perspective) and concludes that this case highlights the importance of good relations between organs of State, especially where contentious but important issues have arisen.

Keywords: Intergovernmental relations; co-operative government; electricity.

Introduction

In *City of Cape Town v National Energy Regulator of South Africa (NERSA) and Minister of Energy*,¹ the issue arose from the inability of the applicant to purchase more renewable energy from independent power producers (hereafter IPPs) to enhance its security of supply without the Minister of Energy's (hereafter the Minister) consent. The dispute between the parties was whether the matter constituted an intergovernmental dispute, resolution of which would have to follow the procedure set out in the Intergovernmental Relations Framework Act² (hereafter the Framework Act) before being brought to court.³

While electricity supply concerns were the reason why the applicant approached the court, the court did not consider the question regarding the role of municipalities in the provision of electricity. This note argues that this was an oversight and a missed opportunity to interrogate possible solutions to the country's struggle to meet the demand side of electricity supply.⁴ Rather, the core consideration of this matter was reduced to the procedural hurdle the applicant had to overcome with respect to intergovernmental relations. The note unpacks what intergovernmental relations imply for co-operative governance, the conceptual differences and how such relations are to be kept cordial when disputes arise. It outlines the *City of Cape Town* decision before discussing what constitutes intergovernmental relations and co-operative government from a conceptual perspective. Finally, the note examines whether a court has the power to adjudicate on an intergovernmental dispute in instances where parties have not yet exhausted other dispute resolution mechanisms.

The Decision

The question before the court was whether a dispute between the City of Cape Town (hereafter the City), the National Energy Regulator of South Africa (hereafter NERSA) and the Minister constituted an intergovernmental dispute.

The basis for this question emanated from the fact that the City wanted to purchase more renewable energy from IPPs, without the Minister's consent, as is stipulated under

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1 *City of Cape Town v National Energy Regulator of South Africa and Minister of Energy* unreported case number 51765/17 of 11 August 2020.

2 13 of 2005.

3 *City of Cape Town* (n 1) para 6.

4 Electricity provision consists of three phases namely, generation, transmission and distribution. Electricity generation and transmission together constitute electricity supply and in South Africa this is largely the function of Eskom (in some cases, municipalities have their own generation capacity, but this is on a limited scale). The distribution function is currently shared between municipalities and Eskom. See <<http://www.treasury.gov.za/publications/igfr/2008/1g/Chapter%208%20-%20Electricity.pdf>>

section 34 of the Electricity Regulations Act (hereafter the ERA).⁵ The City argued that since the dispute over the interpretation of section 34 of ERA was with NERSA and not the Minister, it did not constitute an intergovernmental dispute, subject to section 41 of the Constitution⁶ and the Framework Act.⁷ The Minister contended that, despite the City's prior efforts, the application was premature since the applicant had not fully complied with the requirements of the Constitution and the Framework Act.⁸ NERSA, on the other hand, argued that it could not license an IPP to establish new generation capacity without a ministerial determination in terms of section 34 of ERA.

The court held that arguments to the effect that the matter was not an intergovernmental dispute were without merit.⁹ The court relied on the *Minister of Police and Others v Premier Western Cape and Others*,¹⁰ to point out that even though parties may not have exhausted their remedies before approaching the court, it has the discretion to entertain the matter. However, such discretion must be exercised being mindful of the duty bestowed upon State organs to comply with their obligations under co-operative government, and the Framework Act.¹¹ Finally, the court held that the misplaced assumption of failure to settle a dispute by a State organ could not be condoned.¹² Therefore, the dispute was sent back to the parties for resolution according to section 41(3) of the Constitution.¹³

Discussion

The sensitive nature of electricity provision in South Africa cannot be overstated, as the country grapples with the widening gap between demand and supply.¹⁴ In its concluding remarks, the court pointed out its awareness of the importance of this case but, relying on *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others*,¹⁵ was quick to point to the fact that:

A court should not be moved to ignore the law and the Constitution, and merely make a decision that would please the public.

5 *City of Cape Town* (n 1) 1.

6 Constitution of South Africa, 1996.

7 *City of Cape Town* (n 1) 18.

8 *ibid* para 6.

9 *ibid* para 29.

10 *Minister of Police and Others v Premier Western Cape and Others* 2014 (1) SA 1 (CC) para 58.

11 *City of Cape Town* (n 1) 35.

12 *ibid* para 41.

13 *ibid* para 44.

14 Jessika A Bohlmann and Roula Inglesi-Lotz, 'Analysing the South African Residential Sector's Energy Profile' (2018) 96 *Renewable and Sustainable Energy Reviews* 240, 252.

15 *Economic Freedom Fighters v Gordhan and Others; Public Protector and Another v Gordhan and Others* 2020 ZACC 10.

Although the court had an opportunity to examine and comment on the City's contention that the limits inherent in section 34 of the ERA are unconstitutional for municipalities who want to procure their own electricity from IPPs, it did not. Currently, over ninety per cent of all electricity generated in the country comes from coal.¹⁶ The coal used to generate such electricity has negative consequences to the environment and human health.¹⁷ The case also had an opportunity to explore the challenge of over-reliance on coal for electricity generation and the possibility of municipalities resorting to renewable energy sources but did not. This is despite the mandate, objectives and developmental duties of local government, which include the provision of basic services in a sustainable manner and ensuring socio-economic development of the country.¹⁸ Specifically, in the energy sector, municipalities have the 'executive authority and right to administer' electricity and gas reticulation.¹⁹ Rather, the court focused solely on the procedural challenge that the dispute constituted an intergovernmental dispute and that there was no compliance with the provisions of the Constitution and the Framework Act.²⁰

Intergovernmental Relations from a Conceptual Perspective

The sound relationship between State organs is important for smooth administration.²¹ Therefore, it is necessary for State organs to make collaborative efforts in the provision of services and to make reasonable efforts to resolve intergovernmental disputes, as and when they arise.²² As observed in *National Gambling Board v Premier of KwaZulu-Natal and Others*,²³ State organs are under obligation to use reasonable measures to avoid litigation against each other.

Although most intergovernmental disputes usually involve different spheres of government,²⁴ the court relied on *Independent Electoral Commission v Langeberg*

16 Sustainable Energy Africa (SEA) and South African Local Government Association (SALGA) *Energy Efficiency and Renewable Energy Strategy Guide* (SALGA 2021) 12.

17 This is contrary to section 24 of the Constitution which guarantees the right to an environment that is not harmful to health and wellbeing and the protection of the environment for the benefit of present and future generations.

18 Section 152 of the Constitution.

19 Section 156 (1)(a) of the Constitution read with Schedule 4 (Part B).

20 *City of Cape Town* (n 1) 6.

21 Manore Z Makoti and Kola O Odeku, 'Critical Perspective on the Complexity and Functionality of Intergovernmental Relations between Provincial and Local Governments in South Africa' (2018) *African Journal of Public Affairs* 102.

22 *ibid.*

23 *National Gambling Board v Premier of KwaZulu-Natal and Others* 2002 (2) SA 715.

24 In *Member of the KwaZulu Natal Executive Council for Local Government, Housing and Traditional Affairs v Amajuba District Municipality and Others* 2011 1 All SA 401 (SCA), the court called a decision taken by the MEC to intervene into the affairs of the Amajuba Municipality as a political squabble and set aside the decision of the MEC to intervene in the affairs of the municipality. In *Mogalakwena Local Municipality v Provincial Executive Council, Limpopo and Others* 2014 4 All

*Municipality*²⁵ to illustrate that these can also arise between different State organs.²⁶ The court correctly classified NERSA as an organ of State and further observed that since the relief that the City sought applied to the full extent of the powers of the Minister, the dispute was essentially between the City and the Minister.²⁷ This observation was not only important but necessary because although NERSA has extensive powers concerning the licensing and operation of any facility used for the generation, transmission and distribution of electricity,²⁸ the ultimate decision-maker on establishing new generating capacity is the Minister, after consultations with NERSA.²⁹

In defining intergovernmental relations, Phillimore observes that the characteristics of these relations include, but are not limited to, the number and growth of governmental institutions, the intensity and regularity of contacts among officials, the importance of officials' actions and attitudes and preoccupation with policy issues.³⁰ Furthermore, Painter notes that although a conservative approach to intergovernmental relations focuses on formal structures, particularly those connected with financial arrangements between spheres of government, it also involves extensive informal processes.³¹ Therefore, intergovernmental relations are premised on good interactions between State organs.³²

Although the Constitution is succinct in its vision for harmonious intergovernmental relations among State organs, these relationships are not always without conflict. For instance, section 41(1)(h)(iv) of the Constitution provides that all spheres of government and their institutions must promote co-operative governance and avoid conflict with one another. Moreover, the Constitution imposes a duty on State organs to take positive steps to, amongst other things, co-operate and support each other for the good of the country. Most importantly, State organs must avoid litigating against each other as was expressed in *MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In re Minister of Health and Others v Treatment Action Campaign and Others* by the Constitutional Court.³³

SA 67 (GP), the court indicated that the type of litigation under section 139 of the Constitution puts a heavy burden on the public purse and that matters should be resolved without resorting to litigation.

25 *Independent Electoral Commission v Langeberg Municipality* 2001 (3) SA 925 (CC).

26 *City of Cape Town* (n 1) 22.

27 *ibid* para 23.

28 Sections 4, 7, 13, 14, 16, 17, 18, 30, 32, 33, and 35 of ERA.

29 Section 34 of ERA.

30 John Phillimore, 'Understanding Intergovernmental Relations: Key Features and Trends' (2013) 72 (3) *Australian Journal of Public Administration* 229.

31 Martin Painter, 'Intergovernmental Relations' in B Guy Peters and Jon Pierre (eds), *The SAGE Handbook of Public Administration* (SAGE 2012) 731.

32 Ronald L Watts, 'Intergovernmental Relations: Conceptual Issues' in Norman Levy and Chris Tapscott (eds), *Intergovernmental Relations in South Africa: The Challenges of Co-operative Government* (Idasa 2001) 99.

33 *MEC for Health, KwaZulu-Natal v Premier, KwaZulu-Natal: In re Minister of Health and Others v Treatment Action Campaign and Others* 2002 ZACC 14.

The Framework Act provides for the framework for national, provincial and local government and all State organs to facilitate, align priorities, objectives, strategies³⁴ and to co-ordinate the implementation of policy and legislation, including coherent government, effective provision of services, monitoring implementation of policy, legislation and realisation of national priorities.³⁵ This Act is meant to ensure that in instances where conflict arises between State organs, procedures are in place to resolve it without having to approach the courts for relief. As such, De Andrade observes that State organs should not preoccupy themselves with litigation, except if litigation is imperative for a clearer understanding and interpretation of legislation that impacts the wellbeing and lives of citizens.³⁶ In this matter, NERSA responded to correspondence sent by the City offering to engage with it in the interpretation of ERA but this offer was not taken up.³⁷ In addition, the City failed to engage the Minister after her correspondence dated 24 May 2017.³⁸ By so doing, the City did not utilise both the formal and informal processes to resolve the matter before approaching the court.

It is also vital to note that the concept of intergovernmental relations can be formulated in terms of human relations and behaviour.³⁹ Good individual interactions amongst public officials emphasise that these relations are not occasional occurrences or formally set out arrangements and agreements but are continuous day-to-day patterns of contact, knowledge sharing and information exchange between officials.⁴⁰ Therefore, intergovernmental relations go beyond what legislation dictates and require interpersonal skills on the part of public officials in the execution of their duties.

Co-operative Governance in the Context of Intergovernmental Relations

Co-operative government is founded on the belief that the spheres of government in South Africa can work together, providing citizens with services that will benefit all. It is a representation of the values stipulated in section 41(1) of the Constitution and the implementation of this section through the establishment of institutions and structures. Co-operative government can also be viewed as a partnership among the spheres of government, demanding each to fulfil a specific role, thereby giving greater legitimacy to the democratic regime.⁴¹ Since co-operative government is based on relationships

34 Section 7 (b)(ii) of the Framework Act.

35 Section 4 (a)-(d) of the Framework Act.

36 Gustavo F De Andrade, 'Comparative Constitutional Law: Judicial Review' (2001) *Journal of Constitutional Law* 977.

37 *City of Cape Town* (n 1) 41.

38 *City of Cape Town* (n 1) 39.

39 Lianne P Malan, 'The Impact of Intergovernmental Relations and Co-operative Government on Good Governance in South Africa' (2008) *African Journal of Public Affairs* 78.

40 *ibid.*

41 Guy Mhone and Omano Edigheji, *Governance in the New South Africa: The Challenges of Globalisation* (University of Cape Town Press 2003) 75. See also Malan (n 39) 78 who notes that co-operative government is about partnership government as well as the values associated with it,

among institutions in terms of certain policy areas, it also enhances the capacity to achieve common goals, while imposing constraints on the scope and duties of individual spheres. Therefore, co-operative government is not an end in itself but a means to an end in improving the standard of living and fostering development in any country.⁴²

Although the *City of Cape Town* case did not venture into the conceptual difference between intergovernmental relations and co-operative government, it is imperative to note these. Co-operative government is constitutionally entrenched and is vital to intergovernmental relations.⁴³ On one hand, the philosophy behind co-operative government is that state organs work in partnership, with each sphere being distinct and fulfilling a specific role.⁴⁴ On the other hand, intergovernmental relations focus on the political, institutional and financial arrangements relating to the interactions between different spheres of government and organs of State.⁴⁵ Therefore, Simeon and Murray conclude that intergovernmental relations are how co-operative government finds practical expression.⁴⁶

Can Courts Adjudicate on an Intergovernmental Dispute?

The court had to address the question of whether it could condone non-compliance with the provisions of section 45 of the Framework Act. This section provides explicitly that no government or State organ may institute judicial proceedings to settle an intergovernmental dispute unless the dispute has been declared a formal intergovernmental dispute and all efforts to settle the dispute were unsuccessful. Thus, it fulfills section 41 of the Constitution that states that a State organ involved in an intergovernmental dispute must make every reasonable effort to settle the dispute, utilising mechanisms and procedures provided for that purpose and must exhaust all other remedies before it approaches a court to resolve the dispute.⁴⁷ Read together, these sections seek to promote co-operative government and intergovernmental relations between State organs.⁴⁸ In considering the facts of the *City of Cape Town* case, the court reasoned that the mere fact that the applicant had been waiting for two years to hear from the Minister did not qualify the application for condonation.⁴⁹ Nothing suggests, apart from the time factor that the City took any other steps to engage with the Minister.

which may include national unity, peace, proper co-operation and co-ordination, effective communication and avoiding conflict.

42 Mhone and Edigheji (n 41) 74.

43 Tryna Edwards, 'Cooperative Governance in South Africa, with Specific Reference to the Challenges of Intergovernmental Relations' (2008) 27(1) *Politeia* 68.

44 *ibid.*

45 *ibid.*

46 Richard Simeon and Christina Murray, 'Multi-sphere Governance in South Africa: An Interim Assessment' (2001) 31(4) *Publius: The Journal of Federalism* 65–92.

47 Section 41(3) of the Constitution.

48 *City of Cape Town v Premier Western Cape, and Others* 2008 (6) SA 345 (C) para 10.

49 *City of Cape Town* (n 1) 37.

Conclusion

The reasoning of the court in the *City of Cape Town* case is coherent with the existing body of literature on what constitutes intergovernmental relations and the notion of co-operative government. Although the issue of electricity supply is an important one that requires urgent solutions (even at the local government level), the court's decision highlights that side-stepping procedure where intergovernmental disputes have arisen to prematurely approach the court to adjudicate the matter is ill-advised and not incongruent with the concept of co-operative governance. Therefore, the case serves as a precaution that if a State organ chooses not to engage with another in the spirit of co-operative government, the matter may not simply be adjudicated but will likely be sent back to the parties for resolution.

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