

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

CASE NUMBER: _____/2018

In the matter between:

WATERBERG CHAMBER OF BUSINESS

Applicant

and

ESKOM HOLDINGS SOC LIMITED
Respondent

First

MODIMOLLE-MOOKGOPHONG LOCAL MUNICIPALITY

Second Respondent

**THE MEC FOR THE DEPARTMENT OF PROVINCIAL
TREASURY: LIMPOPO PROVINCIAL GOVERNMENT**

Third Respondent

**MEC FOR THE DEPARTMENT COOPERATIVE
GOVERNANCE, HUMAN SETTLEMENTS AND
TRADITIONAL AFFAIRS:
LIMPOPO PROVINCIAL GOVERNMENT**

Fourth Respondent

**THE PREMIER OF THE LIMPOPO PROVINCIAL
GOVERNMENT**
Respondent

Fifth

**MINISTER OF COOPERATIVE GOVERNANCE AND
TRADITIONAL AFFAIRS**
Respondent

Sixth

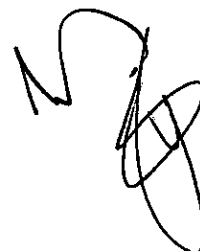
MINISTER OF FINANCE

Seventh Respondent

FOUNDING AFFIDAVIT

I, the undersigned,

WIETS LOURENS BOTES

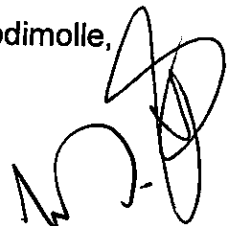


do hereby declare under oath as follows:

1. I am a major male businessman and chairman of the applicant with place of business situated at Nylstene Business Park, No 8 Nelson Mandela Drive, Modimolle, Limpopo Province.
2. I confirm that I am duly authorised to depose to this affidavit on behalf of the applicant. In confirmation of the aforesaid, I attach hereto a resolution authorising me to depose to this affidavit and act on behalf of the applicant and its members, marked as Annexure "FA1".
3. The content of this affidavit falls within my personal knowledge, save where the contrary appears from the context thereof, and is to the best of my belief both true and correct.
4. Insofar as submissions of a legal nature are made in this affidavit, they are made on the basis of advice I have received from the applicant's legal representatives, which advice I accept to be true and correct.

THE APPLICANT

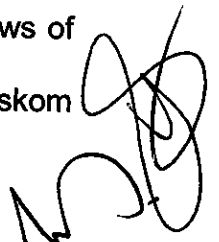
5. The applicant is the **WATERBERG CHAMBER OF BUSINESS**, a voluntary association with perpetual succession, authorised by its constitution to acquire, own and dispose of property apart from its members and further to take or defend itself against legal action, with its main place of business situated at Nylstene Business Park, No 8 Nelson Mandela Drive Modimolle, Limpopo Province.

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6. I attach hereto a copy of the applicant's constitution, marked as Annexure "FA2". I further attach hereto a list of the applicant's members, marked as Annexure "FA3".
7. The applicant and its members conduct business and/or reside within the jurisdiction of the second respondent, and are further consumers and end-users of the electricity supplied by the second respondent.
8. The applicant represents the interests of its members, who are business owners and residents within the second respondent's jurisdiction. The applicant's members have a constitutional right to the provision of municipal services in a financially sustainable manner, with specific reference to the provision of basic services such as water and electricity.
9. In instituting this application the applicant not only seeks to protect the interest of its members, but all the members of the community that reside within the jurisdiction of the second respondent that are reliant on the continued provision of electricity, as a basic and essential service, that is inextricably linked to the standard of living of all who reside within the second respondent's jurisdiction.

THE RESPONDENTS

10. The first respondent is **ESKOM HOLDINGS SOC LTD**, a South African power utility and public company duly incorporated in terms of the company laws of the Republic of South Africa and established in terms of the Eskom

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Conversion Act, 13 of 2001, with its principal place of business situated at Megawatt Park, Maxwell Drive, Sunninghill, Sandton, Gauteng.

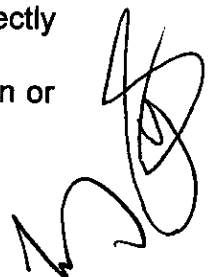
11. The second respondent is the **MODIMOLLE-MOOKGOPHONG LOCAL MUNICIPALITY** (Municipal Demarcation Board Code: LIN368), a local municipality as defined in section 1 of the Local Government: Municipal Structure Act, 117 of 1998, with its principal place of business situated at OR Thambo Square, Harry Gwala Street, Modimolle, Limpopo Province.
12. The second respondent was established by the amalgamation of the Mookgophong Local Municipality and the Modimolle Local Municipality on 3 August 2016.
13. For ease of reference, I will refer to the first respondent as "*Eskom*" and the second respondent as "*the Municipality*" for the remainder of this affidavit.
14. The third respondent is the **MEC FOR THE DEPARTMENT OF PROVINCIAL TREASURY: LIMPOPO PROVINCIAL GOVERNMENT**, cited herein in his official capacity with offices situated at Ismini Towers, 46 Hans van Rensburg Street, Polokwane, Limpopo Province.
15. The fourth respondent is the **MEC FOR THE DEPARTMENT COOPERATIVE GOVERNANCE, HUMAN SETTLEMENTS AND TRADITIONAL AFFAIRS: LIMPOPO PROVINCIAL GOVERNMENT**, cited herein in his official capacity with offices situated at Hensa Towers Building, 20 Rabe Street, Polokwane, Limpopo Province.



16. The fifth respondent is the **PREMIER OF THE LIMPOPO PROVINCE** cited herein in his official capacity as the head of the Limpopo Provincial Government Executive Council with offices situated at Mowaneng Building, 40 Hans van Rensburg Street, Polokwane, Limpopo Province.
17. The sixth respondent is **MINISTER OF COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS**, cited herein in his official capacity with offices situated at 87 Hamilton Street, Arcadia, Pretoria, Gauteng Province.
18. The seventh respondent is the **MINISTER OF FINANCE**, cited herein in his official capacity with offices situated at 40 Church Square, Pretoria, Gauteng Province.
19. The third to seventh respondents are joined in the application due to their interest in the matter, and no relief is asked against them, except if they oppose the relief sought by the applicant, in which event applicant will apply for a cost order against them.

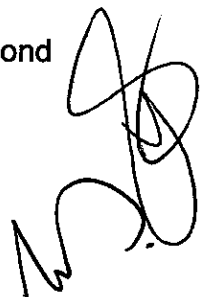
PURPOSE OF APPLICATION

20. This is an urgent application for an interim interdict prohibiting Eskom from implementing a program of scheduled interruptions and/or disconnections of its bulk electricity supply to the Municipality, which interruption and/or disconnection is to commence on Friday, 29 June 2018.
21. At the outset, it is respectfully submitted that the applicant was only indirectly informed of Eskom's decision on Monday, 19 June 2018. In this regard, on or



about Monday, 18 June 2019 Mr Breytenbach, one of the applicant's members and a duly appointed legal representative of the applicant, received an email from the Mayor of the second respondent. Attached to the email was a notice addressed to the second respondent's municipal manager advising that Eskom had decided to continue with bulk electricity supply interruptions commencing Friday, 29 June 2018. The notice further confirmed that "A final notice will be published in the media on Friday, 22 June 2018."

22. A copy of the email and notice are attached hereto as Annexures "FA4" and "FA5", respectively.
23. The applicant submits that Eskom's attempt to comply with its obligation of community participation prior to the issue of said notice, constituted an unreasonable and formalistic approach when regard is had to the facts and circumstances of the current matter.
24. The drastic nature and effects of Eskom's decision to interrupt the second respondent's electricity cannot be over-emphasised and will be elaborated on in full hereinbelow. In reaching its decision Eskom has failed to apply its mind to the applicant's substantive submissions regarding the disproportionate and adverse effects that Eskom's decision will have on businesses and private individuals who diligently pay for their electricity consumption.
25. In consideration of the above-mentioned, the applicant has no alternative but to approach the Honourable Court on an urgent basis for an interim interdict to prohibit Eskom from interrupting and/or terminating the second



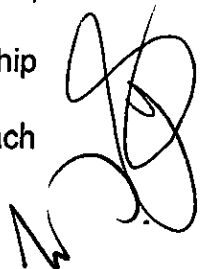
respondent's electricity supply pending the institution and finalisation of a review application to set-aside the afore-mentioned decision.

26. In addition, the applicant has further instituted an urgent application under case number 3629/2018 in the High Court of South Africa, Limpopo Division, Polokwane, in which the applicant seeks an order compelling the national and provincial executive to comply with the mandatory provisions of section 139(5) of the Constitution, read together with the provisions of sections 139 and 140 of the Municipal Finance Management Act 56 of 2003 (hereinafter referred to as "*the MFMA*").
27. The aforesaid application has been enrolled for hearing on Tuesday, 10 July 2018 and Eskom is cited therein as the seventh respondent. The relief sought in the aforementioned application is interictally interwoven with the current dispute between the Eskom and the Municipality relating to arrears due and payable by the Municipality to Eskom.
28. In the alternative, the applicant will request that the Honourable Court grant an interim interdict to prohibit Eskom from disconnecting or interrupting the second respondent's electricity supply pending the finalisation of the aforementioned application and process in terms of Section 139(5) of the Constitution, read together with Sections 139 and 140 of the MFMA.

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STRUCTURE OF AFFIDAVIT

29. With reference to the interim interdictory relief sought, I am advised that the applicant is required to clearly and concisely set-out the circumstances which render the matter urgent.
30. In order to contextualise the applicant's discussion of the circumstances that have necessitated the institution of this application, I will respectfully beg the indulgence of first providing a summary of the factual background leading up to the institution of this application, together with a consideration of the relevant facts that have now necessitated this urgent application.
31. I will subsequently deal with the steps taken by the applicant and the related grounds of review. I will further also briefly deal with the grounds and circumstances applicable to the relief sought in the pending semi-urgent application.
32. I will lastly provide a summation of the applicable legal principles and substantive requirements for the relief sought, with specific reference to the urgency and the interdictory relief sought.
33. A reading of this affidavit will serve to confirm that the applicant will not be able to obtain substantial redress should this application be heard in the normal course. Having regard to the far reaching implications of the interruptions and/or disconnection of the electricity supply to the Modimolle, Vaalwater, Mookgophong Town, Phahameng Township, Leseding Township and Mookgophong Township, the applicant has no alternative but to approach



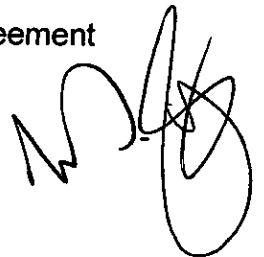
the Honourable Court on an urgent basis for the interim interdict sought in the Notice of Motion.

FACTUAL BACKGROUND

34. On or about 13 October 2017, Eskom published a notice titled "*Interruption of Bulk Electricity Supply to LIM368 Municipality (Modimolle, Mookgophong and Vaalwater)*" in the local newspaper. The notice was published in terms of the Promotion of Administrative Justice Act, 3 of 2000 (hereinafter referred to as "PAJA").
35. In the notice, Eskom advised that the Municipality was indebted to Eskom in the amount of R213 198 703-00 (Two Hundred and Thirteen Million, One Hundred and Ninety Eight Thousand Seven Hundred and Three Rand), for the bulk supply of electricity.
36. The notice confirmed that Eskom was contemplating a regulated interruption of electricity supply, as opposed to the outright disconnection, and accordingly invited all effected parties to submit written representations, comments and/or submissions as to why Eskom should not proceed with the contemplated interruption and/or disconnection.
37. The closing date for the public representations, submissions, comments and/or requests for further information was the end of business 13 November 2017. A copy of the notice is attached hereto as Annexure "FA6".

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38. As the contemplated decision to interrupt the Municipality's electricity supply constituted an administrative decision for the purposes of PAJA, Eskom elected to follow a notice and comment procedure as set-out in section 4 of PAJA. The aforesaid was done in order to give effect to the public's right to procedurally fair and administrative action. By electing to utilise the notice and comment procedure, Eskom was obliged to adhere to section 4(1) of PAJA, which obligation included a duty to provide consumers with a meaningful opportunity to be heard in the making of a decision to interrupt the electricity supply.
39. Subsequent to the publication of the notice, it is my understanding that the Municipality and Eskom entered into negotiations aimed at resolving the dispute, and more importantly avoiding the interruption and/or disconnection of the Municipality's bulk electricity supply.
40. On or about 10 November 2017 the Municipality and Eskom entered into two separate agreements described as "*Acknowledgement of Debts and Payment Plan Agreement for Municipal Bulk Supplies and Suspending Future Interest Charges*". In terms of the aforesaid agreements, the Municipality acknowledged its indebtedness for:
- 40.1 August 2015 to August 2017 in the amount of R126 941 652-00 (One Hundred and Twenty Six Million Nine Hundred and Forty One Thousand Six Hundred and Fifty Two Rand). A copy of the agreement is attached hereto as Annexure "FA7";

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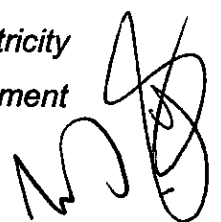
40.2 A second agreement for the period of October 2012 to October 2017 in the sum of R116 572 793-00 (One Hundred and Sixteen Million Five Hundred and Seventy Two Thousand Seven Hundred and Ninety Three Rand). A copy of the agreement is attached hereto as Annexure "FA8".

41. As a result, no further consultation was required and the contemplated interruptions and/or disconnections never transpired. It was the applicant's understanding that the dispute between the Municipality and Eskom had now been resolved under the circumstances.
42. I digress to state, that Eskom did not take a final administrative decision to terminate the electricity supply. The publication of the above-mentioned notice was merely a notice commencing the community participation process, which was prematurely terminated in light of the settlement agreements concluded with the Municipality.

The First Urgent Application

43. On or about Friday, 16 March 2018 a new notice titled "*Interruption of Bulk Electricity Supply to Modimolle-Mookgophong Municipality*" was published in the local newspaper. For ease of reference the following was confirmed in the notice:

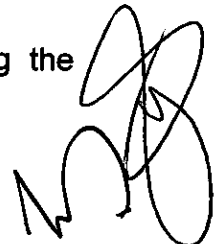
"On 8 December 2017, Eskom issued a notice suspending the interruption of Modimolle-Mookgophong Municipality's bulk electricity supply subject to the Municipality honouring the repayment agreement and electricity supply agreement.



The Modimolle-Mookgophong Municipality has breached its agreement with Eskom and after careful consideration of the overall impact of the escalating municipal debts, Eskom has taken a decision to proceed with the interruption of the bulk electricity supply to the Modimolle-Mookgophong Municipality.

Eskom hereby notifies all parties who are likely to be materially and adversely effected that the contemplated interruption of bulk supply to Modimolle-Mookgophong Municipality will commence on 31 March 2018." (own emphasis)

44. Eskom proceeded to set-out the relevant times during which the electricity supply will be interrupted and/or disconnected. Eskom further specifically reserved the right to disconnect the electricity entirely, and indefinitely, on 15 days' notice should the electricity debt situation with the Municipality not improve.
45. Despite the notice clearly constituting a new interruption notice, as well as a final administrative decision on new facts, no provision was made for community participation in the form of either written representations, comments and/or submissions, as to why Eskom should not proceed with the contemplated interruption and/or disconnection.
46. I digress to state that Eskom was undoubtedly aware of its obligations, with reference to its administrative decision in terms of PAJA. In this regard, the notice clearly states that it is issued in terms of PAJA, however, no reference is made to the community participation provisions, when considering the

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nature and far reaching implications of this decision. I attach hereto a copy of the notice, marked as Annexure "FA9".

47. The applicant accordingly proceeded to institute an urgent application in the above Honourable Court, for temporary relief to interdict the interruption of electricity supply, which application was set-down for 27 March 2018. The parties managed to reach an agreement and the following order was made an order of Court:

"The First Respondent shall not proceed with the planned interruption of electricity supply to the Second Respondent on the 31st of March 2018, as published and issued in the Notice in the local newspaper on 16 March 2018 or give effect to that notice in any manner whatsoever.


Part A of the application is removed from the urgent court roll for 27 March 2018.

All costs are reserved for future determination.

That in the event of the Second Respondent's default on its financial obligations in terms of the repayment agreement to First Respondent, First Respondent will afford the Applicants and the other affected parties an opportunity to make submissions and be heard in terms of section 4 of the Promotion of Administrative Justice Act, 3 of 2000.

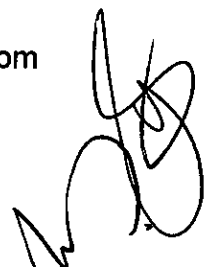
That the applicants may proceed with part B of the application if they so wish."

48. A copy of the order is attached hereto as Annexure "FA10".

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The New Notice

49. It was the applicant's understanding that the matter had been resolved and that the second respondent would comply with its obligations. Nevertheless, on 7 May 2018 Eskom forwarded a letter to the Mayor of the second respondent.
50. In the letter Eskom confirmed that due to the second respondent's failure to make payment or to respond to Eskom's queries, Eskom was in the process of preparing a public notice which would be placed in the media on 11 May 2018. The letter further confirms that Eskom would review the public's submissions and then issue a final notice of electricity disconnection/interruption. The letter also proceeds to set-out proposed times for the interruption of electricity supply.
51. A copy of the letter and publication in the newspaper, dated 11 May 2018, are attached hereto as Annexure "FA11".
52. The notice serves as confirmation that it was at all times Eskom's intention to disconnect or interrupt the second respondent's electricity supply despite any submissions made by the public. A reading of the notice further serves to confirm that Eskom had already made its decision at that stage and that Eskom had no intention of partaking in meaningful community participation for the purpose of exploring alternative and less drastic measures. Eskom

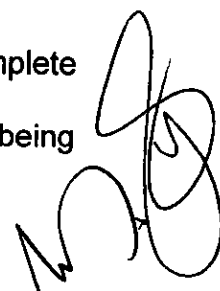
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accordingly failed to facilitate participation at a point in the process where involvement by the community would be meaningful.

53. Nevertheless, the applicant and its members decided to submit objections and submissions to Eskom in the hope of being afforded a reasonable opportunity to engage with Eskom in order to explore alternative measures that could be taken.

APPLICANT'S PARTICIPATION

54. In accordance with the notice the applicant duly submitted its "*OBJECTION TO PROPOSED INERRUPTION OF BULK ELECTRICITY SUPPLY TO THE MODIMOLLE-MOOKGOPHONG MUNICIPALITY, LIMPOPO PROVINCE*" on behalf of its members on 11 June 2018. A copy of the objection is attached hereto as Annexure "FA12".
55. I confirm that many of the applicant's members also submitted their own individual submissions to Eskom in addition to the applicant's submission.
56. In preparing its submission the applicant employed the services of Mr H.U. Schussler of Economists.co.za to conduct an economic survey to determine what the impact of the disconnection /interruptions will be on the local economy.
57. The applicant's legal representatives further forwarded a copy of the complete report to the designated email address of Eskom, being



LPExecActionTeam@eskom.co.za on 11 June 2018. I attach hereto the applicant's legal representatives letter and report, marked as Annexures "FA13" and "FA14" respectively.

58. It is emphasised that in the aforementioned letter the applicant's legal representative unequivocally stated that:

"In the premises and upon the instructions of the Chairperson of the Business Chamber, the enclosed report is submitted to your office which should be added to the submission of the Waterberg Business Chamber and dealt with accordingly."

59. Subsequent to the submission of the report to the prescribed email address no further correspondence was received from Eskom regarding the applicant's submissions.

60. In order to avoid the unnecessary burdening of this affidavit, I will refrain from entering into and indepth discussion of the content of the report, however, for ease of reference the following constitutes the executive summary of the report:

"The district of Modimolle-Mookgophong will lose about 10% of all employment in a short period of the load shedding is instituted.

207 businesses responded to the survey

200 businesses filled in all the answers and 204 most of the answers.

There were ten questions about the power situation of the businesses survey.

Almost all of the businesses that filled in the survey receive power from the local municipality.

55% of businesses will close in three months.



There will be no way for the local government to pay money it owes to Eskom if this happens.

Nearly 100% of businesses pay for their power.

Nearly 100% of business would pay Eskom directly to keep the power on.

The two towns that make up the local municipality (called LIM 368) would never fully recover if the electricity load shedding continues for a long time."

TERMINATION NOTICE

61. With reference to Annexures "FA4" and "FA5" above, during discussions with the second respondent's Mayor, on Monday, 18 June 2018, Mr Breytenbach was informed that Eskom had issued a final notice regarding the termination of the electricity supply.

62. In the notice, the following is confirmed:

"Eskom and the Municipality have a contractual relationship and are both obliged to comply with the contractual terms and conditions. Eskom is also obliged to supply electricity on a financially sustainable basis and after careful consideration Eskom has decided to continue with bulk electricity supply interruptions on 29 June 2018." (own emphasis)

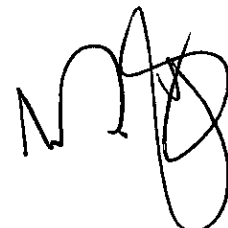
63. If not for the fortuitous discussion with the Mayor of the second respondent, the applicant would only have become aware of the decision on Friday, 22 June 2018, a mere 5 court days before the interruption commenced.



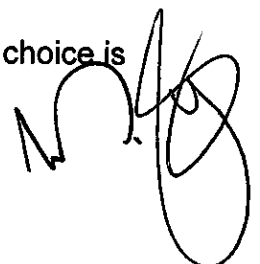
64. I attach hereto a copy of the "Final Decision Notice" published on Friday, 22 June 2018 in the local newspaper, marked as Annexure "FA15".
65. It is respectfully submitted that in order to illustrate that the applicant has not delayed in instituting this application consideration must be given to the procedural developments surrounding the pending semi-urgent application.

APPLICATION TO COMPEL COMPLIANCE WITH SECTION 139(5) OF THE CONSTITUTION

66. As mentioned above, on or about 14 June 2018 the applicant instituted a semi-urgent application in the High Court of South Africa, Limpopo Division, Polokwane under case number 3629/2018. The matter has been set-down for 10 July 2018.
67. In the application the applicant seeks an order declaring the Municipality to be in a financial crisis as prescribed by Section 139(5) of the Constitution, read together with Sections 139 and 140 of the MFMA. In addition to the aforementioned declaratory relief, the applicant is requesting the Honourable Court to grant a *mandamus* directing the provincial executive, *alternatively* national executive, to comply with the mandatory and obligatory provincial intervention procedures prescribe by Section 139(5) of the Constitution, read together with Sections 137 to 144 and Sections 146 to 153 of the MFMA.

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68. In order to avoid the unnecessary burdening of this application, I attach hereto a copy of the notice of motion and founding affidavit, without the annexures, marked as Annexure "FA16". Should it be necessary a full copy of the application will be made available at the hearing of this application.
69. I will refrain from entering into a discussion of the merits of the pending application, suffice it to state that relief is sought on the basis that the second respondent is in a serious and persistent breach of its financial obligations and commitments and has further admitted that it is unable to meet its obligations and financial commitments.
70. I am advised by the applicant's legal representatives that once the aforesaid requisite circumstances and facts are present, the provincial executive is obligated to intervene and follow the processes prescribed by Sections 139 and 140 of the MFMA. The process consists of two stages. The first stage entails the preparation of a financial recovery plan, which plan is to be prepared in accordance with the provisions of the MFMA. The second follows if the Municipality cannot or does not implement the plan.
71. The recovery plan is key to the process. As soon as the provincial executive becomes aware of the seriousness of the situation, they are obligated to request the Municipal Financial Recovery Service (referred to as the recovery service) to prepare a financial recovery plan. The recovery service forms part of, and functions within, the National Treasury. In contrast to the discretion and intervention in terms of Section 139(1) or 139(4) of the Constitution, where a suitable person may prepare a plan, a provincial executive's choice is

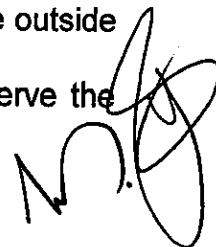
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restricted to the recovery service. The recovery service is further obligated to apply the terms of reference imposed by Section 139(1) of the MFMA.

72. It is respectfully emphasised that an intervention in the case of a financial crisis consists of a detailed process that is aimed at restoring the Municipality's financial ability to comply with its constitutional duties and obligations relating to the provision of services in a substantive manner. The process involve the provincial and national executives.
73. It is submitted that in addition to the grounds of review discussed below, that in the alternative it will be prudent for the Honourable Court to grant an interim interdict pending the finalisation of the semi-application, and if an order is granted, the finalisation of the Section 139(5) process.
74. It cannot be doubted that the fundamental purpose of a Section 139(5) intervention is to salvage the Municipality's financial position to ensure the continued and sustainable delivery of basic services. The applicant has already been forced to approach this Honourable Court on an urgent basis once, and is now called upon to approach this Court for a second time to protect the rights of its members and the community as a whole.

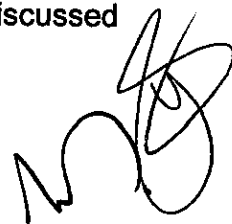
ATTEMPTS TO OBTAIN UNDERTAKING

75. The applicant's attorneys were not able to serve the semi-urgent application on Eskom due to the strikes and protest actions currently taking place outside Eskom's offices. As a result, the applicant's attorneys proceed to serve the

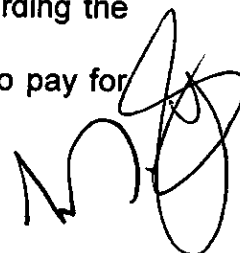
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semi-urgent application on *Ngeno & Mteto Incorporated*, the attorneys of record for Eskom in the first urgent application, on 18 June 2018.

76. In this regard, the applicant's attorney proceeded to contact the previous attorneys of record in the first urgent application to enquire whether they would accept service of the application on behalf of Eskom and further whether they were mandated to act on behalf of Eskom in said application. The aforesaid was done telephonically on 18 June 2018.
77. In addition, on 18 June 2018 the applicant's attorney forwarded an email to Eskom's erstwhile attorneys of record. The letter confirmed the aforesaid telephone call between the applicant's attorney and Eskom's attorney. The letter further proceeded to confirm that the semi-urgent application had been served on their offices and also further referenced the problems with regards to the strikes relating to service on Eskom itself.
78. Confirmation was sought that the attorneys had instructions to act on behalf of Eskom. An undertaking was also sought in terms whereof Eskom would not start with interruptions on 30 June 2018 in light of the pending semi-urgent application. Reference was also made to the fact that the applicant had made submissions to Eskom and as yet not receive any response from Eskom. A copy of the email is attached hereto as Annexure "FA17".
79. The applicant's attorney further proceeded to forward an email to Eskom's legal representatives on 19 June 2018. In the email it was confirmed that the applicant's attorney had obtained a copy of the final decision discussed above. A copy of the email is attached hereto as Annexure "FA18".

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80. On 19 June 2018 an email was received from Eskom's attorneys advising that they indeed acted on behalf of Eskom and that they were awaiting instructions regarding the undertaking not to proceed with the electricity interruptions on 29 June 2018. A copy of the email is attached hereto as Annexure "FA19".
81. On 20 June 2018 the applicant's attorneys proceeded to forward a letter to Eskom's attorneys of record. The letter proceeded to confirm that Eskom had notified the Municipality that it intended to proceed with the interruptions on 29 June 2018. The letter further proceeded to state:
- "We are duty bound to require Eskom to provide us with an undertaking by no later than 14h00 on Thursday 21 June 2018 to not continue with the electricity supply interruptions as contemplated on 29 June 2018. Should we not receive an undertaking we hold instructions to proceed with an urgent application to protect the rights of our clients and inter alia its members.*
- The Municipality, we are made to believe, does not have difficulty with consumers making payment directly to Eskom so to ensure that in going forward Eskom does receive the lionshare of its contemplated income. The historical debt should be addressed by the MEC: Treasury."*
82. A copy of the letter is attached hereto as Annexure "FA20".
83. On 21 June 2018 a letter was received from Eskom's attorneys. In the letter it was confirmed that Eskom was unable to give an undertaking regarding the termination of electricity supply for there was no reciprocal tender to pay for

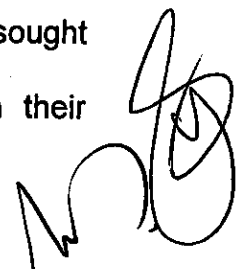
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electricity that is to be supplied and the debt that has been created. Furthermore, it was specifically stated that:

"Our client will reconsider its decision if the notice of motion were to be amended to include an order compelling the Municipality or whichever tier of government that will take over to continue with the payment of electricity that will be supplied and the debt.

In this regard we suggest that you sent us a draft amendment that will include our suggestion. We can then take instructions in this regard."

84. A copy of the letter is attached hereto as Annexure "FA21".
85. A reading of the above-mentioned serves to confirm that the applicant has taken all possible and necessary steps available to avoid the institution of this application. The applicant can further not be faulted for Eskom's failure to formally and timeously advise the applicant of its decision to terminate the electricity supply. At best the applicant would in any event only had been advised of the decision to terminate on Friday, 22 June 2018.
86. The applicant's members are not at fault for the position that the second respondent now finds itself in, yet it is the applicant's members that will now suffer as a result of the second respondent's maladministrations and corruption.
87. The applicant has further, by instituting the Section 139(5) application, sought to ensure that the provincial and national executives comply with their

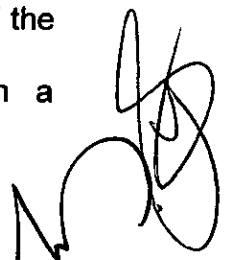


statutory obligations under the present circumstances. Should Eskom be allowed to continue with the interruptions it will render any attempts to prepare a financial recovery plan and subsequent steps to be taken superfluous under the present circumstances.

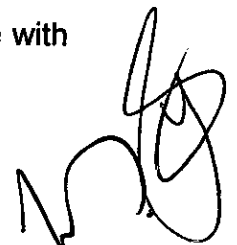
88. Therefore, in addition to the grounds of review referenced below it is submitted that the applicant is justified in seeking an interim interdict pending the finalisation of the Section 139(5) application, and if an order is granted, the finalisation of the intervention as required by Section 139(5) and the applicable provisions of the MFMA.
89. I now proceed to provide a brief discussion of the legislative framework surrounding the provision of electricity to the Municipality by Eskom.

LEGISLATIVE FRAMEWORK

90. The residents that fall within the jurisdiction of the Municipality have a right to receive electricity and basic municipal services. The provision of electricity has further become virtually indispensable in society today.
91. The aforesaid accords with section 152 of the Constitution, in terms of which a Municipality is obliged to prioritise the basic needs of the community and to promote the social and economic development of the community, and section 152(2) in terms of which the Municipality is required within its financial and administrative capacity to achieve the object set-out in section 152(1) of the Constitution, including the provision of services to communities in a sustainable manner.



92. With reference to the constitutional obligation imposed on local government to provide basic municipal services, which include electricity, I am advised that the Courts have confirmed that any decision to interfere with these rights, including the termination or interruption of supply by Eskom to a Municipality, is an administrative action which must comply with the prescripts of administrative fairness.
93. The interruption decision is accordingly subject to the requirements of administrative fairness as set-out in PAJA.
94. The Electricity Regulation Act, 4 of 2006 establishes a national regulatory framework for electricity supply industry. In terms of section 7 thereof, NERSA (the fourth respondent) must issue licences for operating of any generation, transmission or distribution facility, as well as the trading of electricity.
95. Section 7(1)(a) provides that:
- "No person may, without a licence issued by the Regulator in accordance with this Act operate any generation, transmission or distribution facility."*
96. Section 27 of the Electricity Regulation Act set-outs the duties of Municipalities, which include (amongst others), the duty to comply with all the technical and operational requirements for electricity networks determined by NERSA, and the duty to execute the reticulation functions in accordance with the relevant national energy policies.

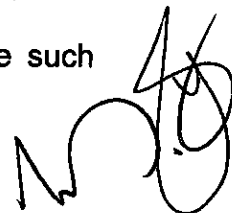
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97. In this regard, section 21 of the Electricity Regulation Act deals with the "*Powers and Duties of Licensee*". Section 21(5) is of particular import and provides as follows:

"(5) A licensee 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."

98. I am advised, that when a Court is interpreting the ambit of Eskom's powers and determining whether the termination decision was taken lawfully in terms of section 21(5), it must attempt to formulate the power in line with the constitutional and statutory framework and must prefer an interpretation which is more constitutionally compliant.

99. The function of generation and the transmission of electricity in South Africa is carried out by Eskom. Eskom is further the only holder of a licence for the generation and transmission of electricity and exercises a licence monopoly over the supply of electricity in South Africa. The distribution function is either carried out by Eskom directly to electricity consumers (who are referred to as "Eskom's direct customers"), or it may be carried out by one of a number of licensees. NERSA issues licences to licensees to distribute electricity, the majority of whom are Municipalities. The second respondent is one such licensee.

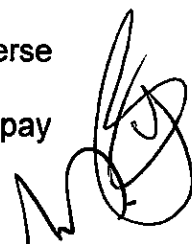
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100. In consideration of the aforesaid, Municipalities are licenced by NERSA to distribute electricity to end-users such as the applicant and the general public at tariffs approved by NERSA. This means that once electricity is delivered by Eskom to the Municipal switchgear, the Municipality is responsible for performing the distribution function which includes:
- 100.1 Providing the electricity, to distribute electricity to its end-consumer;
 - 100.2 Maintaining and servicing the supply grid within the Municipalities;
 - 100.3 Distributing electricity to end-consumers;
 - 100.4 Administering, billing, and recovering of charges relative to electricity consumption by end-consumers;
 - 100.5 All credit risk and credit controlling functions relative to electricity supply business from receiving electricity at its switch gear, until delivery the electricity to its end-consumers; and
 - 100.6 Paying to Eskom the costs of bulk electricity received, at a supplied tariff approved by NERSA.
101. Users pay for electricity usage monthly to the Municipalities who are, in turn obliged to pay Eskom in accordance with the conditions and the supply agreements concluded between Eskom and the Municipalities.

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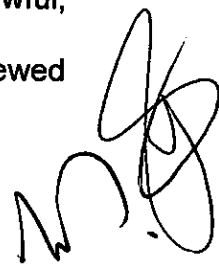
GROUNDINGS OF REVIEW

102. Eskom is a major public entity and listed as such in terms of schedule 2 of the Public Finance Management Act, 1 of 1999 and an Organ of State exercising public powers and performing public duties.
103. As discussed above, it is reiterated that the decision to interrupt or discontinue the electricity supply to the Municipality constitutes an administrative action as contemplated in PAJA, which Act has been promulgated to give effect to the constitutional right to administrative action that is lawful, reasonable and procedurally fair.
104. It is submitted that the disconnection of the electricity supply is disproportionately oppressive vis-à-vis the means sought to be achieved, in that Eskom has so far failed to implement judicial proceedings against the Municipality, despite claiming in public that the interruption of electricity supply is always an option of last resort.
105. The decision would in this case have highly detrimental and disproportionate financial, commercial, industrial ramifications and health consequences for the daily operations of the applicant's members, who are all up to date in respect of their electricity payments to the Municipality. The applicant's members constitute the economic backbone of Modimolle and Mookgophong, and are crucial to the survival of the local economy of Modimolle and Mookgophong.
106. Eskom has clearly failed to apply its mind to the disproportionately adverse effect of its decision on businesses and private individuals who diligently pay



for their electricity consumption and the lack of justification to harm the business interests and the environment in Modimolle and Mookgophong, whilst the actual cause of the debt of the Municipality is attributed to financial maladministration, lack of planning and neglect of debt collection from those consumers who are indeed in arrears, on the part of the Municipality – in brief, the diligently paying end-users are to be made to pay clearly for the Municipality's constitutional delinquency.

107. The applicant will accordingly exercise its right to request reasons for Eskom's administrative decision in terms of section 3 of PAJA.
108. In the absence of said reasons, and a record of the decision it is submitted that in Eskom's action is procedurally unfair and that the decision was taken based on irrelevant considerations, alternatively that the necessary relevant considerations were not considered even considered.
109. It is emphasised that Eskom's attempts at community participation were simply not reasonable in the present circumstances.
110. The applicant has a further right to require Eskom to consider all other possible means of debt collection before resorting to this drastic measure of interruption. The aforesaid right also includes the right to ask for information as to what other measures were considered by Eskom under the circumstances. In such an event, where Eskom has failed to consider alternatives adequately, or at all, it would render the decision unlawful, irrational and unreasonable. Eskom's decision would stand to be reviewed

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and set-aside on the basis of section 6(2)(e)(iii), 6(2)(e)(v), 6(2)(f)(ii), 6(2)(h) and the principle of legality.

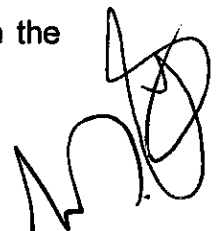
111. Furthermore, Eskom's persistence with the interruption and/or disconnection in light of the applicant's submissions discussed above, is undoubtedly unreasonable and irrational under the circumstances and is not rationally connected to the purpose for which it was taken. The exercise of its administrative power by Eskom is further so unreasonable that no reasonable person could have exercised the power in such a manner.

URGENCY

112. I am advised that the applicant is required to specifically set-out the circumstances that render this matter urgent and that further justify the deviation from the rules and forms of this Honourable Court. Furthermore, the applicant is required to set-out and justify the relevant time periods utilised under the present circumstances in terms of the Honourable Court's Practice Directive.
113. The applicant has not delayed in the institution of this application. Immediately upon becoming aware of the notice on Monday, 18 June 2018, the applicant took the necessary steps to obtain further information. The aforesaid was complicated as a result of the strikes and protest action at Eskom's head offices.
114. The applicant's attorneys further proceeded to contact Eskom's attorney in order to obtain an undertaking in light of the pending semi-urgent application.



115. It is respectfully submitted that in order to afford the respondents sufficient time to oppose this application, and having regard to this Honourable Court's Practice Directive, the applicant was left with no alternative but to afford the respondents until close of business, Tuesday, 26 June 2018 to file their answering affidavits with the matter to be enrolled for hearing on Thursday, 21 June 2018.
116. It cannot be doubted that the termination of the electricity will have far reaching effects, and it is submitted that this renders this matter urgent. The applicant is further been deprived of the right to request reasons in terms of PAJA, the right to engage timeously with Eskom when considering the mere 5 court days available subsequent to the publication of the notice on 22 June 2018.
117. If a temporary interdict is not granted the applicant's members will suffer irreparable harm as the interruption of any length of time of the electricity supply by Eskom to the Municipality will essentially result in permanent and irreparable harm to the applicant's members and the larger community. The applicant is furthermore obliged to proactively take steps to mitigate their damages.
118. In consideration of the above-mentioned, it is respectfully submitted that this application is sufficiently urgent to justify the deviation from the Honourable Court's rules and forms. Furthermore, it cannot be doubted that the applicant will not obtain substantial redress if this application were to be heard in the normal course.

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SUBSTANTIVE REQUIREMENTS FOR INTERIM RELIEF

119. In order to succeed in respect of the relief sought, the applicant is required to establish:

119.1 a *prima facie* right although open to some doubt;

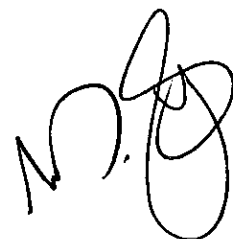
119.2 a reasonable apprehension of irreparable harm to the right if the interdict were not granted;

119.3 the balance of convenience favourable to the grant of the interim interdict; and

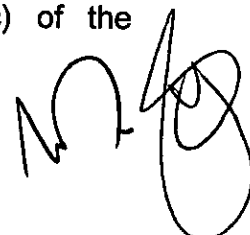
119.4 the absence of any other adequate remedy.

120. I am advised that these requirements are to be assessed together and are not to be judged in isolation. It is respectfully submitted that the Honourable Court must therefore consider whether the granting of an interim interdict would promote the objects, spirit and purport of the Constitution when considering the nature of the relief sought and the public interest at stake.

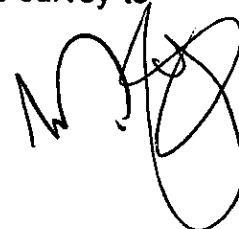
Prima Facie Right

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121. In the current instance, the applicant has surely established a strong *prima facie* right to review and set-aside Eskom's decision. However, the applicant must also show a right which requires protection now.
122. In addition to the "right to review", the applicant has a right to just administrative action and the protection against arbitrary deprivation of property, which must inform the purpose of Eskom's power to interrupt its supply to third party distributors like the Municipality. No purpose is served by acting to the ultimate detriment of the end-user where, like here, the end-users are multiple innocent parties who have paid their electricity accounts to the Municipality in the vast majority of instances.
123. It is further submitted that Eskom's decision to interrupt the electricity supply to the Municipality is contrary to its constitutional duties as an organ of State, hence also reviewable under section 6(2)(i) of PAJA. In this regard, Eskom's central role in the provision of basic municipal services like electricity must be remembered. Eskom ought to have been guided by its duties in terms of section 195 of the Constitution.
124. I am further advised that it will be argued that Eskom has failed in these duties because:
- 124.1 the significant economic costs caused by interrupting electricity supply to the Municipality will be the antithesis of the development – orientated public administration, with reference to section 195(1)(c) of the Constitution; and

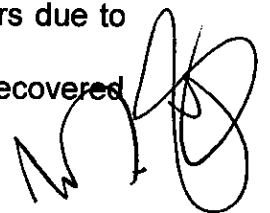
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- 124.2 interruption in the face of (a) significant economic prejudice, and in particular extensive job losses, and (b) less drastic but effective alternatives would be ineffective human-resource management and minimise human potential, contrary to developmental injunction of section 195(1) (h). One need only to have regard to applicant's letter discussed above to see the effects of the aforesaid in practice.
125. For those businesses that will close because they cannot run without a continuous supply of electricity (and cannot themselves provide the back-up generators the required amount of energy), their rights to property and to trade will be destroyed by Eskom's regulatory decision – and disruption will be irreparable.
126. Furthermore, in respect of those persons who are currently employed by those businesses who, may loose their jobs of the businesses are forced to close, there will be irreparable violations their rights to property, fair labour practices and dignity.
127. For the limited number of businesses that will be able to limp along, (for a short period of time, at best), that will only be as a result of the emergency measures taken by them, which measures will come at a heavy expense of their profits for the concomitant impact on their rights to property (which includes the right to profits) and their right to fairly trade.
128. It is for the above reasons that the applicant obtained an economic survey to substantiate its submissions.

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Reasonable Apprehension of Irreparable and Imminent Harm

129. Interrupting a Municipality's electricity supply will have disastrous consequences. Given the large industrial nature of certain of the applicant's members' businesses, a constant uninterrupted supply of electricity is vital. Eskom's proposed interruption will cause significant financial loss and potential foreclosures. Interruption of electricity supply will cause significant, if not total, losses to the production of certain of the applicant's members businesses.
130. When considering the practical effect of the interruption, the losses are not confined to the hours when there is no electricity. There are uncountable knock on effects. In short, large scale, industrial production processes cannot be switched on and off in an instant.
131. A failure to follow-up shutdown protocols will cause irreparable damage to machinery and equipment. In addition, shutdown that occurs during an incomplete production cycle will cause significant and irrevocable losses and damages.
132. Ultimately, the financial impact of Eskom's decision to interrupt the electricity supply to the Municipality is irreparable. It is humbly and respectfully submitted that many of the applicant's members have no means to ameliorate these losses. Most are not able to operate using standby generators due to the electricity load requirements and the financial loss cannot be recovered

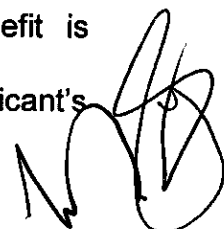


through price increases. The devastating impact on the industry and the Municipality's jurisdiction is likely to precipitate wholesale disinvestment.

133. From the public interest perspective, hospitals will be unable to properly function during this period, businesses are disrupted, the water system (including the sewerage network), shuts down and cannot immediately be turned back on, children have no electricity to do homework to be ready for school, industries are forced to shutdown during these "off" periods.

Balance of Convenience in Favour of Granting Interim Relief

134. The prejudice that will be suffered by the applicant if the interim relief is not granted pending the outcome of a review application, far outweighs any prejudice that will be suffered by Eskom if the interim relief is granted.
135. The prejudice that will be caused to the applicant and the public at large is manifest and far reaching. The loss suffered will not merely be financial, but may and probably will effect the viability of the applicant's members' businesses and to those persons who live and work in the Municipality's jurisdiction.
136. It is difficult to identify any prejudice that will be caused on the part of Eskom if interim relief is granted. Interrupting a Municipality's electricity supply does not benefit Eskom financially. Even if Eskom were to benefit financially from interrupting electricity supply, it cannot be doubted that the benefit is outweighed by the huge financial impact of the interruption on the applicant's



members' businesses, the employees, the economy of the Municipality and the livelihood of the persons who live and work in the Municipality's jurisdiction.

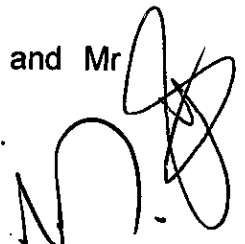
137. Furthermore, if the applicant's application fails ultimately, Eskom will still be able to implement whatever debt collection measures are necessary and appropriate.

No alternative remedy

138. Given the irreparable harm that will be caused to the applicant, as well as the others (such as the employees and broader community and economy), the applicant has no alternative remedy. The unilateral decision in the absence of reasonable and meaningful community participation has essentially deprived the applicant of its right to request reasons and utilise any dispute resolution mechanisms provided for before NERSA, alternatively the Premier in the circumstances. The applicant has also further been deprived of their right to engage with Eskom as to alternative means under the circumstances.
139. It cannot be doubted that the applicant has no alternative, but to approach the Honourable Court for the interim relief sought in order to view the administrative decision taken by Eskom under the current circumstances.

CONFIRMATORY AFFIDAVITS


140. I further attach hereto the confirmatory affidavits of Mr Cilliers and Mr Breytenbach, marked as Annexures "FA22" and "FA23" respectively.

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CONCLUSION

141. In closing, the applicant has no alternative but to approach the Honourable Court for the relief sought. The applicant has complied with the substantive requirements for the relief sought and it will be in the public interest and to the benefit of all parties if the interim introductory relief sought is granted herein.

WHEREFORE an order is prayed for in terms of the Notice of Motion.



DEPONENT

SIGNED and SWORN to at MADIMOLE on this 22 day of June by the Deponent who stated that:

1. He knows and understands the contents of the declaration; and
2. He has no objection to taking the prescribed oath; and
3. He considers the prescribed oath as binding on his conscience;

And Government Notice Regulation 1258 as amended by the Government Notice Regulation 1648, Government Notice Regulation 1428 and Government Notice Regulation 773 was fully complied with.



YVONNE PEGGY SILVESTRI
KOMM. VAN EDE / COMM. OF OATHS

Praktiserende Prokureur / Practicing Attorney
Kroepstraat 78 / 78 Kroep Street
Modimolle, Nylstroom 0510
Tel: (014) 717 4401

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COMMISSIONER OF OATH

FULL NAMES:
BUSINESS ADDRESS:
AREA:
DESIGNATION: