

# LOCAL GOVERNMENT BULLETIN

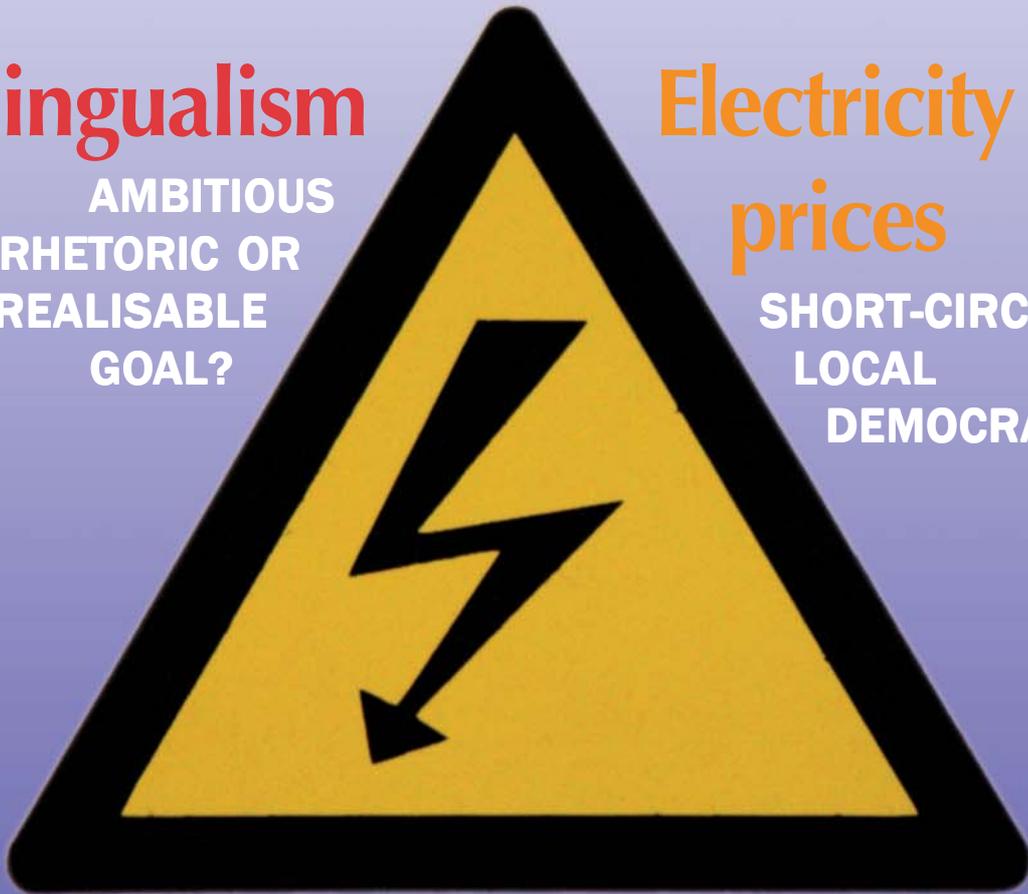
Volume 10 • Issue 3 • July/August 2008

## Multilingualism

AMBITIOUS  
RHETORIC OR  
REALISABLE  
GOAL?

## Electricity prices

SHORT-CIRCUITING  
LOCAL  
DEMOCRACY?



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# BULK ELECTRICITY PRICES, EXEMPTIONS & The demise of local democracy?

The recent electricity hikes have affected everyone from government to the private sector, and not least of all, the ordinary man on the street. As organs of state, municipalities, Eskom, the National Energy Regulator (NERSA) and the Minister of Finance may not act outside of the law. This article raises concerns about the legality of the electricity increases and the implications it has for local government.

On 20 December 2007 the NERSA granted approval to Eskom to increase the tariff at which it sells electricity to municipalities, who are licensed electricity distributors, by 15,02% with effect from 1 July 2008. On 18 June 2008 it granted approval to Eskom to increase its electricity tariffs further, also with effect from 1 July 2008. The result of the two increases is that the total average increase for Eskom's municipal customers who are licensed electricity distributors, is actually 35,9% with effect from 1 July 2008.

## Statutory framework

In terms of section 4(a)(ii) of the Electricity Regulation Act 2006, NERSA must regulate electricity prices and tariffs. Essentially, electricity distributors, including municipalities who are licensed electricity distributors, must obtain NERSA's approval for any tariff increase.

Eskom is an organ of state that supplies electricity in bulk to municipalities who are licensed electricity distributors. This means that increases in the prices at which Eskom sells electricity to municipalities who are licensed electricity distributors, are also regulated by section 42 of the Local Government: Municipal Finance Management Act 2003 (the MFMA).

Section 42(5) of the MFMA distinguishes between bulk price increases tabled in Parliament before and after 15 March of any year.

In principle, bulk tariff increases tabled on or before 15 March may take effect on 1 July of the year during which they are tabled. Those submitted after 15 March will only take effect on 1 July of the next year.

The Minister of Finance may, however, in both instances, approve that a tariff increase be implemented earlier.

Further analysis of section 42 of the MFMA reveals a number of steps that must be followed in the current inquiry, namely:

- (a) Eskom must submit any application for an increase in the price at which it sells electricity in bulk to municipalities to both the Minister of Public Enterprises and NERSA.
- (b) At least 40 days before doing so, Eskom must request the National Treasury and organised local government to provide written comments regarding the proposed increase. The National Treasury and organised local government's comments must accompany Eskom's application when it is submitted.
- (c) The Minister of Public Enterprises must table Eskom's application in Parliament, together with other documents including comments from the National Treasury and organised local government.
- (d) If, as is the case with Eskom's application granted on 18 June, the Minister of Finance does not approve the increase, it will take effect in respect of the affected municipalities only on 1 July 2009.

A municipality's budget accompanied by, among other things, a draft resolution proposing the tariffs for services must be tabled in the council at the end of March each year.

Immediately after its tabling, the budget and all the relevant documents must be made public. The municipality must then consult with local communities and other stakeholders on the budget and the proposed tariffs. The municipality must consider its budget and the proposed tariffs on or before 30 May of each year and must approve it on or before 30 June each year.

An approved budget may be revised by adopting an adjustments budget (s 28[1] MFMA). It is irrelevant whether the financial year to which a budget relates has commenced or not: once a budget has been adopted, it can only be changed by means of adopting an adjustments budget. Further, an adjustments budget may only be adopted to achieve specific ends, which are set out in section 28(2) of the MFMA. For example, it can adjust estimated revenue and expenditure downwards if a material under-collection of revenue is expected.

- Eskom's price of electricity was increased after 15 March 2008, too late for inclusion in 2008/2009 municipal budgets.
- The Minister of Finance, however, approved the last minute inclusion in the 2008/2009 budgets.
- This made consultation on the new budgets impossible so he also exempted municipalities from consultation on the increases. This exemption is legally doubtful.
- The real casualties are the communities deprived of the right to engage the municipality on the budget.

In terms of section 15 of the MFMA a municipality may, except where the MFMA provides otherwise, incur expenditure only in terms of an approved budget and within the limits of the amounts appropriated for the different votes in an approved budget. Should a municipality not be able to pass on Eskom's tariff increases due to the statutory limitations imposed by the MFMA, it may well incur unauthorised expenditure because it would overspend the total amount appropriated in the approved budget and the relevant vote against which it pays Eskom's invoices. Unauthorised expenditure must, in principle, be recovered from the person who incurred it in terms of section 32 of the MFMA.

## The conundrum

Many municipalities had already approved their budgets, property rates and service charges for 2008/09 when NERSA granted approval to Eskom on 18 June 2008 to increase the price at which it sells electricity to municipalities who are licensed electricity distributors. For example, the City of Cape Town approved its budget on 28 May 2008, together with a 20% increase in electricity tariffs with effect from 1 July 2008 "...based on the National Energy Regulator's (NERSA's) approval of Eskom's price increases in December 2007 ...". However, on 25 June 2008, during a council meeting, the council set aside its earlier tariff increase and adopted a revised budget that included a tariff increase of 35,9% for 2008/09. Interestingly, this "setting aside" of its earlier tariff determination and revision of its earlier budget occurred prior to

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the ministerial exemption of 27 June 2008 which is referred to below in more detail.

Eskom's new tariffs were approved after 15 March 2008. For these increases to have any effect upon municipalities for the 2008/09 financial year, it thus had to request the approval of the Minister of Finance as contemplated in section 42(5) MFMA. The Minister could have upheld the carefully crafted and fundamentally democratic budgetary scheme of the MFMA. This scheme, for good reason, anticipates the possibility of bulk suppliers to municipalities imposing tariff increases at a time when their budget cycle would make proper participatory democratic processes impossible. However, the Minister relented.

On 27 June 2008, he approved an amendment to the Eskom pricing structure which was tabled in Parliament to become effective for municipalities and municipal entities on 1 July 2008.

By now municipalities realised that the light at the end of the tunnel is actually a high speed train powered by Eskom and they had no room to manoeuvre within the confines of the MFMA. The anticipated collision would leave very few survivors in its wake. In desperation, SALGA called upon the Minister to exempt municipalities from compliance with the MFMA as far as the adoption of adjustment budgets and public consultations were concerned. Of course, SALGA could have appealed to the Minister not to approve the Eskom increase but to abide by the spirit of the MFMA. But who, realistically, was going to fart against the thunder from Eskom?

## Exemptions from specific provisions

Section 177(1) of the MFMA empowers the Minister of Finance to exempt a municipality from a specific provision of the Act "... where practicalities impede the strict application ..." of such provision. On 27 June 2008, the Minister exempted municipalities and municipal entities from the following

specific provisions in the MFMA:

- Section 28 dealing with adjustments budgets;
- Section 87 dealing with the budget process in respect of municipal entities;
- Any other provisions of the Act to the extent that those sections and any of those other provisions prevent a municipality or municipal entity from
  - revising its annual budget for the 2008/09 financial year as a consequence of the approved Eskom price increase;
  - preparing, approving and implementing an adjustments budget to give effect to such provision;
  - increasing its electricity tariffs during that financial year to accommodate Eskom's price increase; and
- All provisions of the Act requiring or prescribing formal consultation processes in relation to the adjustments budgets and electricity tariff increases contemplated in the notice.

Municipalities were permitted to adopt an adjustments budget, free from any public consultation processes to deal with the new electricity tariffs, as long as they submit such budgets to the National Treasury and the relevant provincial treasury on or before 30 September 2008, and as long as they publish the approved adjustments budget on their website on or before 30 September 2008.

The crash has seemingly been averted. However, it may be worthwhile to examine more closely the mechanism employed to allow municipalities to implement the tariff increases and to appreciate the effect that the exemption has on the deeply entrenched democratic principle of public participation in local government.

## The exemption

The MFMA is very clear that the Minister may exempt a municipality or a municipal entity from a *specific provision* of the Act, subject to certain conditions.

The only specific provisions that municipalities are exempted from are sections 28 and 87. The other provisions are not specified and are therefore subject to interpretation by every municipal official that is charged with implementing the exemption.

This is clearly not what Parliament had in mind when this provision was crafted and it can certainly be argued that the Minister has exceeded his powers when he purported to exempt municipalities from certain unspecified provisions.

## Public participation

The golden thread that runs through the new suite of local government legislation is the emphasis on the duty for, and obligation upon, municipalities to consult their residents and communities on

any number of governance related matters.

It is, in fact, as a result of the need to consult with the public on integrated development plans and the budget that the MFMA provides that a draft budget is tabled by the end of March, so that there is enough time for public input until the budget is finally adopted towards the end of June of a year.

Section 42(5) of the Act seeks to protect the integrity of democratic and participatory municipal budgeting by providing that a bulk tariff increase after 15 March of a year will only take effect on 1 July the following year.

The exemption purports to “relieve” municipalities from the rigours of public participation as a result of “practicalities” (namely belated and approved Eskom price increases) that impede the strict application of the provisions of the Act.

So it does appear that there was a train smash in the tunnel. ESKOM and the Minister of Finance escaped with light injuries. However, the real casualties are the communities that are deprived of their democratic right to engage with the municipality during its budget process.

Ultimately, so are municipalities that will have to deal with the consequences of the wedge that is being driven between them and their communities through schemes such as these.

It must, however, be borne in mind that there still remains a general duty upon municipalities to consult with their communities as contemplated in Chapter 4 of the Local Government: Municipal Systems Act 2000 (the Systems Act).



Photo: Johann van Tonder / PictureNET

Also, as indicated above, the purported exemption from public consultation processes as contemplated in the MFMA may be of doubtful legal validity and municipalities will be well advised to comply with the letter and spirit of both the MFMA and the Systems Act.

## Comment

The suite of local government legislation is largely progressive and adheres to the democratic principles of accountability, transparency and participatory governance. The structure of such legislation is consequently sensitive to these constitutional imperatives and any deviation from those imperatives, in the form of an exemption for example, must nevertheless strive to maintain the general adherence to such constitutional principles. When there is a deviation from a legislated process to the extent shown by the recent ministerial exemptions, there is a risk that hard-won constitutional gains may be sacrificed at the altar of expediency brought on by “practicalities”.

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