

MEDIA RELEASE (30 AUGUST 2022)

ARTICLE: “DISPELLING SOME OF THE MYTHS AND MISCONCEPTIONS ABOUT ELECTRICITY RESALE OR ELECTRICITY RESELLING IN SOUTH AFRICA”

by

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- a) The author wishes to state that the views expressed in this article may not represent the views of all the members of the respective organisations he represents, given inter alia the diversity of the cross section of the respective membership profiles of the said organisations.*
- b) The author is providing the information in this article as a guide and as a public service and is not intended to be a legal interpretation of any applicable legal and associated statutes, etc. Although reasonable care was taken the author is not responsible for any errors or omissions in this article. The author accordingly advises readers and/or users of information in this article to first check with their respective professional service providers the accuracy and/or correctness of such information if they wish to utilise such information in any risk mitigation and/or business-related decision-making process, project or exercise.*

1. INTRODUCTION

According to the Electricity Resellers Association of South Africa (“ERASA”) the concept of reselling electricity in South Africa has been around for many years. Several of their members have been members for 20 years or more. If they take into consideration bulk supplies of electricity to Body Corporates, landlords and other large commercial buildings it goes back even further. The bulk supply point platform was

created by municipalities needing to lessen or decrease their administrative and cost burden due to the greater prevalence of high-density urban developments. Reselling therefore started as a need by property owners, landlords and Body Corporates to have a metering service to individual consumers or customers beyond a bulk supply point.

This article is an attempt by the author to dispel some of the myths and misconceptions about electricity reselling and in so doing he is hoping to provide clarity and/or answers to some of the myths or misconceptions. In this respect the author had also consulted with some licensed SA power utilities, NERSA, SARPA, end use customers, legal and other professionals in the industry or sector when arriving at some of the aforesaid responses, clarifications, etc.

1.1 WHAT IS THE LEGAL STATUS OF ELECTRICAL RESELLING IN SOUTH AFRICA?

According to Schedule 2 of The Electricity Regulation Act, 2006 (Act No. 4 of 2006) ("**the Act**") published on 12 August 2021 as a Government Gazette (No. 44989):

- a) a "**Reseller**" means a person who purchases electricity from a trading entity in order to sell such electricity to a customer.
- b) a "**Customer**" means a person or legal entity that has entered into an agreement with a Distributor or Transmitter for the provision of distribution or transmission services. A legal entity may be an Embedded Generator, another Distributor, an end-use customer, an international customer, a retailer or a reseller.
- c) an "**Embedded Generator**" means a legal entity that operates one or more Unit(s) that is connected to the distribution system. Alternatively, a legal entity that desires to connect one or more Unit(s) to the distribution system;
- d) an "**End-use customer**" means a user of electricity connected to the distribution or transmission system;
- e) the following activities are also exempt from licensing and require registration (according to the said sections of Schedule 2 of the Act);

- I. **(s3.5) The trading of electricity by a reseller in circumstances in which;**
 - **(s3.5.1)** the price charged by the reseller to customers does not exceed the tariff that would have been charged to such customers for the electricity if it had been purchased from the holder of a distribution licence for the area in which the electricity is supplied to the customer; and
 - **(s3.5.2)** the reseller has entered into either a service delivery agreement in accordance with the Municipal Systems Act, (Act No 32 of 2000) (where the licensed distributor is a municipality) or a similar agreement with the distributor (where the licensed distributor is not a municipality) that regulates the relationship between the reseller and the holder of the distribution licence and the obligations of the reseller in respect of the quality of supply to customers; and the Regulator has ratified the general terms and conditions of such service delivery agreement.

2. OBLIGATIONS THAT THE ACT PLACES ON THE RESELLER (AND/OR ITS AGENT)

- a) Resellers must take meter readings, provide consumption, and test meters.
- b) A reseller must communicate to its customers regarding for example disconnections.
- c) Resellers must operate and maintain its electricity networks in a manner as if it were licensed including quality of supply
- d) Resellers must also note that common use electricity must be charged for by dividing by the number of customers.
- e) A reseller must provide emergency numbers, respond to power failures in reasonable time and must inform its customers of the procedure for reporting faults

- f) Resellers must provide a licensed distributor (as applicable) with information on customer categories and the draft invoice (consumption and tariff).
- g) Resellers must familiarise themselves with the licensed distributor's (in this case Eskom or municipality) tariff.
- h) Prepaid meters should comply with prevailing applicable approved standards and receipts should show the breakdown of costs.
- i) Resellers must provide information on tariffs to its customers.
- j) Tariffs must be at rates identical to the approved equivalent tariff of the licensed distributor. This means that no additional costs such as prepaid vending fees may be recovered in the electricity tariffs.
- k) Resellers may not charge in addition to this tariff other electricity costs (even if there is a shortfall – they may also be in contravention to the Sectional Title Act). Therefore, the tariff rates and tariff structure according to which electricity is resold must be identical to the approved tariff rates and tariff structure that would have been applicable had the customer been supplied with electricity by the supplying licensee.
- l) If the tariff charged is higher the reseller may face civil proceedings.
- m) Resellers must submit information as required by the Act and the associated supply/service agreement to the licensed distributor.
- n) Complaints from end-use customers about tariff, billing or service quality to be first raised with the reseller (or its agent) and if not resolved then referred to the Licensee and if not resolved then to NERSA.
- o) A complaint facility must be provided by the reseller.

3. OBLIGATIONS THAT THE ACT PLACES ON BOTH THE LICENSED DISTRIBUTOR AND THE RESELLER

The Act places obligations on the **Reseller and the licensed distributor** that will be enforced through the **licensed distributor electricity supply/service agreement** i.e.,

the licensed distributor must contract that the reseller must comply with the said supply/service agreement as per the Act. Some of these obligations are:

- a) **the licensed distributor** must complete a supply/service level agreement with the reseller wherein such agreement is inclusive of the bulk selling price to the reseller, the NERSA authorised tariffs (as applicable) that the resellers customers should be paying, profit margin that the reseller can make based on the said bulk selling price.
- b) The reseller's power distribution system must comply with the safety standard applied by the licensed distributor to its own infrastructure networks.
- c) The reseller's power distribution system will be subject to inspection and approval by the licensed distributor.
- d) The reseller must comply with all legal requirements and free the **licensed distributor** from all obligations related to the safety of the resellers network
- e) All customers within a development will have the right to request a direct supply (this will be subject to **the licensed distributor** conditions).
- f) Resellers must register with the **licensed distributor** (i.e., a licensed municipality electricity distributor and/or Eskom).
- g) Registration can be completed in a manner deemed fit and acceptable by the **licensed distributor**.
- h) The **licensed distributor** must report to NERSA:
 - i. Data on all new bulk connections:
 - ii. Date of registration
 - iii. Installed capacity
 - iv. Name and account
 - v. Stand or erf number
 - vi. Tariff complaints received

- vii. Disputes between reseller and licensed distributor to be referred to NERSA

4. THE IMPLEMENTATION OF THE ACT TO RESELLERS

The licensed distributor will comply with the Act in the following manner:

- a) A supply agreement/service level agreement must be signed between the Body Corporate, Owner of the block of the flats or the Reseller (as its agent) and the licensed distributor (includes Eskom, municipality power utility)
- b) Recourse for non-compliance will be referral to NERSA after **the licensed distributor or the Body Corporate, Owner of the block of the flats or the Reseller (or its agent)** fails in resolving the dispute, after which NERSA's decision will be final.
- c) **the licensed distributor** (Eskom, municipality power distributor) to register all resellers and provide NERSA with the updates.

5. DISPELLING SOME OF THE MYTHS AND MISCONCEPTIONS ABOUT ELECTRICITY RESELLING

Recently there seems to be some confusion and/or misconceptions in the marketplace about inter alia certain aspects associated with electricity reselling:

- a) ***Myth/misconception: Electricity resellers have no legal status.***

VP: This is untrue because electricity resellers and reselling are governed by Schedule 2 of the Act

- b) ***Myth/misconception: Electricity reselling as a process is not regulated***

VP: This is also untrue because electricity reselling as a process is regulated by Schedule 2 of the Act

c) ***Myth/misconception: Electricity resellers are not regulated***

VP: This is not true because electricity resellers are also regulated by the Act.

Electricity resellers must be or need to be regulated:

- I. to ensure that they provide electricity to end users at a price not less favourable than the licenced distributor in the area,
- II. to ensure that end use customers are not prejudiced with a higher cost merely because they happen to be buying from a reseller rather than licensed distributor,
- III. to ensure that the service levels provided to end use customers by resellers are of a similar standard to those provided by licensed distributor,
- IV. to ensure that they are not prejudiced because of having to purchase electricity from a reseller.

d) ***Myth/misconception: Electricity resellers CANNOT make a profit***

VP: Electricity resellers can make a profit. The electricity reseller buys electricity in bulk from a licensed distributor (using a bulk supply point) and then the said electricity reseller on-sells it to end use customers (who have individual meters), and in so doing the electricity reseller is allowed to make a profit. This buying and selling of electricity (inclusive of the profit margin) by an electricity reseller and the associate conditions must be formalised in the electricity supply/service agreement between the electricity reseller and the said licensed electricity distributor (this principle is not generally applied, in the absence of a Service Level Agreement (“SLA”) which terms and conditions have been ratified by NERSA, a reseller remains exposed to not making profit. The provisions of section 15(1) of the ERA do not apply to resellers)

e) **Myth/misconception: There is no transparency of transactions associated with electricity reselling** (It is appropriate to make reference to customer and services-oriented instruments which are applicable to the industry which will be binding once an agreement is reached)

VP: Electricity resellers in terms of the Act must be transparent in their formalised relationship with the said licensed distributor with respect to all matter relating to electricity reselling. Arguably the licensed distributor can through the electricity supply/service agreement that is concluded between the electricity reseller and the licensed distributor enforce:

- I. Transparency between the electricity reseller and the licensed distributor and
- II. Transparency between the electricity reseller and the end use customer
- III. The licensed distributor must ensure that the said regulated tariff that the end use customer ought to be charged and paying is made transparent to both the electricity reseller and the end use customer
- IV. A dispute resolution mechanism should also be made clear and transparent to both the electricity reseller and the end use customer. In this respect if the end use customer has an electricity issue e.g., he/she is unhappy with the tariff he/she is being charged by the electricity reseller then the end use customer can approach the electricity reseller in the first instance, then the licensed distributor if the electricity reseller does not respond or if he/she is unhappy with the electricity reseller's response. The end use customer has recourse to NERSA, the Regulator if he/she is unhappy with response (or lack of response) by the licensed distributor.

f) Myth/misconception: An electricity reseller can and is allowed to charge an end use customer more than the regulated tariff that a licensed distributor (e.g., a municipality or Eskom) would have charged the said end user if a reseller was not involved in the process

VP: This is not true. An electricity reseller is not allowed to charge an end use customer any tariff that is different to the one that a licensed distributor would have charged the end use customer.

g) Myth/misconception: The process of electricity resale or electricity reselling is not regulated

VP: This is not true because the process of electricity reselling is regulated by the Act

h) Myth/misconception: An end use customer can be charged a so-called resellers service fee, operational recovery fee, etc

VP: Electricity resellers cannot charge or claim any fees (whether service, operations, etc related) from an end use customer. As indicated the end use customer cannot be charged any tariff besides the said regulated tariff that the licensed distributor would have charged the end use customer

i) Myth/misconception: Electricity resellers can claim a cost of operations fee from end use customers.

VP: As indicated electricity resellers cannot claim any fees from end use customers

- j) ***What is the status of tenant(s), sub tenants, etc in relation to a licensed distributor's retail customer?***

VP: All tenants, sub tenants etc to such a retail customer supplied by a licensed distributor are still considered as end use customers to/of the licensed distributor. Hence it is the prerogative of the retail customer to inform the licensed distributor of the existence (and the details) of such tenants, sub tenants, etc.

The latter requirement was made clear in the ***“Leon Joseph et al versus CoJ/City Power JHB et al, CONSTITUTIONAL COURT OF SOUTH AFRICA, judgement, Case CCT 43/09 [2009] ZACC 30 court case”***

- k) ***Is the reseller the owner of, or (where the owner is not the account holder) the account holder in respect of a property such as a block of flats? Is the reseller the body corporate or homeowners' association – or the account holder (in cases where the account is not in the name of the body corporate or homeowner's association, but rather the account holder is the developer or the managing agent)? This is a very important question because often owners have managing agents managing their properties for them. This raises the issues of (amongst others) who must be registered, who must give notice, who is responsible for dealing with complaints, who has the power to terminate supply, and from whom invoices must be issued. [Source: Schindler's Attorneys]***

VP: Resellers do not buy electricity and on-sell to other parties. They sell electricity on behalf of a licensed distributor, whether Eskom or a Municipality. It does not matter who the reseller is, whether the owner of a block of flats or an agent appointed by the owners or a body corporate. That does not change the legal status in respect of the sale of electricity.

- l) Can a reseller charge each end user (i.e., each sectional title unit or flat) the standard network and/or service fee charged to the reseller? Or must it divide this charge up amongst all of the units or flats? [Source: Schindler's Attorneys]*

VP: If someone had bought bulk electricity from a licensed distributor and was further distributing; they would require a separate distribution licence to on-sell electricity to consumers. If, however, they are reselling on the back of another distributor's licence, they cannot charge users a tariff that is higher than that approved for that distributor as prescribed by Section 15(2) of ERA.

[Please refer to Young Ming Shan CC v Chagan NO and Others (26148/2013) [2015] ZAGPJHC 25; 2015 (3) SA 227 (GJ); [2015] 2 All SA 362 (GJ) (2 February 2015) at Paras 61 – 84]

On the 20 Feb 2015 the High Court, Gauteng Local Division, Johannesburg, ruled in a case concerning a landlord's profit-making by levying electrical service charges on tenants over and above the rent and the actual cost of electricity they consumed. The court characterized the Rental Housing Tribunal's ruling in the initial complaint as administrative action and reviewed it to determine whether it was fair and just in the circumstances. In this case, a landlord applied for the High Court to set aside a decision by the Gauteng Rental Housing Tribunal ("Tribunal"). Eighty rental tenants had brought a complaint to the Tribunal based on their landlord's charge of about R385 per month per tenant for electricity in addition to the costs they paid for their individual consumption. The tenants discovered that the utility service provider, City Power JHB, charged the landlord about R337,50 per month for the whole building. This meant that their landlord was generating a significant profit from the service charge. The Rental Housing Tribunal found that this levying of electrical service charges on tenants was an "unfair practice" under the Gauteng Unfair Practices Regulations and, consequently, interdicted the landlord from levying the

charges. It also ordered the landlord to provide a copy of its City Power JHB monthly electricity account to tenants on demand, and to repay all services charges levied. The landlord sought to have the Tribunal's ruling reviewed by the High Court and an order of costs against the tenants.

The court upheld the Tribunal's ruling, holding that the landlord had failed to show that the ruling was not fair and just and should be set aside. Finding that the "function" of the Tribunal was administrative and, therefore, governed by the Promotion of Administrative Justice Act (PAJA), the court found that the appropriate standard of review was provided by Section 33 of the Constitution (on just administrative action), namely, whether the action was lawful, reasonable, and procedurally fair. The High Court held that the Tribunal had reasonably and fairly found that the Unfair Practice Regulations applied to the landlord and that the landlord was not entitled to make a profit by charging a service fee for electricity received from a utility service provider.

Enforcement of the Decision and Outcomes:

The Landlord will have to repay all the tenants the amounts they were unlawfully charged from 2009 to 2013. The tenants are all still in undisturbed occupation.

The tenants are currently (2015) calculating how much is owed to each unit and will be approaching the landlord for a refund in due course as per the court order.

Groups involved in the case:

Socio-Economic Rights Institute of South Africa (SERI)

Significance of the Case:

This decision sets precedent enabling tenants being overcharged by their landlords to seek recourse.

[Source: <https://www.escri-net.org/caselaw/2016/young-ming-shan-cc-v-chagan-no-and-others-2015-3-sa-227-qj>]

m) Where the reseller is buying in bulk and is on a tariff that does not provide any free electricity or charge in steps (such as a large user LPU tariff): must the reseller still charge the end user based on the applicable residential or business tariff using steps, and/or provide for a free allowance? [Source: Schindler's Attorneys]

VP: Resellers cannot charge a tariff (including service fees, etc.) other than that set/approved for a licensed distributor

n) Can disconnection or reconnection fees lawfully be charged by resellers? . [Source: Schindler's Attorneys]

VP: Resellers have absolutely no rights in law other than those given to the distributor on behalf of whom they are a reselling. It's only the licensed distributor that can exercise the powers given by Section 21 of the ERA.

[The author, Vally Padayachee has over 40 years' "hands on" experience across all levels from operational, management, executive, CEO up to and including Board level in the power and energy sectors. His profile also includes having worked in such major blue-chip companies as Toyota Manufacturing SA; SAPREF Shell & BP Refineries, Mobil/Engen Refinery, DUT; Eskom, City Power JHB, GIBB Consulting Engineers, PDNA Mott Macdonald Consulting Engineers and Altron Power (Powertech Group)]

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