HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 005779/2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 1 DECEMBER 2023

SIGNATURE [redacted]

In the matter between:

UNITED DEMOCRATIC MOVEMENT	First Applicant
INKATHA FREEDOM PARTY	Second Applicant
ACTION SA	Third Applicant
BUILD ONE SOUTH AFRICA	Fourth Applicant
DR LUFUNO RUDO MATHIVHA	Fifth Applicant
DR TANUSHA RADMIN	Sixth Applicant
LUKHONA MNGUNI	Seven Applicant
SOUTH AFRICAN FEDERATION OF TRADE UNIONS	Eighth Applicant
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	Ninth Applicant

HEALTH AND ALLIED INDABA TRADE UNION	Tenth Applicant
DEMOCRACY IN ACTION NPC	Eleventh Applicant
SOUTHERN AFRICAN INSTITUTE FOR RESPONSIVE AND ACCOUNTABLE GOVERNANCE	Twelfth Applicant
WHITE RIVER NEIGHBOURHOOD WATCH	Thirteenth Applicant
THE AFRICAN COUNCIL OF HAWKERS AND INFORMAL BUSINESSES	Fourteenth Applicant
SOUTH AFRICAN UNEMPLOYED PEOPLE'S	Fifteenth Applicant
SOWETO ACTION COMMITTEE	Sixteenth Applicant
MASTERED SEED FOUNDATION	Seventeenth Applicant
NTSIKIE MGAGIYA REAL ESTATE	Eighteenth Applicant
FULA PROPERTY INVESTMENTS PTY LTD	Nineteenth Applicant
and	
ESKOM HOLDINGS SOC LTD	First Respondent
MINISTER OF PUBLIC ENTERPRISES	Second Respondent
DIRECTOR GENERAL: DEPARTMENT OF PUBLIC ENTERPRISES	Third Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Fourth Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Fifth Respondent
DIRECTOR-GENERAL: DEPARTMENT OF MINERAL RESOURCES AND ENERGY	Sixth Respondent
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	Seventh Respondent
GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Eighth Respondent
MINISTER OF ELECTRICITY	Ninth Respondent

CASE NO: 003615/2023

DEMOCRATIC ALLIANCE	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
ESKOM HOLDINGS SOC LIMITED	Second Respondent
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	Third Respondent
MINISTER OF PUBLIC ENTERPRISES	Fourth Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Fifth Respondent
MINISTER OF FINANCE	Sixth Respondent
MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT	Seventh Respondent
MINISTER OF TRADE, INDUSTRY AND COMPETITION	Eighth Respondent
SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Ninth Respondent
PREMIER, WESTERN CAPE	Tenth Respondent
PREMIER, NORTHERN CAPE	Eleventh Respondent
PREMIER, EASTERN CAPE	Twelfth Respondent
PREMIER, KWA-ZULU NATAL	Thirteenth Respondent
PREMIER, MPUMALANGA	Fourteenth Respondent
PREMIER, LIMPOPO	Fifteenth Respondent
PREMIER, GAUTENG	Sixteenth Respondent
PREMIER, FREE STATE	Seventeenth Respondent
PREMIER, NORTH WEST	Eighteenth Respondent

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA	Nineteenth Respondent
MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Twentieth Respondent
MINISTER OF ELECTRICITY	Twenty-First Respondent

CASE NO: 022464/2023

In the matter between:

SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
ESKOM HOLDINGS SOC LIMITED	Second Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Third Respondent
MINISTER OF CO-OPERATIE GOVERNANCE AND TRADITIONAL AFFAIRS	Fourth Respondent
MINISTER OF PUBLIC ENTERPRISES	Fifth Respondent
MINISTER OF ENERGY	Sixth Respondent
MINISTER OF FINANCE	Seventh Respondent

Summary: *If courts could end load shedding, they would but they cannot and it is not their function. The relief sought in three consolidated applications centre around this conundrum. There are two themes – the first is the relief to be granted pursuant to the failure by organs of state to provide consistent provision of electricity. Whilst the Constitution does not expressly provide for a right to electricity, it guarantees the right to*

other aspects of life which cannot be provided or function properly without electricity such as the right to proper healthcare (which sometimes even impacts on the right to life), the right to education, the right to water and sanitation and the right to be protected by the South African Police Services. The second theme centres around a review application launched in order to determine whether the tariffs whereby Eskom recovers revenue sufficient to cover its costs of electricity generation and distribution, were correctly determined by NERSA. The court found that the preventable failure to provide electricity amounted to Constitutional breaches and ordered the Minister of Electricity to take certain remedial steps in respect of schools, hospitals and police stations. The reviews against the NERSA tariff determination were refused.

ORDER

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1. It is declared that the non-realisation of the Government's intention in the late 1990s to open the energy sector to competition with private actors and to timeously implement the Independent Power Producer procurement programme, the delays in the decisions and implementation to build Medupi and Kusile power stations , the decisions to run power stations beyond their capabilities without proper maintenance, the failure to ensure or approve sufficient revenue for its services and the failure to take adequate steps to protect Eskom from criminal activity, corruption and "state capture", individually and collectively and the resultant energy crisis manifested by loadshedding and the continued failure to remedy the crisis, constituted and

still constitute breaches by the respondent organs of state to protect and promote the rights contained the Bill of Rights.

2. It is specifically declared that these breaches constitute unjustified infringements of the following rights enshrined in the Constitution: the right to human dignity contained in Section 10(5); the right to life contained in Section 11; the right to freedom and security of the person contained in Section 12; the right to an environment that is not harmful to health and wellbeing contained in Section 24(a); the right of access to healthcare services contained in Section 27(1)(a); the right to access of sufficient food and water contained in Section 27(1)(b); and the right to basic education contained in Section 29(1)(a).

3. The Minister of Electricity is ordered to take all reasonable steps by no later than 31 January 2024, whether in conjunction with Eskom and other organs of state or not, to ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to the following institutions and/or facilities:

   3.1 All "public health establishments" as defined in the National Health Act 61 of 2003, including all hospitals, clinics and other establishments or facilities;

   3.2 All "public schools" as defined in the South African Schools Act 84 of 1996;

   3.3 The "South African Police Service and Police Stations" as envisaged in the South African Police Service Act 68 of 1995, including satellite stations.

4. The respective review applications of the tariff determination by the National Energy Regulator of South Africa of 12 January 2023 are dismissed.

5. Each party is ordered to pay its own costs.

JUDGMENT

This matter has been heard in open court and is otherwise disposed of in terms of the Directives of the Judge President of this Division. The judgment and order are accordingly published and distributed electronically.

DAVIS, J

Introduction

[1] In terms of Section 7(2) of the Constitution, which, amongst others, provides that the State must respect the rights contained in the Bills of Rights, Eskom (an organ of State) had (and still has) a duty not to conduct itself in a manner that would result in an infringement of those rights.[1]

[2] The same duty rests on other organs of State and that duty *"... to respect the rights in the Bill of Rights is uncontroversial"*[2].

The parties to the applications

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[1] *Eskom Holdings SOC Ltd v Vaal River Development Association* 2023 (4) SA 325 (CC) at [266] (*Eskom*).
[2] *Eskom (supra) par [267]* and *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* (*Centre for Child Law* as *amicus curiae*) 2011 (8) BCLR 761 CC, [2011] ZACC13.

[3] The three consolidated applications have become known as the "UDM application", the "DA application" and the "SALGA application" being references to the first or only applicants in each of matters 005779/2023, 003615/2023 and 022464/2023 respectively.

[4] In the UDM application, the United Democratic Movement is the first applicant and it was joined by 18 other political or public interest applicants as well some medical healthcare practitioners personally. Due to the third applicant in that application having taken a somewhat different stance from the remaining applicants, it needs to be identified separately. It is another political party, Action SA. The Respondents in this application are Eskom Holdings SOC Ltd, the Minister of Public Enterprises (the DPE Minister), the Director General: Department of Public Enterprises, the President of the Republic of South Africa (the President), the Minister of Mineral Resources and Energy (the DMRE Minister), the Director General: Department of Mineral Resources and Energy, the National Energy Regulator of South Africa (NERSA) and, by way of a general citation the Government of the Republic of South Africa as eighth respondent. Some time after his appointment, the Minister of Electricity was also joined as the ninth respondent.

[5] In the DA application the Democratic Alliance, another political party, is the applicant and the respondents are NERSA and twenty other organs of state or their representatives involved in the generation, provision and distribution of electricity in one way or another.

[6] In the SALGA application the applicant therein is the South African Local Government Association and the respondents are: NERSA, Eskom, the DMRE Minister, the Minister of Cooperative Governance and Traditional Affairs (the COGTA Minister), the DPE Minister and the Minister of Electricity.

[7] In both the UDM and the DA applications the first subject thereof matter is what has now become known as loadshedding and the declaration of unconstitutionality resultant therefrom and what consequential relief if any could or should be granted. In addition hereto, in similar fashion as in the DA application and in the SALGA application, the further subject matter is that of a review of a tariff determination by NERSA.

[8] The hearing of the matters took place over 4 days with the loadshedding theme occupying the first 2 days and the "NERSA review" the next 2 days. I shall deal with these two themes separately but first the UDM application needs to be dealt with independently as a result of its ultimate withdrawal as more fully set out hereunder.

The UDM application

[9] The relief sought in the UDM application were in two parts. Part A, which Adv. Benson who appeared for Action SA labelled as an application for "humanitarian relief" was heard on 20, 22 and 23 March 2023.

[10] On 5 May 2023 this Court set out the background to the current electricity crisis whereby demand for electricity exceeds the generation capacity on a regular basis and summarised the position as follows (which summary is also useful for the determination of the current disputes):

> "*In summary then, the collective framework for the generation, supply and distribution of electricity and the upkeep of the infrastructure to do so, is as follows: the DMRE Minister authorises the generation of electricity including plans for the expansion thereof and dictates policy in respect thereof. Eskom performs the actual acts of generation, supply and distribution in terms of its performance agreement with the*

State, represented by the DPE Minister and does so in terms of licences issued to it by NERSA who in turn prescribes conditions or limitations to these licences by way of published tariffs. It is within these parameters that the various stages of load shedding are determined)."

[11] As mentioned before, in addition to the abovementioned role-players mentioned in the previous judgment, the Minister of Electricity has since the commencement of the litigation been appointed as has been joined as a party to the proceedings. He describes his role as follows:

"*I was appointed by the President on 6 March 2023, just over a month after the launch of this application. On 24 May 2023 in a proclamation made in terms of Section 97 of the Constitution, the President conferred on me the powers in Section 34(1) and (2) of the Electricity Regulation of the Electricity Regulation Act 6 of 2006 (the ERA).*[3] *As a result of*

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[3] These sections read as follows:

34. New generation capacity

(1) The Minister may, in consultation with the Regulator—

(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;

(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;

(d) determine that electricity thus produced must be purchased by the persons set out in such notice;

(e) require that new generation capacity must—

(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost-effective;

(ii) provide for private sector participation.

(2) The Minister has such powers as may be necessary or incidental to any purpose set out in subsection (1), including the power to—

(a) undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity;

(b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective tenderers for the purpose of transferring such thing or right to a successful tenderer;

(c) apply for and hold such permits, licences, consents, authorisations or exemptions required in terms of the Environmental Conservation Act, 1989 (Act 73 of 1989) or the National Environmental Management Act, 1998 (Act 107 of 1998), or as may be required by any other law, for or on behalf of the State or prospective tenderers for the purpose of transferring any such permit, licence, consent, authorisation or exemption to a successful tenderer;

the relief in Part B of the UDM case and Part [1] of the DA case also implicates me as Minister of Electricity, in particular, on the question of new generation capacity, which has now been assigned to me under the transfer of powers and whether it is necessary for the above Honourable Court to appoint a special master to oversee the implementation of the Electricity Action Plan ("EAP").

[12] In the judgment in respect of Part A of the UDM application, this court further found as follows:

"*[30] In simple terms, the government had been warned (and had accepted) that it will run out of a generating capacity by 2008 (which had happened) and in the 15 years since then, has failed to remedy the situation. Added to this, is the details evidence of Eskom's Acting Group Executive: Generation regarding catastrophic failure suffered by both Kusile and Medupi which contributed substantially to the overall lack of generator capacity.*

[31] In addition to the above, Eskom has admitted that, in order to attempt to supply electricity at a continuous level, it ran coal powered plants harder than was advisable and referred amendments programmes during which plants would be taken off line. It is only fairly recently that amendment programmes have been re-implemented. The result is,

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(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business;

(e) subject to the Public Finance Management Act, 1999 (Act 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business.

however, frequent breakdowns in non-maintained equipment and unavailability of units during repairs and maintenance."

[13] Eskom has further explained in its answering affidavit in the UDM application that, in addition to the historic failure to maintain its power generating fleet and the governmental failure to create new generation capacity, inability to render sufficient electricity to the country was further hampered by the lack of cost-effective tariffs, the lower ability of the aging generation fleet, the previous management's refusal to conclude renewable energy Independent Power Producer (IPP) contracts, regulatory obstacles, high municipal debt and alleged state capture, corruption and sabotage damage. It is worth mentioning these complaints as they also feature in the NERSA tariff review dealt with hereinlater.

[14] Having stated all of the above, Eskom conceded that "*loadshedding causes human suffering and has a detrimental impact on a variety of constitutionally protected rights, including those that the applicants identified*". The rights that the UDM applicants have identified in their application in particular, were the rights to proper healthcare, the supply of water and sewerage treatment and the provision of education and police services.

[15] In respect of Part A of the UDM application this court consequently granted the following order on 5 May 2023:

> "*1. Pending the final determination of Part B of the application in case no. 005779/2023, in respect of users of electricity, where the supply directly by Eskom Holdings SOC Ltd ("Eskom") or by local authorities, the Minister of Public Enterprises shall take all reasonable steps within 60 days from date of this order, whether in conjunction with other Organs of State or not, to*

ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of load shedding the following institutions and/or facilities:

1.1 All "public health establishments" as defined in the National Health Act 61 of 2003, including publically owned hospitals, clinics and other establishments or facilities;

1.2 All "public schools" as defined in the South African Schools Act 84 of 1996;

1.3 The "South African Police Service and Police Stations" as envisaged in the South African Police Service Act 68 of 1995.

2. The second, fourth, fifth and eighth respondents jointly and severally the one paying the other to be absolved shall pay the applicant's costs of this part of the application, such costs to include the use of three counsel were employed;

3. The costs in regard to the first respondent are reserved for determination at the hearing of Part B of the aforesaid application".

[16] Shortly after the above order had been granted, the DPE Minister, the President and the cited Government of the Republic of South Africa delivered notices of applications for leave to appeal. In his notice the DPE Minister took no issue with the declarations of breaches of Constitutional obligations. The application for leave to appeal was based on the grounds that the order was alleged

to be vague that it was impossible to implement as the Minister did not have the power to generate and supply electricity, that the order was not competent in law for the same reason and that the order violated the doctrine of separation of powers. Significantly the President and "the Government" also did not take up issue with a declarations of breaches of Constitutional duties and obligations and the findings regarding failures by organs of state to protect the rights enshrined in the Bill of Rights and materially relied on the same points as those raised by the DPE Minister as grounds upon which leave to appeal should be granted.

[17] In Part B of the UDM's application it sought extensive relief. This included a declaration that the President has failed to respect, promote and fulfil the rights in the Bill of Rights as required by Section 7(2) of the Constitution, a declaration that the failure by Eskom and other organs of state has violated the rights of the applicants and the persons who they represent, including the South African public at large to various Constitutional rights including those of equality, dignity, life, freedom of economic activity, healthcare, sufficient food and water, the rights of children and their rights to education. Remedial relief was sought in the form of a direction to Eskom to report to the court what steps will be taken to ensure that there is uninterrupted and reliable supply of electricity to eligible users and what steps will be taken in the short and long term to end loadshedding within a reasonable time. As already mentioned in the introduction of this judgment, in addition the UDM also sought a review of NERSA's decision of 12 January 2023.

[18] Shortly before the commencement of the hearing of the consolidated applications on Monday 15 September 2023, including the hearing of Part B of the UDM application, the UDM applicants (excluding Action SA) delivered a Notice of Removal of their application on Thursday 11 September 2013. This proposed removal was done unilaterally and without consent of the other parties. The intention was however not to permanently remove the matter from the roll but to re-

enrol it at a later stage. The reason given for this was that the UDM applicants still wished to take an interlocutory order given by this court on 7 June 2023 in respect of the sufficiency of the records produced by Eskom and NERSA on appeal. No such application for leave to appeal has however been delivered nor has any condonation application been delivered and after extensive argument this court, taking into account the prejudice to the other parties, the undesirability of a "splitting" of the applications which would result in a multiplicity of actions on the same cause of action, declared the notice of removal irregular and ordered the UDM parties to pay the costs occasioned thereby of all the others parties including costs of all counsel.

[19] Pursuant to the above and whilst the UDM parties were reconsidering their position, the court proceeded to hear the DA in respect of its application regarding loadshedding, with which I shall deal hereunder.

[20] After the luncheon adjournment on the first day of hearing, counsel in the UDM application informed the court that the applicants in the UDM application, excluding Action SA, withdraw the application in terms of Part B and left the issue of costs in the discretion of the Court. Action SA indicated that it in fact only sought the "*humanitarian relief*" claimed in Part A. Both the UDM and Action SA conceded that, should Part B of that application not be proceeded with, that the interim order granted in terms of Part A would lapse. This would also render the applications by the DPE Minister and for the President for leave to appeal that order moot. Counsel for Eskom and the other organs of state had no objection to the withdrawal of the application but put forward forceful arguments regarding the issues of costs, with which I shall deal at the end of this judgment.

The DA application

[21] The relevant portion of the DA's Notice of Motion dealing with the topic of loadshedding is contained in Part B thereof. The relief sought therein is as follows:

> "*3. With respect to the Respondents' on-going and repeated decisions to implement loadshedding:*
>
> *3.1 declaring the decisions to implement loadshedding inconsistent with the constitution and invalid;*
>
> *3.2 reviewing and setting aside the decisions to implement loadshedding;*
>
> *4. Declaring the respondents' response to the on-going energy crisis in South inconsistent with the constitution and invalid;*
>
> *5. Declaring that the respondents' response to the on-going energy crises has failed to respect, protect, promote and fulfil the rights in the bill of rights and has unjustifiably limited various constitutional rights, including:*
>
> *5.1 the right to human dignity in Section 10(5);*
>
> *5.2 the right to life in Section 11;*
>
> *5.3 the right to freedom and security of the person in Section 12;*
>
> *5.4 the right to an environment that is not harmful to health and wellbeing in Section 24(a);*

5.5 the right of access to healthcare services in Section 27(1)(a);

5.6 the right to access of sufficient food and water in Section 27(1)(b);

5.7 the right to basic education in Section 29(1)(a);

5.8 the right to access of courts in Section 34 of the Constitution.

6. Directing the Third to Fifth Respondents to file with this court within 30 days of the date of this order a report setting out the Executives' plan to averred the energy crisis, including short-, medium-, and long term steps;

7. After the filing of the report in paragraph 5, interested parties may approach this court on supplemented papers for just and equitable relief".

Costs are of course also claimed.

[22] In subsequently delivered heads of argument alternative relief by way of the appointment of a Special Master as a remedial interdict was sought. In terms of this proposal a Special Master would be appointed by the court after nominations and a consideration by the court of candidates. The powers of the Master was foreseen to be the following:

"7. Once appointed, the Special Master shall, until otherwise directed by this court, monitor and evaluate –

7.1 the implementation of the Energy Action Plan of 25 July 2022 and any amendments thereto, including the steps envisaged or taken by Eskom for any competitive bidding process or processes aimed at the procurement of goods, services or other commodities, including steps to amend the procurement policies and individual procurement decisions; and

7.2 the implementation of any recommendations pertaining to Eskom made by the judicial Commission of Enquiry into allegations of State capture, corruption and fraud in the public sector including organs of state other than those recommendations to be implemented or considered by the National Prosecuting Authority;

8. After appointment the Special Master may approach this court for an order authorising the appointment of independent legal practitioners or experts to assist the Special Master in discharging his/her duties.

9. The Special Master shall file reports on affidavit with this court every three months commencing on a date three months after the date of this order or any shorter period as the Special Master may deem necessary, setting out the steps he/she has taken to evaluate the matters referred to in paragraph 7, the result of their evaluations and any recommendations he/she considers necessary.

10. Upon receipt of any report by the Special Master, this court may make any just and equitable order, including after consideration of the parties' submissions on the Special Master's report.

11. All respondents responsible or otherwise involved in the matters referred to in paragraph 7 shall cooperate or cause a relevant organ of state to cooperate with the Special Master including ensuring that:

11.1 that the Special Master is provided with all documents (including further documents) and records requested by him/her;

11.2 that all officials of the organ of state are reasonably available to meet with the Special Master and provide him with such information as he may reasonably require;

11.3 that all reasonable requests by the Special Master are timeously responded to".

[23] In support of its application for a declaration of breaches of constitutional obligations, Adv Katz SC on behalf of the DA referred the Court to a number of facts which remained in existence, not only since the inception of loadshedding but also since the launch of its application and despite the order in terms of Part A of the UDM application. These facts were referred to in support of the argument that continued breaches were still being perpetrated by the respondents. The allegation was made that, had Eskom's management not refused to approve power purchase agreements from IPPs, 96% of load shedding could have been prevented. Reference was again made to the fact that corruption and state capture caused mismanagement of the construction of Medupi and Kusile power stations. These two power stations

are referred to as the generating "anchors" in the affidavit of the Minister of Electricity to which I shall refer to later. Reference was also made to the concession by the President in his affidavit that the national executive's policy to keep electricity prices artificially low was "ill conceived". As can be seen from the NERSA review documented hereinlater, the historically persistent determination of below cost tariffs is beyond dispute. In further reliance on the President's affidavit, the DA referred to the concession that the history of sabotage, corruption and criminal activity at Eskom and its power stations is "a long and sordid" story. When this is coupled with the admitted high turnover of CEO's, Eskom being a state owned entity of which the DPE Minister was the state's shareholder representative, could not operate sustainably. Details of specific decisions relied on by the DA were the formal decision taken in 2015 by Eskom's erstwhile GCEO Mr Brian Molefe to not conclude agreements with IPPs and a continuation of that decision from 2016 to 2017 by Mr Majela Koko, all which could have assisted in the avoidance of loadshedding have been corroborated, according to Eskom's last CEO, Mr de Ruyter, by an independent firm, Meridian Economics and has been fully described and reported to Parliament during his appearance on 24 January 2023 before the Standing Committee on Public Accounts ("SCOPA").

[24] With reference to *Hoffman v South African Airways*[4] the DA argued that once there could be no doubt that rights enshrined in the Bills of Rights have been infringed and are continuing to be infringed "*it now remains to consider the remedy to which the [applicant] is entitled*".

[25] The DA argued that the situation cries out for a just and equitable relief and in this regard the DA argued that the only possible solution was the appointment of a Special Master as referred to above. In support of the argument that this Court

[4] 2001 (1) SA 1 (CC) at [41]

would be fully justified in granting such an order, the DA referred to similar orders granted in *Mwelase & Others v Director-General Department of Rural Development and Land Reform & Another*[5] (*Mwelase*)and *Black Sash Trust v Minister of Social Development & Others (Freedom under Law Intervening)*[6] (*Black Sash*). Upon a question from the Court, Adv Katz SC conceded that, as an alternative to the appointment of a Special Master, the recently joined Minister of Electricity can be directed to report to the Court and to fall under its supervision as contemplated in paragraphs 7.1 and 7.2 of the DA's Notice of Motion.

NERSA's opposition

[26] NERSA opposed the granting of a declaratory relief based on breaches of Constitutional duty against it. The argument was that the DA has not sufficiently identified the duty which rested on NERSA to prevent energy crises but, insofar as NERSA has contributed to the fact that non-cost effective tariffs had been approved in the past which have impacted negatively on Eskom's sustainability, the argument was that this all related to historical conduct and that there is no purpose going forward to make a declaratory order in this regard.

[27] NERSA's further argument in opposition was that, as it may exercise some control over the proverbial purse strings, it does not control the spending of what is recovered from that purse and neither does it control the generation of electricity. It argued that the DA had not made out a case on its papers that NERSA had failed in its duties in this regard or alternatively is currently failing in performing its duties. Therefore, no need for a declarator to be issued against NERSA exists and if that is the case, then there is no cause to grant any other relief against NERSA on the loadshedding issue.

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[5] 2019 (6) SA 597 (CC).
[6] 2017 (3) SA 335 (CC).

Eskom's opposition

[28] At the outset, Adv Trengove SC who appeared for Eskom, accepted that this Court had already in paragraph 38 of its judgment in respect of Part A of the UDM application found that the organs of state involved in that application had breached their constitutional duties. He argued that Eskom is "agnostic" in respect of that finding and equally "agnostic" regarding any other declaration of constitutionally invalid conduct but denies that any of Eskom's conduct amounted to such breaches. The principal argument was therefore that the DA had not shown that Eskom should bear the burden of blame for loadshedding and, insofar as there may have been historical failures or breaches of governmental obligations, Eskom objected to it being named as being part thereof.

[29] In amplification of the above denial Eskom argued that in respect of the five principle grounds relied on by the DA, namely (1) the failure to invest in renewable energy (2) the existence of corruption, (3) the persistent award of non-cost effective tariffs by NERSA, (4) the policy to suspend maintenance and (5) aspects of sabotage, criminality and lapses of security, none of those could or should be attributed to Eskom as the sole representative of the other organs of state. In short Adv Trengove SC argued that the DA did not individualise "whose fault the energy crisis is". A "group case" or blanket allegation that the "State" has failed in its duties, did not result in every organ of state, of which Eskom is one, is to be blamed.

[30] Eskom argued that the DA's case against it suffers from a "*Plascon Evans* problem"[7] which in short provides that, in instances where real disputes of fact exist in motion proceedings, an applicant cannot succeed if, on the version of the respondent read with the uncontested version of the applicant the requirements for an order have not been satisfied. The facts averred by Eskom are that the core cause

[7] This is a reference to *Plascon Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A).

of the energy crisis was the failure by the State to authorise energy generation. This power lies in the hands of the DMRE Minister (now the Minister of Electricity) and Eskom can only generate what those Ministers allow it to generate. Similarly the sustainability of Eskom due to lack of sufficient funds to perform maintenance was dependent on NERSA tariff determinations which were also beyond the powers of Eskom.

[31] The argument was further that, even if a Court were to find that Eskom as an organ of state was also in breach of its constitutional duties, a declaration in the terms sought by the DA should not be granted. Nothing is to be gained by such a declaration, even more so if it relates to historical conduct only and it might be sought only for political gain. If that is the case, so Eskom argued, a court should exercise its discretion against the granting of a declaration. For purposes of this submission reliance was placed on the *Minister of Finance v Oakbay Investments (Pty) Ltd & Others*[8].

[32] In a separate argument presented by Adv. Steinberg SC regarding what relief should be granted, should the Court repeat its findings of constitutional breaches made in respect of Part A of the UDM application, the point was stressed that Eskom reported to the DPE Minister and now the Minister of Electricity who in turn reports to the President. The Minister of Electricity has reported that he monitors the implementation of the Electricity Action Plan ("EAP") and that updates are made to the Cabinet on a bi-weekly basis.

[33] Adv Steinberg SC argued that the matter is therefore to be distinguished from other cases where supervisory orders had been granted as the DA has not established that there is currently a mismanagement of its functions by Eskom which would necessitate the appointment of a Special Master and Court supervision. Even though

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[8] 2018 (3) SA 515 (GP) at para. [63] to [64]

Courts may in the past have made such wide-ranging orders, there is no need to do so in the present instance. The point was further made that the Court's supervisory orders in *Mwelase* and *Black Sash* had, in similar fashion as in *Minister of Health & Others v Treatment Action Campaign & Others (TAC)*[9], only been made where a pre-existing order of Court had been ignored or was not implemented. That is not the case in the present matter.

The other State respondents' opposition

[34] Section 172(1)(a) of the Constitution obliges a Court to declare "a*ny ... conduct that is inconsistent with the Constitution* ..." invalid when it decides a constitutional matter within its power. Adv. Moerane SC who appeared for the President and the Ministers (the State respondents) argued that the present matter is not such a matter but rather one provided for in Section 38 of the Constitution which provides that anyone acting in their own interest or as a member of or in the interest of a group or class of persons has the right to approach a Court, alleging that a right in the Bill of Rights is being infringed and the Court may then grant appropriate relief, including a declaration of rights. The principal distinction underlined by Adv. Moerane SC between the two provisions is the difference between "*must*" used in Section 172 and the word "*may*" used in Section 38.

[35] Pursuant to the aforesaid distinction, the Government respondents argued that it is not necessary to make a declaratory order as the Court is precluded from granting the relief which the DA claims and therefore that a declarator would have no consequence.

[36] The above argument was persisted with despite the acknowledgement that the Court could take all admissible evidence already placed before it into account and, despite the UDM not proceeding with its application, a Court was entitled to take

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[9] 2002 (5) SA 703 (CC)

into account the contents of the affidavits already placed before the Court. Despite this, the argument was that there were insufficient facts placed before the Court indicating unconstitutional conduct on the part of the State respondents.

[37] The argument was then further developed in the heads of argument delivered on behalf of the State respondents that the declarators sought by the DA are sought in the abstract. The State respondents argued that any order by a court should be rooted in specific facts based on an identified cause of action and that a general declarator that the President or the Government (or NERSA or Eskom) failed to ensure an uninterrupted supply of electricity or failed to prevent the energy crisis is too generalised. This argument was put forward despite the concession and acknowledgment by the President that there is an energy crisis brought about by multiple causes. In fact the President listed 8 interrelated reasons for a shortfall in electricity. The first was the non-realisation of the Government's intention in the late 1990s to open the energy sector to competition with private actors. This failure was exacerbated by delays in the decisions and implementation to build Medupi and Kusile and to introduce the renewable energy IPP procurement programme. The President argued that a cause for the current crisis was the delay to implement maintenance in order "*to keep the lights on*". The President argued that the applicants did not say why this was an unreasonable decision in the circumstances. The President further listed as the fourth and fifth reasons the fact that Eskom has not been able to ensure sufficient revenue for its services and that between 2018 and 2022. As a result 2930 megawatts were lost that had come from ageing power stations that had to be decommissioned. The sixth reason was that power stations were damaged due to criminal activity and that Eskom fell victim to state capture. In this regard the heads of argument on behalf of the President reads "*the DA seems to believe that the President and Government could have prevented this. But they don't say how*". The seventh reason was the admitted overcomplicated procurement processes causing delays in obtaining spares and limitation of maintenance. The

combination of all the factors "... *have caused Eskom to lose skills and technical capacity at power stations*".

[38] Even if the abovementioned conduct were to be found to amount to breaches of constitutional obligations, Adv. Moerane SC argued that any consequential relief could only be granted if it is "fair and just" and effective. A declaration in itself would not constitute appropriate relief and in support hereof reference was made to *Minister of Defence and Military Veterans v Motau & Others*[10] (*Motau*) where the Court found that: "*to grant appropriate relief we must determine what is fair and just in the circumstances of a particular case. There are interests that might be affected by the remedy and this should be weighed up. This should at least be guided by the objective to address the wrong occasioned by the infringement, deter future violations, make an order which can be complied with and which is fair to all those who might be affected by the relief*".

[39] With reference to *Komape & Others v Minister of Basic Education & Others*[11] (*Komape*) it was held that "a *compelling factor as was stressed by this court in Kate*[12] *is that a declarator is most appropriate where it will serve a useful purpose in clarifying or settling legal disputes to hopefully prevent new ones from arising*" and, with reference to the ability of organs of state to do "*the right thing*" the Court continued: "*thus far they seem to have lacked the capability to do so, but that would not be overcome by a declaratory order. Moreover the declarator sought, namely that the respondents had breached various sections of the constitution, would not identify the conduct which is the subject of the order nor identify the respects in which constitutional obligations were breached. It would thus be inappropriate to issue a declaratory order in such indeterminate terms*".

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[10] 2014 (5) SA 69 (CC) at par [85]
[11] 2020 (2) SA 347 (SCA) par [66]
[12] *MEC for the Department of Welfare, Eastern Cape v Kate* 2006 (4) SA 478 (SCA) (*Kate*).

[40] Whilst appreciating the frustration of citizens bearing the brunt of governmental failure and the equal frustration of the Court in being precluded from granting a remedy in the face thereof, the argument was that the EAP referred to in the affidavit delivered by the Minister of Electricity was a reasonable governmental response to the crisis.

[41] Adv. Hassim SC further addressed the Court on behalf of the State respondents regarding the issue of appropriate relief. In particular it was argued that the appointment of a Special Master to oversee the EAP would be inappropriate as the plan was already under the supervision of the National Energy Crisis Committee ("NECOM") which is led by the Minister of Electricity and includes more than a 100 experts, comprising of high level officials of Government and Eskom, working together with business partners. NECOM coordinates 10 different work streams aimed at achieving the overall objectives of the EAP. Each work stream entails technical and complex planning and execution.

[42] Adv. Hassim SC also in heads of argument referred to the President's following statement made in his answering affidavit in the UDM matter: "*This independent team has devoted resources, financial and human, to support implementation of the EAP as urgently as possible. Their involvement also means that they too can provide oversight and monitoring of work streams to ensure compliance with time frames and to support the unblocking of challenges as they arise*".

[43] The argument made on behalf of Eskom was repeated to the effect that a supervisory order by a court should only become necessary when organs of state fail

to comply with previous court orders and that there was no evidence of that having occurred here. Reference was in this regard made to *Mzalisi NO v Ochogwu*[13].

[44] Lastly Adv. Hassim SC urged the Court to exercise "*judicial restraint*" and not grant either a declaratory order or to appoint a Special Master in respect of what was in effect historical conduct.

The Minister of Electricity

[45] In an affidavit delivered as a consolidated supporting affidavit in both the UDM and the DA matters, the Minister of Electricity stated that he was appointed on 6 March 2023, just over a month after the launch of the DA's application on the terms as already set out in paragraph [10] above. On the 5th of May 2023 this Court granted the order in terms of Part A of the UDM application in terms of which the DPE Minister was ordered to take all reasonable steps "... *whether in conjunction with other organs of state or not* ". According to the Minister of Electricity the powers relating to generation capacity provided for in Sections 34(1) and 34(2)[14] of the Electricity Regulation Act 6 of 2006 was only assigned to him under a transfer of powers proclamated by the President on 24 May 2023. The operation of the order of this Court in respect of Part A of the UDM application was suspended by way of applications for leave to appeal delivered by the DPE Minister and the President and the "*the Government of the Republic of South Africa*" on 30 May 2023 and 1 June 2023 respectively with one of the principal grounds being that the DPE Minister did not have the power to generate electricity.

[46] In his aforesaid affidavit, the Minister of Electricity explained that he had been tasked by way of the abovementioned proclamation "... *with the political responsibility of overseeing the response to the electricity crisis [and that he has]*

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[13] 2020 (3) SA 83 (SCA)
[14] See footnote 3 above.

the authority and control over all critical aspects of the EAP in order to create synergy among different responsibilities across various departments and ministers required for an appropriate response to the crisis ...". The Minister states that in the exercise of his powers and within the context of the work streams of NECOM (of which he is the Deputy Chairperson), he has a working relationship with Eskom's Board and Executive Management and he has "... *also established a parallel working relationship with the Minister of Public Enterprises...*".

[47] In order for him to understand the nature and extent of the energy crisis and the loadshedding effect and its causes the Minister undertook a "*detailed assessment of the situation*" from 20 March 2023 to 1 April 2023. He thereafter prepared a diagnostic report which was presented to NECOM and subsequently to the Cabinet on 10 May 2023. This report, to which I shall also refer to later, had as its purpose to appraise Cabinet on the socio-economic impact of loadshedding on the South African economy, to provide a diagnostic assessment and profiling of performance of Eskom's thermal generation fleet, to address challenges relating to the pace of new generation capacity relative to the decommissioning of the coal fleet and to "*outline the transversal observations and interventions necessary to limit the intensity and frequency of loadshedding*". The document's classification was "*SECRET*".

[48] The diagnostic assessment conducted by the Minister categorised the existing base load fleet into three tiers with tier one being the "*anchors*" (Medupi and Kusile), tier two being the "*backbone*" (which are plants that are older than Kusile and Medupi with high ignition levels and which will soon be decommissioned and which include Tutuka, Matemba, Kriel, Duvha, Letabo, Kendal, Matla and Mejuba power stations) and tier three being the "*older fleet*" (which comprise the oldest of the power stations at the end of their designed life, accounting for 720 megawatt of installed capacity).

[49] The proposed interventions were divided into "*supply side interventions*" and "*demand side management interventions*". On the supply side interventions energy procurement on short to medium term "supply gains" were mentioned including the construction of temporary stacks at Kusile, temporary emissions exemptions at Kendal and Kriel and the improvement of coal quality at Letaba and Matla power stations. The prospect was to thereby improve the coal fleet energy production by 3350 megawatts. In the event that there would be a "*fast cracking of environmental authorisation*", this capacity was envisaged to be introduced to the grid within a 12 months period. On the demands side management intervention it was envisaged that "*as part of the 2010 demand management plan*" users, particularly household consumption, would be encouraged to reduce electricity usage and a "*small discount*" on electricity bills for participating households was envisaged if they were to install a "*ripple control receiver*" in their geyser's electrical circuit, allowing Eskom to remotely switch off geysers during peak demand periods.

[50] The Minister also envisaged plans for public and commercial facilities and in this regard referred to the "*islanding of hospitals and strategic nodes*". The Minister then stated that the Department of Health has identified 213 hospitals for exclusion from load shedding of which 76 hospitals have been excluded to date (of his affidavit) with work underway to exclude a further 46. He asserted that the remaining hospitals have sufficient back-up power supply from generators and UPS. He conceded however that diesel costs for generators remain a "*major expenditure driver*". He explained that the installation of solar plus battery storage as an embedded electricity generation option presented a more cost effective solution but indicated the magnitude thereof to be R10.1 billion to cover 137 hospitals. On the other hand the operating costs represented primarily by diesel purchases would be R3.3 billion annually. A rapid deployment of embedded generation solutions would only be possible, the Minister stated, through "*aggregated power purchase*

agreements" which would require "*... coordination with the Department of Public Work and Infrastructure and the National Treasury*".

[51] On the more topical issue namely the mitigation of "*risks and challenges*", the Minister stated that "*innovative funding solutions must be developed by National Treasury, the Department of Human Settlement and the Department of Small Business Development*". He further stated that the limited supply of imported products including solar panels, invertors and battery storage units was a key constraint to installation capacity. The shortage of skilled solar installation tradesmen was also mentioned as a problem. As a further option for reducing or limiting demand the Minister mentioned that he, in consultation with the DMRE Minister and the National Energy Development Institute would undertake a request for information "processed" to enable "*... real time assessment of the available technology/financing options and test market capability for an expedited full scale roll out. This roll out envisages the installation of 'geyser control switches' for residential households.*"

[52] In conclusion the Minister stated that it should be clear from his affidavit that the EAP is being implemented and that it is "*showing results*". Based on this as well as the practice of furnishing regular reports to Cabinet "*... and to the public ...*" he argued that there should be no need for the granting of the relief claimed by the DA.

Evaluation

[53] Due regard should be had to the contents of the affidavit by the Minister of Electricity. Not only is his response the most recent governmental portrayal of the State's response to the crisis, but he is the Minister most crucially empowered to address the situation. It appears from a reading of the Minister's affidavit that he somewhat underplays the seriousness of the situation. The actual effects of the crisis became more apparent from a reading of the secret memorandum presented to

Cabinet. Therein, *inter alia*, the following was stated: *"5.1.4 The impact of load shedding has been experienced across the country, with disruptions to businesses, schools, hospitals and households. Whilst the situation has highlighted the need for long term solutions to address the underlying issues facing South Africa's power generation sector, the current state of load shedding poses both a socio-economic and security risk to the sovereign and requires an appropriate and urgent response from Government …*

5.3.1 Loadshedding poses an immediate danger to life, immediate harm to the economy and an immediate threat to the State...

5.3.2 Continued disruptions to global and local supply chains, rising food prices and constraint food and energy supply with renewed and uncertain inflationary pressures remain key risks for the South African Economy.

5.3.3 The intensity of loadshedding has resulted in the erosion of the purchasing power of South Africans, with food accounting for the biggest driver of inflation .... real take home pay is estimated to be 11.1% lower in January 2023 compared to July 2021 ...

5.3.5 Econometric modelling by the Minister of Electricity adopted a two pronged approach in estimating:

(i) the GDP loss out of loadshedding;

(ii) the direct, indirect, induced and total effects of loadshedding determining job losses, forgone tax revenue and household income effects [the GDP loss in 2022

approximately equalled R1 billion per day and the modelling projects R1.3 billion per day for 2023] ...

5.3.7 The lost to the manufacturing sector alone is R47.3 billion in 2022 and is forecasted to be R59.1 billion in 2023 ....

5.3.11 From a State capacity prospective and the ability of the State to continue to fulfil its constitutional obligations, 2022 potentially saw a loss of R61 billion in tax revenues and in 2023 this may deteriorate to R77 billion;

5.3.2 It is evident that the current crises have resulted in the pervasive disruption of business activity, impeding productivity and reduce output, compromising job security of the employed and worsening the economic plight of job seekers and discourage job seekers, affecting the socio-economic wellbeing of South Africans".

[54] An annexure to the report on the impact of loadshedding paints an even bleaker picture: "*Accounting for the dire consequences and induced effects of load shedding paints a significantly increased crippling picture, exacerbated by a statistically significant effect on the tax base of the country and household spending threatening the underlying social fabric of South Africa as a nation hampering state capacity to deliver services and arguably raising National Security concerns against the milieu of a continued threatened economic environment, increasing inequality and further marginalising vulnerable communities*".

[55] The Minister's reference in his answering affidavit to the alternate generation capacity provided by generators and funded, albeit with some difficulty, by diesel purchases in respect of hospital facilities was a false illusion insofar as it purported

to indicate an intervention since the transfer of authority over generation power to him. The exact same particulars relating to the 213 hospitals to be considered for possible exemption from loadshedding with 76 hospitals already exempted appeared in "*the State's response*" to this issue delivered in an affidavit by the Chief Director: Health Facilities and Infrastructure Management at the National Department of Health in the UDM matter as long ago as 23 March 2023 already. The Minister's statement is therefore nothing new nor does it reflect any new facts.

[56] Having, by way of annexing the secret Cabinet report, disclosed the assessment of the socio-economic impact of loadshedding and thereby, in effect, conceded the infringements of rights protected in the Bill of Rights as mentioned in both the UDM and DA applications. The Minister of Electricity, representing the Government's authority to generate power, is however significantly silent on any interventions relating to schools and police stations. It must not be forgotten that in respect of schools the "humanitarian relief" referred to in particular by Action SA can be summarised as follows: smaller or rural schools or schools in 'poorer' communities who have no own generation capacity by way of solar, generators or batteries are forced to close, particularly in the cold and dark winter months due to extended load shedding (anything from stage 4 upwards) with the resultant deleterious effect that school feeding programmes are impacted thereby. The argument was made that in this fashion the education of learners from poor and previously disadvantaged communities remain as prejudiced and disenfranchised as there had been in a pre-constitutional era. It has previously been conceded that not all South African Police Stations have generator backup systems and definitely not solar power or batteries. The effects of the closure of a police station or its incapacitation during the hours of the night need no explanation. The position is exacerbated in respect of satellite police stations deployed in areas where crime is most rampant during the hours of darkness."

[57] It is therefore no surprise that Adv. Katz SC arguing in reply on behalf of the DA argued that the country was not only suffering under the "historical conduct" as argued by the respondents but under the effect of continued breaches of the obligations to respect and promote the rights contained in the bill of rights, whilst each organ of state blames another organ.

[58] When one considers that Eskom blames the "Executive" and NERSA and that members of the Executive between themselves, as evinced from the governmental response to the initial order (or rather, the lack thereof) and the reasons furnished in the DPE Minister's application for leave to appeal, continue to either blame each other or appropriate responsibility to each other, there appears to be much merit in the DA's argument that organs of state are involved in a proverbial "blame game"as far as loadshedding is concerned. At least, now that the Minister of Elctricity has been appointed, that solves the DPE Minister's principal objections to the previous order. In my view, what is clear is that there remains a continued breach of the rights enshrined in the Bill of Rights as this court has already determined. The subsequently filed affidavits merely underlined this fact.

[59] With reference to, *inter alia, Mazibuko v Sisulu & Another*[15] the DA argues that once a Court finds conduct to be unconstitutional, "an *order of constitutional invalidity is not discretionary*". As to what appropriate relief should follow a declaratory order in this case, the DA still maintained its claim for the appointment of a Special Master. In response to the previously mentioned question by the Court as to whether a supervisory order could instead be granted against the Minister of Electricity, the DA argued that he lacked the defining element of a Special Master, being that of independence. Lastly the DA reiterated that the Court is enjoined, pursuant to the finding of unconstitutional conduct, to grant a just and equitable

[15] 2013 (6) SA 249 (CC); 2013 (11) PCLR1297 (CC) at par. [70].

relief and that the Court's powers in that regard are wide.[16] Despite the objections by the respondents, it appears that considerations of public policy, justice and convenience and the continued existence of an infringement of constitutional rights, resulting in a continued live dispute, distinguishes this case from those where the granting of a declaratory order would not be appropriate.[17] In my view, a declaratory order should therefore be granted.

[60] The vexing questions still remains though, what would be the just and equitable relief following on such a declaratory order? The Court is mindful of the arguments relating to the separation of powers and that a Court should not trample on that dividing line nor unduly infringe in another sphere of Government. Orders which implicate the National Economy and budgets of organs of state in order to remedy breaches of constitutional rights should be exercised sparingly.[18] One is however reminded of the injunction by Harms JA in *President of the Republic of South Africa v Modderklip Boerdery (Pty) Ltd*[19] that "*Courts should not be overawed by practical problems. They should attempt to reconcile the real world with the ideal construct of a Constitutional world and they have a duty to mould an order that will provide effective relief to those affected by a Constitutional breach*".

[61] Nowhere has it been indicated in the opposing papers in respect of Part B that the relief previously granted in respect of Part A in the UDM's application would cripple the State, its budgets or derail the implementation of the EAP. In fact, the Minister of Electricity kept referring to the intention to "urgently" address the socio-economic impact of loadshedding, but never went as far as addressing the aspects of "humanitarian relief" mentioned in the papers. It is also clear from what has been summarised in paragraphs [42] to [47] above that, despite all the plans of the EAP

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[16] Section 172 (1)(a) of the Constitution.
[17] Such as in *Minister of Finance v Oakbay Investments (Pty) Ltd & Others* 2018 (3) SA 515 GP.
[18] See: *TAC* at par [19].
[19] 2004 (6) SA 40 (SCA) at par [42].

being put in place, they all envisage some relief at some future date (only).Once the objections raised by the DPE Minister in his interpretation of the previous order and having ignored the injunction therein that performance could be made with or without intervention of other organs of state (resulting in intergovernmental cooperation as envisaged in Section 41 of the Constitution), have been removed by the appointment of the Minister of Electricity, we find there are no cogent reasons why those orders, albeit slightly modified, dealing with immediate relief, cannot and should not be granted. To do so would at least provide relief for learners going into the new school year in addition to the other relief.

[62] We do find however that going beyond that immediate "*humanitarian relief*" would cross the boundary of separation of powers. It is however further also trite that an order of this Court will be binding on the respondents, including members of the Executive[20] and it is therefore envisaged that the respondents and in particular the Minister of Electricity acting in his oversight role as set out in his affidavit, would take steps to ensure that the constitutional breaches contained in a declaratory order will not continue. Such a declaration should therefore have a real effect. The orders made will reflect these findings.

The tariff review

[63] On 12 January 2023 NERSA approved a tariff increase for Eskom in respect of bulk electricity tariffs for the 2023/2024 and 2024/2025 financial years(FY). Both the DA and SALGA seek to have the decision whereby NERSA approved the tariff increases reviewed and set aside.

[64] What must immediately be made clear is that it is not the applicants' contention that the increases were too high and created an impermissible burden on

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[20] It is in this context that we grant the orders set out hereunder in respect of the load shedding topic of the litigation.

consumers, including local authorities and household. That is not the basis of either of their applications.

[65] SALGA's attack on NERSA's decision is the following: in terms of Section 15(1)(a) of the ERA NERSA is required to establish, based on Eskom's submission, a costs of service amount. The prediction of revenue must take into account all considerations that could adversely affect a revenue forecast. SALGA's main ground of review in this context is that NERSA failed to conduct a prudency and/or efficiency assessment that takes into account corruption, fraud and wasteful expenditure at Eskom prior to making the impugned decision. NERSA and Eskom do not dispute that corruption, fraud and wasteful expenditure are relevant considerations for purposes of prudency and efficiency. They maintain however that corruption, fraud and wasteful expenditure are not relevant at the revenue determination stage because that stage involves a forward looking or forecasting process concerned only with projected costs.

[66] The DA's attack is on a different footing. The DA's first issue of dispute is whether NERSA should have considered cross-subsidisation during the multi-year price determination (MYPD) phase of the tariff determination. The second issue is whether NERSA, on the facts, considered the impact of cross-subsidisation when it took the impugned Eskom Retail Tariff and Structural Adjustment Application (ERSTA) decision.

The scheme of tariff determination

[67] Electricity tariffs in South Africa are regulated by a process by which a licensee such as Eskom seeks approval from NERSA to allow it to recover from customers revenues for costs that it expects to incur in a specified financial year in order to provide electricity to those customers. It does so by way of an application to NERSA indicating an estimate of these costs. Should NERSA, after an

interrogation of a licensee's application, allow or approve the costs, they are incorporated into the electricity tariffs so that the licensee can recover payment of revenue amounts to cover the approved costs. The regulatory framework for this process provides that a licensee is entitled to recover its "*prudent*" costs of service.

[68] The principles applicable to the tariff determination are set out in Section 15 of the ERA. Due to the fact that these principles not only guide and bind NERSA but are the premises upon which the reviews have been founded, it is necessary to refer to them in full:

> "*15. Tariff principles*
>
> *(1) A licensee condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues –*
>
> *(a) must enable an efficient licensee to recover the full costs of its license activities, including a reasonable margin or return;*
>
> *(b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which the services are to be provided;*
>
> *(c) must give end users proper information regarding the costs that their consumption imposes on the licensees business;*

(d) must avoid undue discrimination between customer categories; and

(e) may permit the costs subsidy of tariffs to certain classes of customers.

(2) A licensee may not charge a customer any other tariff and make use of provisions in agreements other than that determined or approved by the regulator as part of its licensing conditions.

(3) Notwithstanding sub-section (2), the regulator may, in prescribed circumstances approve a deviation from set or approved tariffs". ("*the regulator*") refers to NERSA.

[69] For the determination of what "*an efficient licensee*" is or what efficient practices are, reference is made to a standard of prudence which forms part of the methodology used by NERSA to calculate the tariff.

[70] The exercise or application of the above principles is pursuant to the bestowal of the power to set and approve prices, charges, rates and tariffs charged by licensees in connection with electricity on NERSA in terms of Section 14 of the ERA. This section further empowers NERSA to make any license subject to conditions relating to the methodology to be used in the determination of rates and tariffs which must be imposed by licensees.

[71] The starting point of the methodology used by NERSA is the application of the MYPD. The MYPD was first introduced in 2006 for implementation from 1 April 2006 to 31 March 2009. Since then there has been various iterations of the MYPD. The current MYPD is known as MYPD4. It is, on its own wording, a costs-

of-service based methodology which incentivises a licensee for costs savings and efficient and prudent operations. There is no dispute that efficiency and prudence informs MYPD4 which, for example provide as follows:

> "*10.4.4 Expenses must be prudently and efficiently incurred and must be arm's length transactions" and*
>
> *10.4.9 Expenses for costs will be based on the most recent prudently and efficiently incurred actual costs taking into account the fixed and variable nature of such costs*".

[72] In addition to the provisions of the ERA, the Electricity Pricing Policy, also known as the EPP[21] applies to electricity pricing and tariffs. According to the EPP one of the objectives of a tariff is that "*price levels should assume an efficient and prudent utility, in other words prices should be based on the least cost options and exclude inefficiencies*". Under the heading "*Policy Position 2*" at par. 2.3 the EPP states that "*electricity tariffs must reflect the efficient costs of rendering electricity services as accurately as practical*".

[73] This theme has been repeated in the "*Guidelines for Prudency Assessment*" published by NERSA (the Prudency Guidelines). These guidelines are used to assess the prudence of capital expenditure (CAPEX) and operational expenditure (OPEX) incurred by a licensee at various stages. Its stated objective is to ensure that regulated entities initiate and implement the economic activities and actions that they engage upon in an efficient, reasonable and prudent manner, including the provision of reliable service, raising of capital projects and complying with regulatory requirements. Sub-paragraph 1.2 of the Prudency Guidelines makes it clear that, in accordance with the statutory prescripts "... *under supporting*

[21] Promulgated in Government Gazette no. 31741 dated 19 December 2008

methodologies, rules and guidelines of each industry, NERSA must ensure that all costs allowed in the determination of Allowable Revenue (AR) or Required Revenue (RR) for repurposes of setting or proven tariffs are prudently, efficiently and reasonably incurred by the licensee".

NERSA's decision and how it came about

[74] NERSA contends that 5 basic rules can be distilled from Section 15 of the ERA. The first is that licensees must be able to recover the full costs of the regulated activities plus a reasonable margin or return. The second is that in order to prevent the unintended effects of pure costs regulation, the ERA prescribes an efficiency element. The third rule relates to the obligation to provide for or prescribe incentives for the continued improvement of the technical and economical efficiencies in order to achieve outcomes similar to those in a competitive market where such improvements would likely take place. The fourth rule is that the license conditions may permit cross-subsidies between different classes of consumers and the final rule is that discrimination between different categories of consumers are in principle allowed as long as it does not give rise undue discrimination. The section does not otherwise prescribe the steps or sequence in which NERSA must implement these principles and also does not prescribe the procedure for tariff determination or the stages at which each of the rules should apply. The rules or principles govern the entire process for tariff determination so that the end result reflects the application of the section.

[75] The issue of cross-subsidisation forms part of the EPP. It is provided for not only in Section 15(1) of the ERA but has also been extracted in paragraph 2.1 of the EPP from the Local Government Municipal Systems Act 32 of 2000 ("the Systems Act") as follows:

"*(a) Users of municipal services should be treated equitably in the application of tariffs;*

(b) The amount individual users pay for services should generally be in proportion to the use of that service;

(c) Low income households must have access to at least basic services through tariffs that cover only operating and maintenance costs, special tariffs or lifeline tariffs or low levels of use or consumption of services or for basic levels of service or any other direct or indirect method of subsidisation of tariffs for low income households;

(d) Tariffs must reasonably reflect the costs associated with rendering of a service, including capital, operating, maintenance, administration and replacement costs and interest charges;

(e) Tariffs must be set at levels that facilitate the financial sustainability of the services, taking into account subsidisation from sources other than the service concerned...

...

(i) *A tariff policy may differentiate between different categories of users, debtors, service providers, services, service standards, geographical areas and other matters as long as such differentiation does not amount to unfair discrimination*".

[76] The EPP further defines a "*costs subsidy*" as the "*over-recovery of revenue from customers in some tariff classes whether intentional (i.e. electricity levies) to balance the under-recovery of revenue from customers in other tariff classes (i.e. electricity subsidies) as calculated in the costs of supply study or unintentional by way of unidentified surcharges within the ESI or as a natural consequence of cost pooling*". Such an over recovery from one category of customers in order to subsidize the costs of furnishing electricity to another category of customers amount to cross-subsidization.

[77] NERSA contends that from the provisions of the PPE it is clear that costs subsidisation has always been considered a significant objective to ensure access to electricity for indigent households and that a sliding scale was envisaged whereby cross-subsidies would gradually reduce as the consumption level increased.

[78] In providing detailed guidance on cross-subsidies, the EPP attempted to reach a balance between several competing objectives, such as affordable electricity tariffs for low-income consumers on one hand and costs reflective electricity tariffs for all the other consumers.[22] The average level of all the tariffs must be set to recover the approved revenue requirement. The tariffs structures must be set to recover costs as follows: the energy costs for particular customer category, the network usage costs for particular consumer category and service costs associated therewith.

[79] The EPP has a specific policy position regarding domestic (residential) tariffs, which also provides as follows for cross-subsidisation[23]: "*Domestic customers present significant challenges for utilities because of the large numbers and the many different types of domestic customers with diverse needs. Utilities should start*

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[22] Policy Position 2 provides as follows: *"All tariffs should become cross-reflective over the next 5 years subject to specific cross-subsidies as provided for in Section 9 ... Policy Position 2: Electricity prices must reflect the efficient cost of rendering electricity services as accurately as practical".*

[23] Policy Position 36.

charging costs reflected tariffs for domestic customers but also cater for cross-subsidisation of some customers ...". In general, NERSA approves tariffs for its licensees on an annual basis. For Eskom however its application is considered on a multiple year basis (in intervals of 3 to 5 years). The MYPD allowable revenue is for each respective year of the MYPD cycle, based on forecasted average energy demand. This forms the basis on which NERSA evaluates the price adjustment applications received from Eskom.

[80] The methodology, which is subject to the requirements of the ERA and the EPP, is applied by NERSA exercising reasonable judgment on Eskom's revenue or any component thereof after due consideration of what may be in the best interest of Eskom, the overall South African economy and the public. Each of Eskom's divisions i.e. generation, transmission and distribution, is calculated separately. With the overall price/revenue determined at distribution level and communicated as such to customers. The methodology provides for a costs "*plus*" system of tariffs. Tariffs are to be set to recover Eskom's allowable revenue on the basis of projected electricity consumption.

[81] The formula for determining the allowable revenue is:

$$AR = (RAB \times WACC) + E + PE + D + R\&D + IDM \pm SQI + L\&T \pm RCA.$$

Where AR = allowable revenue, RAB = regulatory asset base ,WACC = weighted average cost of capital, E = expenses (operating and maintenance costs), PE = primary energy costs (inclusive of non-Eskom generation), D = depreciation, R&D = costs related to research and development programmes or projects, IDM = integrated demand management costs, SQI = service quality incentives, L&T = government imposed levies or taxes and RCA = the adjustment of the balance in the RCA (the risk management devices of the MYPD).

[82] The methodology directs further how each costs component and projected sales volumes are determined in order to have a detailed system for projecting the total revenue on which the tariffs are based. These include sales volumes, a production plan (which includes a risk adjusted production plan) and "*energy wheel diagram*" for each year the MYPD, which reflects all generation sources together with power purchased from independent power producers and international purchasers. The WACC is the weighted average of the expected costs of equity and costs of debt calculated in terms of an articulated formula. The RAB must represent must represent assets used and usable to provide regulated service by each of Eskom's business operations. It should exclude any capital contributions by customers but should make allowance for electrification assets to allow for future replacement of such assets at the end of their economic life. Each of the other components is also dealt with in more detail in the methodology.

[83] From a reading of the affidavits of the parties and the documents informing methodology it is clear that it is a complex, highly specialised process involving matters of operational, technical and financial nature. It is primarily concerned with assessing how much it costs Eskom to provide electricity, as an efficient operator as well as the return it should be allowed to make in providing the service. NERSA contends that the determination of allowable revenue, being the starting point of the tariff determination process is not the appropriate stage to be considering with the cross-subsidies are appropriate for specific Municipalities and/or customer groups. Once the allowable revenue is determined and once a determination is thereafter made about the actual tariffs for the customers' categories to generate sufficient revenue, cross-subsidisation of different customer categories can be properly identified, investigated and determined. The ERSA methodology, based on Sections 4(a)(iii) and 15(1) and 15(2) of the ERA as well as the EPP was approved by NERSA on 29 March 2016. There is no attack on this methodology. It enables Eskom to recover the allowed revenue from standard customers for the application

year based on standard customer forecast sales volumes and allowed average standard customer tariffs for the same year. It is applicable to both Eskom's local authority and non-local authority customers. Paragraph 4.7 of the Methodology provides as follows: "*ERSA is the rate of increase that has to be applied to the base year schedule of approved tariffs for non-local authority customers before consideration of any form of cross-subsidy or structure adjustment. This is to ensure that the same annual average increases apply to all customers before consideration of adjustments*".

[84] Costs subsidies for poor or indigent customers have been applied by NERSA since 2016 and were already in existence prior to the impugned decision. It followed NERSA's approval of the implementation of Inclining Block Tariffs (IBT's) on 24 February 2010 already, in order to provide the cross-subsidies for low income domestic customers. IBT divide the electricity price into several blocks. The first block of electricity is at the lowest price. As the customer purchases more electricity during the month, the electricity board will eventually fall in block 2 which is a bid more expensive. This process repeats automatically as the customer purchase further electricity to move into the next block. At the end of the month the history is reset and the customer will again start in the next month from block 1. The feature of this tariff is that the more you use, the higher the average price.

[85] The objective of the IBT is to provide protection for lower usage in customers against high price increases resulting in a reduction in tariff to these customers. This means that higher consumption customers of electricity will see increasingly punitive charges based on their electricity usage. The process to move from the one block to the next is automatic and depends only on the amount of electricity that is acquired by the customer. NERSA then also provided details of the blocks with reference to kWh and detailed the cost subsidies applied over the years from 2014 to 2023.

[86] In addition to the aforesaid there is a category called Homelight 60A. It is a suite of electricity tariffs based on the size of the supplier. It provides a subsidy to low usage single phase residential churches, schools, halls, clinics, old age homes or similar suppliers in urban areas and electrification areas. Homelight 60A is pre-payment tariff for consuming customers. It has an average consumption of 171 kwh per hour. Homelight 60A customers have an average consumption that is higher than that of 20A customers.

[87] Homelight 60A customers are yet another category of customers which are charged on average R125.00 per month whilst the cost of supply is currently R213.00 per month. The costs are therefore subsidised by other categories of customers.

[88] Getting closer to the calculation of the tariffs approved in terms of the impugned decisions, NERSA referred to the historically approved tariff increases for Eskom since 2006 in a detailed fashion. It conceded that, historically, tariffs were not approved in a fashion that allowed Eskom to recover sufficient revenue to cover its costs.

[89] NERSA also went on to detail Eskom's current application for increased tariffs. This included a detailed consideration of each line entry of Eskom's calculation of its costs. The consideration of each line entry together with Eskom's motivation for it allowed NERSA to make a determination whether those items should be allowed in the amounts as applied for as the total of the costs would result in a determination of the allowable revenue to cover those costs as set out in the formula detailed above.

[90] NERSA and Eskom explained that one of the key challenges was the achievement of sufficient revenue, since it is factor that drives the levels of investment in capital expenditure programme and maintenance to improve plant

performance as well as financial health and liquidity in Eskom. The focus of Eskom's application for tariff increases was that it must be allowed to recover the full costs of its license activities and for that based its projections *"... on motivations provided for each of the changes in the particular cost element of the regulatory formula*". This means that its application was forward looking and based on a forecast on what it could recover from customers during the relevant financial years. The main drivers of the application were the regulated asset base, the primary energy and operating costs, the impact of independent power producers, depreciation and levies and taxes. It also had to comply with costs orders already granted against it.

[91] In respect of the last item, costs orders, this came about as follows. During the MYPD for revenue determination period, Government had injected R23 billion equity per annum for the period of 3 years into Eskom, totalling R69 billion. NERSA recognised the amounts as revenue and deducted them from the MYPD approved revenues to avoid excess returns. Eskom challenged NERSA's decision and the High Court has found in favour of Eskom on 28 July 2020 whereby NERSA was ordered to add back R23 billion to Eskom revenues. NERSA appealed the decision to the Supreme Court of Appeal but the matter was eventually settled between Eskom and NERSA on 6 June 2020 to the effect that R15 billion will be added to the allowable revenue for each of the 2023/2024 financial years and 2024/2025 financial years. NERSA and Eskom also furnished details of the Eskom application for the above two financial years and detailed sales forecasts. It was noted but both those parties that externally controlled elements of allowable revenue had the biggest impact on the price increase. For the 2023 financial year of the 20.5% increase IPP's accounted for 12.81% increase and carbon tax a further 1.09%. Both these fall under the heading Primary Energy in the Methodology which include the key types of fuel to produce electricity. Primary energy costs equate to the costing of electricity supply required to meet demand. The three sources of energy supply are Eskom's own generation, domestic IPP's and regional imports.

[92] In Eskom's application to explain the Government policy in accordance with the integrated resource plan of 2019 which is to increase significantly the contribution of energy sourced from IPP's, this resulted in an upward contribution trend towards allowable revenue over the application of 3 years from IPP's from 25% to 28%. This corresponds to R75 billion, R85 billion and R102 billion for the 3 years respectively. Thus, Eskom's application made it clear that an increase in overall costs related to IPP's would need to be recovered by the price increase. Eskom's application also highlighted the contribution of the environmental levy and carbon tax combined.

[93] After having conducted what could be described as a "*pruning exercise*" in respect of the line items included in Eskom's application, reducing it to what NERSA deemed an efficient licensee would need to cover its costs, NERSA approved allowable revenue allocations in the amount of R318 billion for the 2023/2024 financial years and R352 billion in respect of the 2024/2025 financial years. Pursuant hereto, NERSA approved the following tariff structure for 2023/2024 financial years: Eskom's own customers will realise an increase of 18.65% so will Homelight 60A and Homepower customers. Local authority tariff customer will realise an increase of 18.49%. Key Industrial and Urban customers will realise an 18.65% increase plus an additional 7.37c/kWh to cater for the subsidy which increases from 5.69 c/kWh (a 29.53% increase) and Homelight 20A customers will realise a lower increase of 10%. This approval constituted the decision which SALGA and the DA seek to have reviewed.

SALGA'S attack on the NERSA decisions

[94] SALGA's main contention is that NERSA's determinations and ultimate decision is reviewable because relevant considerations were not considered. SALGA alleges that corruption, fraud and wasteful expenditure at Eskom is a principal consideration which was not considered. SALGA also contends that

NERSA did not consider the impact of the decision on consumers who purchase electricity from municipalities as opposed to Eskom. It further complained that Eskom is overstaffed, the purchasing of diesel by Eskom at a wholesale discount and load-shedding in Eskom's sales forecast were not considered. SALGA lastly contended that NERSA's decision is reviewable because it was procedurally unfair in that members of the public were *inter alia* afforded insufficient time to consider Eskom's revised application.

[95] In support of its first argument, SALGA argued that it would be a fool's errand to argue that Eskom is corruption free. The corruption at Eskom has been the subject of the "*notorious*" so-called state capture commission report by Chief Justice Zondo which details how corruption and maladministration have eroded and plagued Eskom for years. SALGA offered a summary of this report in its Founding Affidavit. The point was further made that not only has Eskom publicly admitted to the impact of corruption and specifically its impact on the procurement of coal contracts, but NERSA had remarked on it during its previous MYPD decisions for the periods 2019/2020 financial years and 2021/2022 financial years.

[96] Developing its argument further, SALGA contended that in determining the costs of service protections in terms of Section 15(1)(a) of the ERA, NERSA should take into account "*all considerations that could adversely affect a revenue forecast*" and that this should include the costs of corruption, fraud and wasteful expenditure. To not do so, would be to ignore a relevant consideration which would render the decision reviewable. This argument was made with reference to the judgment of Kollapen J as he then was in *Eskom SOC Ltd v NERSA (Nersa)*[24] that "*... the issues of affordability and impact on the consumer remain relevant and are required to be factored into* ...." a determination of a tariff. The judgment also noted a tension between Eskom and its consumers as follows: "*The process of determining tariff*

[24] 2020 (5) SA 151 (GP) at par [39].

increases is not only a matter of calculation but also involves a reasonable judgment and the balancing of what may well be conflicting interests! Those of licensees as against those of end users".

[97] SALGA also complains that no mention is made by NERSA of the impact of a tariff increase on areas supplied with electricity by local authorities. This point is raised because consumers receiving electricity from Eskom pay a lesser fee for electricity whilst consumers receiving electricity from local authorities pay more because of the additional margin and surcharges levelled by local authorities for their supply.

[98] SALGA's argument on the overstaffing of Eskom is simply that various public interest *fora* has indicated sufficiently that Eskom was overstaffed. This would result therein that it does not run its affairs as efficiently as it could and that it carries an unnecessary high salary burden.

[99] A further argument relating to whether diesel purchased by Eskom was subject to a wholesale discount or not was properly considered. Allegedly the DMRE Minister has made it clear that Eskom does not buy diesel at a wholesale discount and SALGA contends that the higher costs of diesel used by Eskom for its open cycle gas turbines was an essential component of the costs allowable by NERSA under the heading of primary energy which was not properly considered.

The DA's attack

[100] The DA's argument is in short that Section 15(1)(e) of the ERA obliges NERSA to consider cross-subsidisation. The argument is simply this: NERSA determines Eskom's revenue and tariff increases in two stages. The first is the MYPD stage at which NERSA decides only Eskom's required revenue to cover its reasonable and prudent and efficient costs. NERSA contends that costs subsidies

are irrelevant to this calculation and therefore that it only considers it at the ERTSA's stage.

[101] The DA argues that the ERTSA decision is simply an adjustment to existing tariffs and that it does not entails structural changes or new tariffs other than what was approved by NERSA at the MYPD stage. It argues that the ERTSA's methodology envisages that NERSA decides the new tariffs at the MYPD stage and therefore cross-subsidisation should be determined at that stage already.

[102] For its argument, DA relies on paragraph 6 of the stated methodology which reads as follows:

> "*Costs subsidies and retail tariff structural adjustments.*
>
> *7.1 The energy regulator may, as part of the MYPD, allow cross subsidies between various customer groups.*
>
> *7.2 Costs subsidies approved by the energy regulator should be implemented as part of the annual average tariff increase to affected customer groups. The implementation of cross-subsidies may therefore result in changes to the non-local authority ERTSA and/or the local authority ERTSA for affective customer groups.*
>
> *7.3 The energy regulator may, as part of the MYPD, allow structural adjustments to retail tariffs to a particular group of customers.*
>
> *7.4 Tariffs structural adjustments must be approved by the energy regulator in the MYPD*".

[103] A further string to the DA's bow is that the public is consulted on various issues arising from Eskom's MYPD decision, including affordability, subsidies, economic impact and tariffs and therefore that the socio-economic impact of a tariff increase should be dealt with by way of cross-subsidisation at that stage. In addition hereto the DA argues that the 10% adjustment for the Homelight 20A tariff, although much lower than all the other tariff increases, was arbitrary and without foundation.

NERSA and Eskom's responses and the evaluation of the disputes

[104] The methodology (which is not disputed) enables NERSA to determine the eventual tariff or tariff increase in a two stage process. Firstly it determines Eskom's allowable revenue and average tariff in a forward looking exercise to estimate Eskom's full efficient costs for the supply of electricity in any specific financial year ("FY") and the revenue that it must be allow to collect to cover such costs and reasonable return. Secondly it determines actual tariffs per customer category for non-municipal customers and so actual tariffs to be charges by the Municipalities as licensees.

[105] Section 15(1)(e) of the ERA permits NERSA to consider the issue of cross-subsidisation but does not determine that such consideration need to take place during the first of the two stage process. In fact the ERA does not define the principle of cross-subsidisation. The EPP defines it. The essence of it is that cross-subsidisation is permitted although it results in a under recovery of costs of supply (by charging a lower tariff increase) from one category of customers and permitting another category of customers to cross-subsidise the under recovery by charging it a correspondingly higher tariff increase. Such cross-subsidisation has a neutral effect on Eskom's allowable revenue and therefore the application thereof does not breach Section 15(1)(a).

[106] In its reasons for its ERSTA decision, NERSA explains that it allocates each customer's category contribution to Eskom's allowable revenue, applying cross-subsidisation, when fixing the tariff determination at the ERSTSA stage only. This was entirely permissible, rational and reasonable. For this submission NERSA relied on *Nelson Mandela Bay Business Chambers NPC and Another v National Energy Regulator and Others*[25] where this has been confirmed.

[107] It therefore makes entirely sense that at the stage of determination of Eskom's allowable revenue where the costs of supply and the allowable revenue required to cover the full efficient costs is determined, is not the appropriate stage to determine cross-subsidisation. This stage merely determines the average tariff necessary to cover the allowable revenue and not the actual tariffs per customer category. It is only at the ERSTA's stage that NERSA allocates revenues to different customer categories and determine actual tariffs per customer category (and the resultant increase thereof). Cross-subsidisation can practically only be considered at this stage.

[108] It must also be borne in mind that there is no serious challenge to the ERSTA process which NERSA was bound to comply with unless it fairly and reasonably deviated therefrom[26].

[109] In respect of the 10% tariff increase per Homelight 20A customers, it is clear that it is far lesser increase than for all other categories of customers. The DA does not complain about the fact that the increase is far lesser than others but complains that the percentage increase was determined than arbitrary fashion. NERSA countered that it considered the fact that it wanted to keep the increase for the lowest income or "*poorer*" category of customers as low as possible. It took into account

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[25] (63393/2021) [2022] ZAGPPHC 609 (20 October 2022).
[26] See *Nersa* above.

submissions made at the public consultation process, considered the arguments made there for a single digit increase, considered the consumer price index and exercised reasonable judgment in limiting the increase to the lowest possible increase above a single digit increase.

[110] Insofar as SALGA complained that insufficient public participation was allowed in respect of Eskom's amended application, the regulatory complained of is more illusory than real. The amended application did not alter the final figures but simply some of the motivations for line items. In light of the unchallenged methodology applied in respect of the application of a whole, this irregularity, if it amounts to one at all, is not material.

[111] SALGA's argument that NERSA should also have, in the determination of Eskom's allowable revenue, considered the impacts of fraud, corruption, fruitless and wasteful expenditure implies that a provision should have been made for the losses to be sustained as a result of these factors. In effect, this argument, take into its extreme, would mean that NERSA was obliged to allow Eskom to budget for fraud that it might suffer. This is an untenable proposition. In determining what a prudent and efficient licensee should do to limit its costs, one would rather expect Eskom not to budget for fraud but to take all reasonable steps to prevent fraud, corruption, fruitless and wasteful expenditure. Determine "*wasteful expenditure*" is, by its very nature, had it been included as a line item in Eskom's application, one should be pruned and excluded therefrom.

[112] In any event the methodology includes the Regulatory Clearing Account (RCA). It is crucial component in the methodology for determining of Eskom's tariffs. It is a risk management device ensuring that Eskom and consumers are protected against the consequences of projection based tariffs that proof to be inadequate in the light of the actual experience. The RCA provides for allowable

revenue to be adjusted *ex post facto* on the basis of a retrospective comparison of actual financial facts which occurred in a particular financial year with the projections or allowed application upon which the tariff for that year was determined. Variations between projected and actual revenues and expenses are finally determined at the end of a financial year and the RCA provides for this adjustment. If, on SALGA's version, fraud, corruption, fruitless and wasteful expenditure does occur an impact on Eskom's performance, the methodology provides that this can be addressed in the RCA (*ex post facto*).

[113] There is therefore no need for the determination of any amount to be allowed when considering the allowable revenue and the tariffs. In fact, to do what SALGA asks, would result in an even higher tariff increase to be suffered by the consumers. The NERSA guidelines for prudency assessment also do not contradict this approach. Though in fact intended to improve regulatory certainty in the long terms and provide a transparent framework by ascertaining whether costs were *ex post facto* incurred prudently and without wastage. Costs included in a corrupt and dishonest manner are, in terms of paragraph 6.1.1.3(a) of the NERSA guidelines excluded from such determination, thereby protecting the public.

[114] In respect of the impact of loadshedding on sales forecasts, any actual decline in sales forecasted due to load shedding will also be addressed in the RCA process. Furthermore the long term impact of load shedding on future sales has been accounted for in the statistical regression module that was applied regarding sales forecasts. This module predicted future sales based on actual historical data which then included load shedding. Therefore SALGA's contention that the effects of load shedding had not been considered or taking into account is factually incorrect and it cannot be argued that a relevant consideration had not been considered, resulting in the determination being reviewable.

[115] In respect of overstaffing at Eskom NERSA is entitled to exercise reasonable judgment on what costs to allow in respect of employee costs. NERSA did exactly that and considered the costs of staffing and as set out in its reasons, it produced the amount of revenue applied for by Eskom in a fairly detailed manner.

[116] In respect of the impact of sales from IPP on Eskom's sales forecast, these have been taken into account and, in consideration of Eskom's production plan put forward to meet demand, NERSA allowed Eskom costs to purchase supply from IPP's and that decision was both rational and resulted in a consideration of relevant facts.

[117] In respect of the wholesale diesel account NERSA denied that there was any alleged error of fact. NERSA was entitled to rely on Eskom's application and the contents thereof. The fact is that Eskom does negotiate wholesale discounts with its suppliers of diesel. These have been confirmed by Eskom on oath in the Answering Affidavit. A correct fact has therefore been taken into account by NERSA as opposed to the allegation made by SALGA. In respect of the issue that consumers who purchase electricity directly from Eskom pays a lower tariff than those consumers who purchase electricity from local authorities, the appropriate stage to conduct a detailed assessment of this is conducted when NERSA determines municipal tariffs.[27] NERSA further issues a guideline for Municipalities after the consultation with stakeholders and has taken the differences into account when determining the tariffs.

[118] When all this is considered and the detailed and extensive reasons furnished by NERSA are compared with the attacks on its decisions, we find that none of the review grounds pass muster. All relevant factors have properly and in detail been

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[27] See: *Nelson Mandela Bay Business Chambers NPC v National Energy Regulator (63393/2021) [2022] ZAGPPHC 609..*

considered, the conclusions reached were neither arbitrary nor irrational and the issue of cross-subsidisation was considered at the appropriate stage. We therefore find that both the review applications of the DA and SALGA must fail.

Costs

[119] Various and extensive submissions have been made to us regarding the issue of costs. In respect of the UDM application, the argument was unsurprisingly that the withdrawal of Part B of that application should result in the customary position that occurs pursuant to a withdrawal in terms of Rule 41. This proposition is that a withdrawal amounts to a failure of an application and that the withdrawing should pay the costs of the application. Whilst this is ordinarily so, the withdrawal actually had very little impact on the hearing of the combined applications. The matters were set down to be heard for 4 days before a Full Court and that is what happened. Had the UDM's application continued, the same would have happened and argument might have been curtailed not to exceed the allocated time. Admittedly, Part B of the UDM's application resulted in further affidavits and Heads of Argument being filed additional to that of the aspects raised by the other parties, but, as the parties have indicated, the Court was obliged and entitled to take into account all the evidence placed before it, even in the UDM application, the withdrawal did not prejudice either the Court or any of the other parties. Furthermore we are of the view that the UDM and the other applicants which had joined it, were equally concerned about the infringements of rights guaranteed in the bill of rights in the Constitution. Its litigation as, in fact, the applications of the other parties, all involved the attempt at protection of constitutional rights and the seeking of just and equitable remedies in that regard. We are of the view that the totality of litigation fall squarely within the *Biowatch* [28] principle. Having regard to the nature of the litigation and the conduct of the organs of state who feature as respondents, we are of the view that it

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[28] *Biowatch Trust v Registrar of Genetic Resources and Others* 2009 (6) SA 232 (CC).

would be just and equitable in the exercise of our discretion that each party be ordered to pay its own costs. We are mindful that in respect of the review application NERSA was successful in warding off an attack on its decision but we are similarly of the view that the various applicants have acted in a bona fide manner in pursuance of what they perceived to be necessary for the protection of Constitutional rights. Accordingly, also in this regards, we find that it would be fair for each party to pay its own costs.

Order

[120] The following order is made:

1. It is declared that the non-realisation of the Government's intention in the late 1990s to open the energy sector to competition with private actors and to timeously implement the Independent Power Producer procurement programme, the delays in the decisions and implementation to build Medupi and Kusile power stations , the decisions to run power stations beyond their capabilities without proper maintenance, the failure to ensure or approve sufficient revenue for its services and the failure to take adequate steps to protect Eskom from criminal activity, corruption and "state capture", individually and collectively and the resultant energy crisis manifested by loadshedding and the continued failure to remedy the crisis, constituted and still constitute breaches by the respondent organs of state to protect and promote the rights contained the Bill of Rights.

2. It is specifically declared that these breaches constitute unjustified infringements of the following rights enshrined in the Constitution: the right to human dignity contained in Section 10(5); the right to life contained in Section 11; the right to freedom and security of the person contained in Section 12; the right to an environment that is not harmful to health and

wellbeing contained in Section 24(a); the right of access to healthcare services contained in Section 27(1)(a); the right to access of sufficient food and water contained in Section 27(1)(b); and the right to basic education contained in Section 29(1)(a).

3. The Minister of Electricity is ordered to take all reasonable steps by no later than 31 January 2024, whether in conjunction with Eskom and other organs of state or not, to ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to the following institutions and/or facilities:

   3.1 All "public health establishments" as defined in the National Health Act 61 of 2003, including all hospitals, clinics and other establishments or facilities;

   3.2 All "public schools" as defined in the South African Schools Act 84 of 1996;

   3.3 The "South African Police Service and Police Stations" as envisaged in the South African Police Service Act 68 of 1995, including satellite stations.

4. The respective review applications of the tariff determination by the National Energy Regulator of South Africa of 12 January 2023 are dismissed.

5. Each party is ordered to pay its own costs.

[redacted]

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.

[redacted]

C COLLIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.

[redacted]

J S NYATHI
Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 11, 12, 13 & 14 September 2023

Date of Judgment: 1 December 2023

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Attorney for the 2nd Respondents:	GMI Attorneys, Pretoria
For the 7th Respondent:	Adv K Hofmeyr SC together with Adv L Zikalala
Attorneys for the 7th Respondent:	Malatji & Co Attorneys,