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

CASE NO.: 2023-005779

In the matter between:

UNITED DEMOCRATIC MOVEMENT	First Applicant
INKATHA FREEDOM PARTY	Second Applicant
ACTIONSA	Third Applicant
BUILD ONE SOUTH AFRICA	Fourth Applicant
DR LUFUNO RUDO MATHIVHA	Fifth Applicant
DR TANUSHA RAMDIN	Sixth Applicant
LUKHONA MNGUNI	Seventh applicant
SOUTH AFRICAN FEDERATION OF TRADE UNIONS	Eighth Applicant
NATIONAL UNION OF METALWORKERS OF SOUTH AFRICA	Nineth 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 MOVEMENT	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 LIMITED	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 RESOURSES 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

APPLICANTS' HEADS OF ARGUMENT IN PART A

(EXCLUDING ACTION SA)

TABLE OF CONTENTS

INTRODUCTION

1 On 25 July 2022, during his address to the nation on the actions being taken to address the electricity crisis, President Cyril Ramaphosa said:

> *"There can be no longer any excuses."*[1]

2 Unfortunately, President Ramaphosa has not kept true to his word. The government and Eskom's answering affidavits in this application are riddled with excuses. A thousand pages of them. Beyond a cursory acknowledgment, neither Eskom nor the Government ("**the respondents**") meaningfully engage with the extreme violations of human rights caused by loadshedding. And let us be clear from the outset. On the evidence, President Ramaphosa's government is responsible for the severe loadshedding which the country is experiencing, and has been for at least five years.

3 As a result, this application was brought. It is about the human cost of loadshedding. The applicants say that the Constitution is not suspended during loadshedding. The applicants seek to vindicate certain fundamental rights, which include the rights of access to healthcare; food; water and sanitation; human dignity and basic education. The applicants contend also that where hospitals are subjected to lengthy hours of load shedding, the right to life is violated.

4 These infringements were all avoidable. They stem from the state's failure to provide an uninterrupted supply of electricity, as it is enjoined to do by section 21(5) of the Electricity Regulation Act 4 of 2006 ("**ERA**") and section 5 of the

---

[1] Government Answering Affidavit ("**GAA**") F14: 182 – 190, Annexure **"CMR4"**

National Energy Act, 34 of 2008 (**"NEA"**). The relief sought is to restore the electricity to the sectors identified in prayer 3 of the amended notice of motion. The applicants have a right to this remedy because the state respondents are enjoined by the Constitution and the law to provide them with an uninterrupted supply of electricity. They must do so in this case because there is an undisputed emergency which is causing irremediable harm to the affected sectors. The applicants have no feasible alternative but to turn to this court to enforce their rights under the law and the Constitution.

5 The respondents do not deny the contravention of the constitutional rights. Nor can they; the evidence is overwhelming. They do not deny also that the applicants have a right to an uninterrupted supply of electricity. Instead, Eskom raises these defences:

5.1 We are told that the relief will cause a national blackout. If load shedding is not conducted to the extent that, and in the manner that it is currently being conducted, there will be a national blackout of unforetold duration and proportion. In other words, there is nothing more which can be done; and

5.2 We are also told that there are extensive plans in place to ensure that, within the next 24 months, load shedding will effectively be solved. There is no need for additional measures, plans, accountability, or oversight, because the respondents have everything under control.

6 Neither position is tenable on the evidence or the law. As these heads show, the risk of a blackout is exaggerated and there is no evidence that load shedding will

be resolved within 24 months or in accordance with Eskom's Generation Recovery Plan[2], as alleged. But there is no constitutionally acceptable reason why hospitals, schools, police stations must countenance blackouts for another two years.

7 The President's argument is incredible. He argues that "[n]one of the government respondents cited herein have a Constitutional obligation to supply electricity to the people of the Republic".[3] He says that this is a local government competence, and *"if municipalities do not for one reason or another supply electricity to their people, the Constitution does not say that the President must go down to local government and do it…"*[4] This is obviously misguided. The respondents have a constitutional and statutory responsibility to provide an uninterrupted supply of electricity, as these submissions demonstrate.

8 Since the respondents do not deny the contravention of the constitutional rights pleaded, this must be taken as being established, and the only question before this court is whether the relief sought is just and equitable. Two arguments are made on the relief sought. First, as stated above, these heads will show that the relief sought is necessary, possible and practical. Second, the applicants argue that the remedy sought, i.e. an uninterrupted supply of electricity to the vulnerable sectors is just and equitable.

9 In what follows these heads first outline briefly the material facts in this application. Second, they demonstrates that the relief sought by the applicants

---

2 Eskom Answering Affidavit (**"EAA"**) F13: 528, Annexure **AA30**

3 GAA F14:17 at para 11

4 GAA F14: 22 at para 28

can be implemented without the risk of a blackout. Third, they will demonstrate that the "plans" which the respondents rely on, are no plans at all. Fourth, they examine why the duty to supply electricity is not that of local government and then proceed to explain why it is the respondents' duty to provide the consumers with an uninterrupted supply of electricity. Finally, these heads address why it is just and equitable for the court to grant the relief sought in prayers 3 and 4 of the amended notice of motion, alternatively prayer 5.

THE ISSUES TO BE DETERMINED

10 Eskom is a publicly controlled State-Owned Entity ("SoE") operating in a sector that is heavily regulated by the ERA; the National Energy Regulator Act, 40 of 2002 ("**NERA**"); and NEA. In 2001, the government promulgated the Eskom Conversion Act, 13 of 2001 ("**the Eskom Conversion Act"**) in terms of which it issued 100% of Eskom's issued share capital to itself. The shares are currently held by the Department of Minerals and Energy Affairs.

11 The government has a policy and regulatory role in the administration of Eskom. It determines the energy agenda by legislating for electricity generation, transmission and distribution. Eskom is no more than the entity through which the state implements its responsibilities under the ERA and NEA. It is licensed by the Regulator, the National Energy Regulator of South Africa ("**NERSA**"), to carry out the functions set out in section 14 of the ERA, within the realm of the powers vested in it by section 21. It has no powers to determine its own generation, transmission and distribution functions. These are determined by the state.

12 The question which this court must answer is whether Eskom and the state have contravened their constitutional duty to provide an uninterrupted supply of electricity, particularly to the identified critical sectors, in accordance with the regulatory framework.

13 The applicants contend they have and that the reasons furnished for load shedding constitute no more than unjustifiable excuses.

MATERIAL FACTS

14 The current grip of the energy crisis is attributable to two factors.

14.1 The first is the state's failure to both maintain the grid and create new generation capacity despite being aware since 1998 that Eskom would run out of reserve power by 2007.

14.2 The second is the derelict management of Eskom by its former GCE, Mr De Ruyter and the state's failure to call him to account.

The White Paper: Failure to Implement Policy Decisions

15 The White Paper on the Energy Policy of the Republic of South Africa (**"the White Paper"**), was published in 1998. It set the "government policy regarding the supply and consumption of energy for the next decade".[5] Its aim was to preserve an appropriate balance between energy demand and supply, and it differentiated between the state's "primary role as a policy making and regulatory entity of the energy sector, and its secondary role as a facilitator in the supply of

[5] Replying Affidavit to Eskom (**"RAE"**) F22:16 at para 28; F22: 98"**BHH3**"

energy services".[6] In formulating an appropriate policy on demand and supply, the White Paper records that "the range of basic needs requiring energy inputs show that normal life would be impossible without energy".[7] These basic needs are identified in the White Paper as water supply, health care, public lighting, community facilities and transport.[8] (emphasis added)

16 One of the key issues addressed by Part 3 of the White Paper concerned the supply of electricity and how the state was going to meet the growth in electricity demand. Part 3 records and the Department of Minerals and Energy cautioned that "Eskom's present generation capacity surplus will be fully utilised by 2007."[9] The policy directs that "[t]imely steps will have to be taken to ensure that demand does not exceed the available supply capacity and that appropriate strategies, including those with long lead times, are implemented in time. The next decision on supply-side investments will probably have to be taken by the end of 1999 to ensure that the electricity needs of the next decade are met".[10]

17 The White Paper did not recommend any powers for Eskom, other than to be the state entity for the supply of electricity, which meant generating, transmitting and distributing power. It reserved for the state the role to adopt law and policies on the generation and supply of electricity. Eskom's role as a supplier was, in terms of the White Paper, limited to carrying out research that covered issues such as

[6] RAE F22:16 to 22 – 17 at para 29

[7] RAE F22:17 at para 30

[8] Id

[9] Id at para 31

[10] Id at para 32

establishing the needs of clients; and ensuring efficiency in supply and consumption, among others.[11]

18 The state failed to implement the recommendations emanating from the White Paper to develop policies in time that would manage the challenges it identified. The starkest failures were the failure to diversify the supply of electricity and the state's failure to plan its generation strategy or future IRPs based on the incontrovertible fact that by 2007, Eskom's reserves and surplus would be depleted.[12] What the White Paper demonstrates is that all of the respondents were aware since 1998 that if these measures were not adopted, there was a risk that by 1999, South Africa could run out of power.[13] They knew, as the White Paper stated that "normal life would be impossible without energy" and that the overwhelming number of South Africans depend on electricity for their energy needs.

19 Eskom was stripped of regulatory authority to address its generation constraints. Between 1998 and 2007 the government policy was that Eskom should not expand its generating capacity[14] and while the state assumed responsibility for generation as early as 1998, it did not act on that obligation. This much was conceded by Mr Vali Moosa, the former Board Chair in his February 2007 presentation to the Portfolio Committee.[15]

[11] RAE F22:19 at para 34

[12] RAE F22:21 at para 37

[13] Id at para 37

[14] Id at para 38

[15] RAE F22:22 at para 39

20 Medupi and Kusile were only commissioned in 2007.[16] It will be recalled that the White Paper recommended that the energy action plan for the next decade, including the challenges on new generation capacity had to be determined by 1999. Thereafter, the construction of both power stations ran some eight years late. They were well beyond their budget and beset with design flaws.[17] Kusile is only set for completion in 2026 and Medupi was completed in 2021, 14 years after it was commissioned. The plan was for both power stations to be completed in 2014, but neither met their deadline.[18] The result is that neither can deliver the required capacity to the grid.

Failure to Maintain the Generating Fleet

21 Adding to these challenges is the failure by Eskom and the state respondents to maintain Eskom's current fleet of existing power stations. The state in its adopted IRPs elected to defer the maintenance of the generating fleet.[19] Eskom used money allocated for maintenance to pay debt.[20] The decision to defer maintenance was taken even when the state, as policymaker knew that "*supply constraints are further complicated and increased by the urgent need to undertake critical maintenance on the generation assets over this period*".[21] This challenge was identified in the 2010 IRP and applied for the foreseeable future during the period 2010 to 2017.[22] The IRP concludes that the absence of such

[16] Id

[17] Id

[18] Id

[19] Id at para 40; and F13:173, Annexure **AA4**

[20] RAE F22:29 – 30 at para 69

[21] RAE F22:19-20 at para 40

[22] Id F22:24 at para 43

maintenance would increase the risk of serious breakdowns and outages. It also records that any delay in finalising the construction of Medupi and Kusile would significantly impact the security of the electricity supply.[23]

22 In its updated IRP of November 2013,[24] the government acknowledges that it delayed maintenance on the generation fleet since 2008.[25] In response a New Generation Maintenance Strategy was adopted to "*ensure that required maintenance is carried out on key identified generators, regardless of the demand-supply balance*".[26] The objective of the New Generation Maintenance Strategy was "*to arrest the decline in performance and return the average availability factor of the current fleet to 80% over the next ten years"*.[27] The strategy was never adopted and today, some 10 years later, the Energy Availability Factor ("EAF") is at an abysmal 56%.[28]

23 But the insufficient generation capacity markedly improved when Eskom's previous Board and management adopted an aggressive maintenance strategy. The reserves increased by 23% and there was no load shedding in 2016 and 2017.[29] Since 2018, the current magnitude of the crisis can no longer be ascribed to insufficient generation capacity only. The root cause of this problem is the decision of the current Board not to maintain the fleet and the admitted dereliction

[23] Id F22: 22 at para 39

[24] Id F22:23 at para 41; AA, and F13: 175, Annexure **AA5**

[25] Id "**AA5**" at pgs 5-8 at para3.13

[26] RAE F22:23 at para 41

[27] Id

[28] Id

[29] Id at para 42

of Eskom's former GCE in electing to focus his efforts almost exclusively on the Just Energy Transition Programme ("the JET").[30]

24 The fleet was not maintained because, as appears from paragraph 3.16 of the updated IRP, of the government's policy decision that "*coal-fired power stations are all expected to be decommissioned at the end of 50-year plant life*". [31] This decision was made even though the government knew, and conceded in the updated IRP that the lifespan of the fleet could be extended and that this was an economically viable option.[32] Again, the previous Board implemented this decision when it decided in 2017 to extend the life of the fleet. This decision was retracted by Eskom's current administration.[33]

25 In its November 2022 report to NERSA,[34] Eskom advised that the performance of the generating fleet was below expectation. Eskom records that the latest bout of load shedding is attributable to breakdowns in the generation power stations.[35] This is not the case. Since 2018, the current severe instances of load reduction is attributable to the failure to maintain the generating fleet even though, in its 2013 updated IRP the state adopted the New Generation Maintenance Strategy to maintain the ailing fleet. The failure to maintain the fleet was of course compounded by the fact that the policy directives in the White Paper on increasing new generation capacity and dealing with the shortfall that would arise

[30] RAE F22:24 - 25 at para 57

[31] Id F22:23 at para 43

[32] Id

[33] Id

[34] Id at para 44R

[35] Id

in 2007, were never implemented. However, even with a steady 1% annual decrease in the demand for electricity, which created the time and resources needed to conduct necessary maintenance,[36] Eskom has not maintained the generating fleet.

Load shedding post-2018

26 We must dispense with the capacity discussion. Post 2018 NUMSA observes that the main reason for loadshedding is not the absence of capacity, but the failure to maintain the fleet, and the gross dereliction of duty by the management of Eskom.[37]

27 Since 2014 Eskom added new generation capacity, some of which was generated by Medupi and Kusile. Additional capacity also came from Renewable Energy Independent Power Producers ("REIPPs").[38]

28 The result was a nominal increase in Eskom's capacity. This was coupled with a drop in the peak demand from 2014 to 2022 and a 4.6% decline in sales. As a result Eskom's generation capacity increased by 6.8%, and thus NUMSA concludes that "*having no generation capacity is simply not an excuse"*. [39]

29 What is more Eskom was allocated money to maintain the fleet. If it properly maintained the fleet, there would be no problem of an insufficient generation capacity. Mr Ted Blom indicates that some decisions made by the current

[36] Id F22: 25 at para 45

[37] Id F22: 26 at para 49

[38] Id at para 50

[39] Id F22:27 at para 51

management of Eskom have included redirecting the moneys from the maintenance budget to payment of debt. This is the real reason behind the alleged insufficient generating capacity.

Gross Dereliction of Duty under De Ruyter

30 Load shedding substantially worsened under the tenure of Mr De Ruyter. Before he joined Eskom, the 2017 Medium Term System Capacity Adequacy Outlook ("**MTSAO**") concluded that Eskom had excess capacity for the next five years, which the expert contends formed the basis of the decision not to conclude REIPP agreements in 2017,[40] but De Ruyter managed Eskom poorly in three respects. First, he failed to increase the EAF. Second, he was part of a process in 2018 that saw the withdrawal of the decision to extend the lifespan of Eskom's fleet by 10 years. Lastly, he did not prioritise the maintenance of plants, even when the circumstances were ripe for him to do so since electricity demand was declining by 1% annually.[41]

31 The current return of load shedding, coupled with the ever-increasing levels of outages, coincides with the appointment of the new management and Board. The failure to maintain the generating fleet has eroded Eskom's operational efficiency and resulted in coal generating units experiencing chronic breakdowns over the last five years. The symptom, but by no means the cause, is a rapidly declining EAF from 78% to 56% "*culminating in rolling blackouts*".[42]

[40] Id at para 52

[41] Id at para 53

[42] Id F22:28 at para 54

32 Therefore, contrary to what Mr De Ruyter alleges under oath, the current crisis is precipitated by the failure to maintain Eskom's fleet and De Ruyter's management decisions where he was pursuing his own agenda of "*chasing renewables"* at the cost of his actual job of fixing power stations.[43]

33 De Ruyter had no authority to decide to pursue a JET at the expense of Eskom's main fleet, which is the only available and viable infrastructure to deliver electricity at the scale the nation needs to meet its consumption requirements.

34 All of the above is compounded by the fact that while Mr De Ruyter contends that the energy crisis is attributable to Eskom prioritising the nation's immediate energy supply needs at the expense of investing in and maintaining its infrastructure, both the Minister of Public Enterprises and Mr Mpho Makwana are *ad idem* that Mr De Ruyter was derelict in his duty. They attribute his dereliction to his insubordinate attitude in electing to focus on REIPPs and the JET. The Chair of the Board is emphatic that this approach was "*unpalatable*", and that the GCE implemented it at the expense of the job at hand, which was an instruction to fix and maintain Eskom's existing fleet so that it performed at full capacity.[44] The Chair goes on that this was not an "*either/or requirement*". The GCE was required to both maintain plants and facilitate the JET programme.

35 The leadership of Eskom did not deliver on both Eskom's technical and financial priorities. At the level of technical performance, they were required to manage Eskom's assets on behalf of the Board with the primary purpose increasing the

[43] Id at para 55

[44] Id F22:29 at para 57

EAF. But instead they shifted focus from Eskom's existing capital infrastructure valued at trillions of rands, "*which requires hands on boots on the ground leadership*", to have EAF performance.[45] This accords with NUMSA's submission that the current crisis is due to the incompetent management of the EAF. The Chair informed the nation that Mr De Ruyter was compromised in his ability to do so because of his *"bias in chasing renewables"*, which the Chair conceded could not deliver power at the same scale or capability of Eskom's current ailing fleet. This too accords with the view by NUMSA's experts that too much focus was placed on REIPPs.[46]

36 The Minister of Public Enterprises has since publicly accused Mr De Ruyter of "spending too much time promoting a transition to green energy and paying inadequate attention to fixing its broken coal-burning plants".[47] What has not been explained is why the Board and the Minister did nothing. Why do they speak only after Mr De Ruyter's exit? This is why this court cannot decide who is responsible among the respondents. All of them are collectively responsible for the crisis of load shedding.

37 Mr De Ruyter also gave an interview with Ms Anika Larsen of eNCA in which he admits that his <u>focus</u> was on *"improving climate resilience with the use of concessional funding",* which he described as *"extraordinarily generous*". He also

[45] Id at para 58

[46] Id

[47] Id F22: 30 at paras 58 and 59

admits the state of neglect and disrepair of Eskom's fleet and says *"that Eskom cannot be returned to its former glory."* He says the following:[48]

> *"Once you have so badly neglected mechanical equipment that its falling apart, and eroded your skills base to the point where people are no longer following basic principles of good operating practice, to turn this around is an enormous challenge. It is not feasible to do this".*

38 He concludes that it is <u>not necessary</u> to maintain plants "when looking at the latest technologies from a cost competitive point of view and the significant appetite of the private sector to invest in generation, Eskom will overtime morph into a transmission and distribution company which offers facilities for the private sector to connect to the grid".[49]

39 But this is not what Mr De Ruyter was employed for. He was not employed to open the space for private sector participation in generation. His job was to ensure that Eskom generates electricity. But his interview shows that Eskom could be allowed to "morph" into a transmission and distribution company.

40 But the statement as to the future of Eskom also shows that Mr De Ruyter would have breached the NERSA licence. Eskom is licenced to generate electricity not to self-immolate. The Minister who represents the national government seems to have unequivocally committed to the maintenance of Eskom's fleet. But according to the Board Chair, this was not the GCE's operational priority.

[48] F22: 27 at para 61

[49] Id at para 62

Instead, as appears from the Chair's interview, the GCE "*was compromised by his bias of chasing renewables, which are equally important but will not deliver at scale or at the same capability that our existing fleet can*".[50]

41 Mr De Ruyter also seems to have failed to account to the Board for his decision to pursue renewables at the expense of plant maintenance. The Board Chair also revealed that the GCE resigned before he could be called to account for how he managed Eskom. The Chair added that if the GCE attended his performance review, he would have been told to prioritise the maintenance of Eskom's fleet, which is valued at trillions.[51]

The Regurgitation of Response Strategies and no action

42 In 2014 NERSA requested a report from Eskom on the causes of load shedding. The confidential report is relied on by NUMSA's expert[52] and titled "Preliminary Report – Load Shedding Investigation". In that report Eskom explained its position to NERSA in identical terms to De Ruyter's current affidavit.[53] This begs the question that if the justifications have not changed, what has been done in the interim and if nothing, why is no one is being held accountable for the failure to act. That report can be made available to the Court if required.

[50] F22:25 at para 58

[51] Id

[52] F21:14 -16 at para 12.2

[53] Id at para 21

43 NUMSA has also recorded that the same reasons have been advanced for the delay in building new capacity.[54]

44 Eskom also provided NERSA with the same response strategy in 2014[55], and to date fail to explain why the response strategy was not historically implemented. Further, on 2 July 2015, Eskom released a redacted version of the "Dentons Report",[56] which dealt with the investigation into the status of the business and challenges experienced by Eskom.

45 NUMSA observes that "upon consideration of the Dentons Report is the fact that the problems and solutions have largely remained the same which is indicative of Eskom's ongoing failure to act".[57]

46 There is therefore no reason to believe that the current reiteration of the intended response to the electricity crisis will be implemented and/or effective. Load shedding existed since 2006, and the underlying reasons, therefore, and Eskom and the government's response have remained the same (at least since 2014) with no material change. Therefore, Eskom and the state can only be compelled to carry out their constitutional obligations through the intervention of this court.

[54] Id

[55] F21:18 at para 14

[56] F21: 98

[57] F21:18 at para 14.2

THE IMPACT OF LOAD SHEDDING: THE HUMAN COST AND GROSS VIOLATIONS OF FUNDAMENTAL RIGHTS

47 The respondents' failure to provide electricity contravenes the negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to a number of entrenched constitutional rights. It is a trite principle that at the very minimum these socio-economic rights can and must be negatively protected from improper invasion.[58] The failure to provide electricity is an improper invasion.

Public health facilities (sections 11 and 27(1)(b) of the Constitution)

48 Load shedding is an ongoing threat to the Republic's ability to provide necessary health care to South Africans who may need it, and do not have the luxury of private health care (which is the reality of most South Africans). The evidence on record is that the threat is grave enough to have already resulted in the death of patients. This has innumerable consequences for the rights to life and access to health care, which are entrenched in the Bill of Rights.

49 The right to life is found in section 11 of the Constitution, which simply states that "*[e]veryone has the right to life*".

50 The right to life is the cornerstone of our Bill of Rights, and the central pillar on which the enjoyment of all the other rights in the Bill rests. It is for this reason that the drafters of our Constitution departed from the dominant international and

[58] Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa 1996 (4) SA 744 (CC) at para 10

foreign law wisdom at the time of its making, and entrenched the right as an unqualified right to life.

51 In *Makwanyane*, Chaskalson P described the right to life together with the right to dignity as "*the most important of all human rights, and the source of all other personal rights*".[59] The unqualified nature of the right to life featured extensively in the Court's reasoning that it was incompatible with the death penalty.[60]

52 We submit that:

52.1 The unqualified nature of the right to life under our Constitution means that the right is not subject to the State's resource constraints. In other words: Eskom cannot, as it seemingly does in this case, say "*I know I am interfering with your right to life, but my budget constraints require me to do so*".

52.2 A proper reading of section 11 is that it does not permit Eskom to interfere with the right to life when implementing loadshedding. It acts unconstitutionally when it does so.

53 In this case, the interference with the right to life is closely related to the violation of the right of access to health care services in section 27(1)(a) of the Constitution, which the State has an obligation progressively to realise.[61]

---

[59] S v Makwanyane and Another 1995 (3) SA 391

[60] Id at paras 39, 85, 157, 217, 324, 350 and 354

[61] Section 27(2) of the Constitution of South Africa, 1996

54 We submit, in relation to the right of access to health care services, that load shedding is a deliberately retrogressive measure[62] in that:

54.1 It takes away the previously existing enjoyment of the right of access to health care services by South Africans; and

54.2 Derogates from the State's previously existing ability to meet its positive obligation progressively to realise the right, as required by section 27(2) the Constitution.

55 The applicants have put forward extensive evidence of egregious breaches to the rights to life and access to the health caused by load shedding. As is set out in the affidavit of Professor Mathiva, load shedding:

55.1 damages sensitive medical equipment, causing it to become unreliable thereafter, which is life threatening;[63]

55.2 data processing operations repeatedly breakdown, drastically reducing the efficiency of hospitals, which is life threatening;[64]

55.3 central heating and cooling systems of hospitals are damaged or rendered non-functional which interferes with multiple diagnostic tests, which is life threatening;[65]

---

[62] See General Comment 3 (1990) of the UN Committee on Economic, Social and Cultural Rights 'The Nature of States Parties Obligations' at para 9

[63] Founding Affidavit ("**FA**"), F03, p 03 – 31at para 9 Annexure FA4

[64] FA F03:31at paras 11-12, Annexure **FA4**

[65] If F03:32 at para 13.5, Annexure **FA4**

55.4 central heating and cooling systems of hospitals are damaged or rendered non-functional, which can cause new-borns to suffer hypothermia or hyperthermia, which can kill them;[66]

55.5 central heating and cooling systems of hospitals are damaged or rendered non-functional, which means that proper infection protocol cannot be followed, which is life threatening;[67]

55.6 laboratory services are delayed, which delays patient treatment, and patient turnover, leading to a shortage of available beds;[68]

55.7 specimens cannot be properly stored, leading them to decay and rendering test results inaccurate, which is life threatening;[69]

55.8 pharmaceutical drugs cannot be properly stored, leading to their efficacy and safety being compromised, which is life threatening;[70]

55.9 patients whose procedures are not as urgent have to have their surgeries or procedures cancelled, which results in the worsening of their conditions until they become more urgent;[71]

---

66 FA F03:33 at para 13.10.2, Annexure **FA4**

67 Id at para 13.10.8

68 Id at paras 14.1 - 14.3

69 Id at para 14.4

70 Id at para 15.1

71 Id at para 17

55.10 the integrity of medication, which must be stored at specific temperatures, is compromised, which is life threatening;[72] and

55.11 ventilators and oxygenators for home treatment need to be recharged, but load shedding timetables do not allow sufficient time for them to fully charge, leading people to suffocate, possibly to death.[73] Professor Mathiva's own grandson almost suffocated to death as a result of this problem.[74]

56 Professor Mathiva concludes her affidavit by saying:

> *"there have been several instances where patients succumb and the cause of death is described in many different ways <u>in circumstances where the cause of death may have actually been due to load shedding."</u>*

57 The Nurses Union have said that:

> *"If the electricity goes off while a nurse is overseeing the delivery of a baby, a lot can go wrong."*[75]

and that:

> *"It's a matter of life and death because the mortality rates go up with every power cut. Especially if a person is on resuscitation or oxygen. If*

---

[72] Id at para 36

[73] Id at para 37

[74] Id at para 24

[75] FA F03:16 ; Annexure **FA4**

things don't go as planned, someone dies every time there is a power cut."[76]

58 That is the situation for those who even manage to receive treatment at a public hospital. The Health and Allied Indaba Trade Union aver that during load shedding, many patients are simply turned away.[77]

59 People are dying. The respondents utterly fail to address this fact beyond averring that hospitals ought to have back-up generators. Those that do, have to choose between feeding the patients or buying diesel.[78] This, and the inability to properly store food, has led to patients suffering from malnutrition.[79]

60 Load shedding is also compromising health workers themselves. The Minister of the Department of Health notes that:

"The security in the health facilities is also compromised during the blackout times, especially in the evenings… Health workers feel vulnerable and don't feel safe."[80]

61 The Nurses Union have said that:

---

[76] Id

[77] Id at para 3

[78] Id at para 6

[79] Id at para 11

[80] FA F03:15 at Annexure **FA3**

> *"Psychologically, it is bad. It's depressing looking at the load shedding schedule knowing that a power cut will affect your shift. Especially during night shifts…"*[81]

and that

> *"…healthcare workers are more vulnerable to criminal activities during load shedding. Leaving work after a night shift is the perfect time for criminals to strike."*[82]

62 Importantly, 80% of South Africans rely on public health facilities. The respondents contend that they have no obligation to do anything about the fact that the above is the standard of care available for the vast majority of South Africans, as a direct result of their own negligence.

63 The breaches to the rights to life and access to health care by the respondents are thus conscious, wilful and deliberately retrogressive.

Public schools (section 29(1) of the Constitution)

64 Load shedding interferes with the right to education in section 29(1) of the Constitution.

---

81 FA F03:16 – 22, Annexure **FA4**

82 Id

65 Section 29(1) of the Constitution states that "*[e]veryone has the right— (a) to a basic education, including adult basic education*". Similarly to the right to life, this right is not qualified.

66 As is now trite, a purposive approach must be taken to interpreting a constitutional right, and this requires that the right be construed within its context, history and background.[83]

67 The right to education is of enormous historical significance in South Africa. It is trite that the Republic's history in the area of education is one of unequal access and exclusion owing to the unjust laws and policies which permeated the apartheid regime. As the Constitutional Court noted in *Hoërskool Ermelo*,[84] the effect of the apartheid regime based on division was the following:

> "*Apartheid has left us with many scars. The worst of these must be the vast discrepancy in access to public and private resources. The cardinal fault line of our past oppression ran along race, class and gender. It authorised a hierarchy of privilege and disadvantage. Unequal access to opportunity prevailed in every domain. Access to private or public education was no exception. While much remedial work has been done since the advent of constitutional democracy, sadly deep social disparities and resultant social inequity are still with us.*

[83] Soobramoney v Minister of Health, Kwazulu-Natal 1998 (1) SA 765 (CC) paras 16-7

[84] Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo and Another 2010 (2) SA 415 (CC)

It is so that white public schools were hugely better resourced than black schools. They were lavishly treated by the apartheid government. It is also true that they served and were shored up by relatively affluent white communities. On the other hand, formerly black public schools have been and by and large remain scantily resourced. They were deliberately funded stingily by the apartheid government. Also, they served in the main and were supported by relatively deprived black communities. That is why perhaps the most abiding and debilitating legacy of our past is an unequal distribution of skills and competencies acquired through education.

In an unconcealed design, the Constitution ardently demands that this social unevenness be addressed by a radical transformation of society as a whole and of public education in particular."[85]

68 The Constitutional Court further noted thus in *Juma Musjid*:

"*The inadequacy of schooling facilities, particularly for many blacks was entrenched by the formal institution of apartheid, after 1948, when segregation even in education and schools in South Africa was codified. Today, the lasting effects of the educational segregation of apartheid are discernible in the systemic problems of inadequate facilities and the discrepancy in the level of basic education for the majority of learners.*"[86]

[85] Id at para 46

[86] Governing Body of the Juma Musjid Primary School v Essay NO (Centre for Child Law and Another as Amici Curiae) 2011 (8) BCLR 761 (CC) para 16

69 It is self-evident from the above that the Constitution, through the right to education in section 29 and its other provisions, places an enormous responsibility on the State to redress the inequities in the Republic's education system.

70 The right to education must thus be construed with due regard to its role within the broader project of transformation which the Constitution requires. The State is required fulfil the right in a manner that enables human dignity and the achievement of equality and freedom,[87] and pursues formal and substantive equality.[88] In fulfilling the right, the State is required to further the constitutional promise to "*heal the divisions of the past*" and "*improve the quality of life of all citizens and free the potential of each person*".[89]

71 The transformative content of the right to education in South Africa is wholly defeated and made impossible under load shedding, which widens rather than bridges the inequalities in our education system. The applicants have put up jarring evidence of the consequences of load shedding for Black and poor people.

72 During load shedding, township schools are closing and sending children home, where they are similarly unable to attend to their schoolwork.[90]

---

87 Section 1(d) of the Constitution of South Africa, 1996

88 Sections 9(1) and (2). See also *Hoërskool Ermelo* para 47

89 Preamble of the Constitution

90 FA F02:26 at para 69

73 It is not enough for the respondents' to glibly remark that teachers must organise their day around load shedding. Many schools still have apartheid infrastructure, and no natural light in their classrooms.[91] It is not just a matter of smartboards not working, it is a matter of not being able to see at all.

74 The effect of load shedding coupled with the Covid 19 crisis means that there is a generation of learners who have had a significant gap in their schooling (specifically, learners who are black and poor and fully reliant on public education).[92] 78% of Grade 4 learners cannot read for basic meaning in any language.[93] This means that 8 out of 10 nine-year-old South Africans are functionally illiterate.[94]

75 Load shedding, and trying to learn in total darkness, also has a harmful impact on the psychology of growing children, with 42% of South African children experiencing bullying.[95]

76 Even when schools do remain open, the safety of children and teachers alike is compromised as a result of the improper functioning of electricity generated water pumps.[96] It is truly astonishing that the respondents attempt to downplay this risk by pointing out that many South African schools do not even have

---

91 Id at para 70

92 Id at paras 71 – 72

93 Id at para 72

94 Id

95 Id at para 73

96 FA F03:60 - 61, Annexure **FA08**

water.[97] However, this is consistent with their pattern of justifying one failure on the basis of a previous one.

77 Lastly, necessary central databases are compromised, making it impossible to enter crucial information onto those databases. This is undoubtedly why the 2022 matric results were released late, which has not happened since 1994.[98]

78 The culmination of all these impacts is a situation where poor and Black students who are fully reliant on public education and township schools in particular, are quickly falling several years behind their wealthier and white counterparts who can afford to attend private schools. That is a disgrace to the right to education, and it is also a disgrace to one of the fundamental principles of our Constitution: equality. By sheer neglect and incompetence, the respondents are undermining every effort South Africa has made since the fall of apartheid to ensure that all children, whatever their race, receive a quality education.

The police service (sections 11 and 12 of the Constitution)

79 Load shedding fundamentally undermines the ability of the SAPS to serve South Africa. In a country with record-breakingly high crime rates, further weakening the police service is simply unacceptable, and is a threat to the right to life and the right to freedom and security of the person in section 12 of the Constitution. The latter right includes the right "*to be free from all forms of violence from either public or private sources*".[99]

---

97 GAA F14:61 at para 116.7

98 FA F02:28 at para 74

99 Section 12(1)(c) of the Constitution of South Africa, 1996

80 Like the right to life, the right to safety and security of the person is couched in unqualified terms in section 12. It is simply non-negotiable, and is not subject to resource considerations. The right places a positive duty on the State to protect the public from violence on their person.

81 As has been set out in the previous sections, load shedding compromises the safety of everyone from healthcare workers to learners. Nali'bali notes an observable increase in crime in the areas they patrol.[100]

82 Thus, load shedding has a compounding impact on the basic safety of South African citizens. It is simply not enough for the respondents to contend that police stations ought to have backup generators when they themselves aver that diesel is prohibitively expensive and unreliably available.

Water services (section 27(1)(b) and various other rights)

83 When electricity supply is compromised, the water systems which depend on that electricity to operate are also compromised. The result is that surrounding businesses, homes, schools, healthcare facilities and so forth are left without water supply.[101] The immediate consequence is a decline in hygiene, which is in turn a health risk.

[100] FA F03: 62, Annexure **FA9**

[101] FA,F02:31 at para 83.2

84 In the same vein, when water treatments facilities are unable to operate, there is a drastically heightened risk that sewage will spill into the streets.[102] That is a public health risk.

85 In 2022, during the height of the holiday and tourism season, beaches needed to be shut down as a result of sewage leaks, which were caused by wastewater pumps breaking down as a direct consequence of load shedding.[103]

86 The mayor of Cape Town put it well when he remarked of load shedding:

> *"The most profound effect is major stress on all or infrastructure."*

87 Importantly, the respondents cannot rely on the fact that some water facilities have back-up generators for the reasons previously addressed.

88 The retrogressive infringement on the right of access to water by load shedding therefore results in the infringement of various other rights in the Bill of Rights, including *inter alia* the rights to dignity, life, health care, education and freedom of trade.

Micro, very small, and small businesses (various rights in the Constitution)

89 Lastly, load shedding has had and continues to have a particularly destructive effect on the smaller businesses upon which so many South Africans depend for

[102] Id at para 83.3

[103] FA F03: 41 – 43, Annexure **FA5**

their livelihoods. This has implications for a number of rights, including sections 10, 22 and 27 of the Constitution.

90 Attached to the application are a number of business owner who describe how load shedding means that their businesses are increasingly bound to fail. However, even the Minister of Small Business development is in agreement on the devastating impact of load shedding. Her statement said:

> *"SMMEs are particularly hard hit by continued power outages. Since many cannot afford alternative power sources such as generators, they are forced to pause trading during load shedding. The Minister understands that some small businesses resort to selling perishable goods such as meat and vegetables at low prices, to avoid them rotting away. It goes without saying that this eats away on their much needed income…*
>
> *This sector was devastated and is still barely recovering from the ruinous effects of Covid-19. We cannot afford losing more businesses and jobs."*[104]

91 Many South Africans depend on their businesses for both their livelihood and for their dignity. Load shedding, increasingly, is robbing them of both.

[104] FA F03:63, Annexure **FA10**

Electronic communications networks (various rights in the Constitution)

92 Today's world is fundamentally reliant on the ability to communicate electronically. It is a matter not only of convenience, but the ability for society to function on the most basic level.

93 Load shedding compromises the telecommunications sector. The report by Dr Leoka notes that:

> *"The telecommunications sector is probably one of the most directly affected sectors from an operational point of view. From stage 4 onwards, telecommunication batteries cannot fully recharge, resulting in a loss of connectivity… Mobile companies are now compelled to install generators and alternative power supplies at the tower sites to mitigate against the decline in battery loss. Mobile companies are spending R2billion on batteries alone…"*[105]

94 The consequences of this are dire. Dr Leoka notes that the loss of connectivity caused by load shedding is *"affecting productivity of business, households and students and thus harming economic growth."*[106]

95 But the problem does not end there. By compromising the telecommunications sector, load shedding also compromises national security, as key security persons are rendered unable to communicate.[107]

---

[105] FA F03:65 – 72, Annexure **FA11**

[106] Id

[107] Id

96 Put simply, by compromising this sector, load shedding serves to compromise every other sector too, from businesses to security services to healthcare.

The broader economic impact of load shedding

97 Above and beyond the human cost of load shedding, there is a dire economic cost too. Dr Leoka notes in her report that:

97.1 1 hour of stage 6 load shedding costs the economy R500 million;[108]

97.2 1 day of stage 6 load shedding costs the economy R4 billion;[109]

97.3 In 2020, the CSIR released a report saying that 10 years of load shedding (up to and including 2019) cost the economy R338 billion;[110]

97.4 When one factors in the load shedding between 2020 and 2022, that number increases to R1,2 trillion.[111] does not include 2023, which has already seen more stage 6 level load shedding than 2022;

97.5 R1,2 trillion is equivalent to one quarter of South Africa's entire GDP;[112] and

[108] Id

[109] Id

[110] Id

[111] Id

[112] Id

97.6 This amount far exceeds the budget allocated to police services, courts and prisons, and science and innovation.[113]

98 In short: South Africans are spending far more money on having their basic human rights continuously and repeatedly violated than they are on having those rights protected.

99 In the face of these egregious breaches of the Constitution, the question that remains is this: what is to be done, since the gross violations showed by the applicants are continuing and only but worsening in their intensity?

100 That all of these rights are indeed infringed was confirmed by the Constitutional Court in *Vaal River*, with Madlanga J finding that:

> *"[189] It is deeply disturbing that – through no fault of their own – the residents of the Lekwa and Ngwathe Municipalities (residents) are subjected to a situation that violates several of their fundamental rights protected in the Bill of Rights. A situation that infringes their right to dignity, their right of access to healthcare services, their right of access to sufficient water, their right to an environment that is not harmful to health or well-being and the right to basic education. The residents add that there is even a threat or real risk of infringement of the right to life. All this, as a direct consequence of Eskom's conduct.*"[114]

[113] Id

[114] Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others [2022] ZACC at para 189

101 In sum, load shedding contravenes the applicants' constitutional right to electricity. That right is supplemental to the basic entrenched rights in the Bill of Rights. These multiple rights have been contravened by one single action, the failure to provide electricity. This contravention itself has been recognised as a constitutional breach by the Constitutional Court in *Vaal River*.[115] The effect of the breach has been to relegate the nation and children to illiteracy, by undermining the right to education. Moreover, police services require electricity to carry out their security function. Without freedom and security of the person, the right to life is substantially eroded. Water and sanitation is just as important. Hospitals certainly cannot function optimally without proper sanitation, and sanitation is an important component of the right to dignity.

102 Thus, the applicants have a right to electricity. It is direct because it is a component part of several other constitutional rights. If not, then it is at least derivative in nature, because without it other rights cannot be given effect to. In other words, as the expert and other affidavits filed with this application demonstrate, the fundamental rights entrenched in the Bill of Rights, most notably, the right to life, cannot be given effect to without electricity. Therefore, to the extent that electricity is necessary to protect these basic rights, it is derivative and implicit in the Constitution and, in many cases, an inherent attribute of the rights themselves. This has been confirmed in numerous cases before our courts, as we will show below.

103 But it is not only the state's failure to provide electricity that has contravened these rights. The applicants also challenge the state's failure to take the

[115] *Vaal River* at para 194

measures prescribed by the regulatory framework to realise these rights. The contravention is thus twofold. It is first the failure to provide electricity at all, and second the failure to take the steps prescribed by the ERA and the NEA ensure an uninterrupted supply of electricity.

104 In *Mazibuko and Others v City of Johannesburg and Others,*[116] the Constitutional Court recognised that the state has a positive duty to take reasonable steps to realise these rights. When, as in this case, there is a challenge to the very policies said to give effect to these rights, then the state must disclose how the policy was selected and formulated and how it was considered and applied to give effect to the rights in question. Notably, the court found that a measure is not reasonable if it fails to make provision for those most desperately in need.

THE RESPONDENTS' CONSTITUTIONAL AND STATUTORY OBLIGATIONS TO ENSURE UNINTERRUPTED ELECTRICITY SUPPLY

DPE's Role in the Uninterrupted Supply of Electricity

105 These rights must of course inform and give content to state policies regulating the provision of electricity. The first policy can be traced to the 1998 White Paper, the state's policy document on its role in the energy sector. Two principles therein are relevant. The first is that the state split its role into two. It is in the first instance a supplier of electricity through Eskom. This particular functionality is legislated for in the ERA, whose purpose is "to provide for licences and registration as the manner in which generation, transmission, distribution,

[116] Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

reticulation trading and the import of electricity are regulated". It is in terms of section 7, 14 and 21 of the ERA that Eskom is licenced by NERSA to supply electricity. Supply is defined as *"trading and the generation, transmission or distribution of electricity".*[117]

106 The second role carved out by the White Paper for the state is that the Department of Minerals and Energy would determine all policies on the administration of the grid. The White Paper then provides guiding principles on how these policy decisions must be made, emphasising the management of the supply of electricity as a public good, without which many essential activities cannot be carried out.

107 Two statutes are relevant to the state's role as the policymaker in the supply of electricity. They are the Eskom Conversion Act and the National Energy Act. The Eskom Conversion Act was promulgated, as its long title suggests, *"to provide for the conversion of Eskom into a public company having a share capital incorporated in terms of the Companies Act".*

108 In terms of section 6(4) of the Conversion Act, the MPE must enter into a Shareholder compact with Eskom, and in terms of section 6(5) that agreement must take into account *"(a) The developmental role of Eskom Holdings Limited; and the (b) the promotion of universal access to, and the provision of, affordable electricity, taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom".*

[117] Section 1 of the ERA

109 Therefore, "universal access to electricity", is a prerequisite of the Shareholders Compact between the MPE, and Eskom. There is thus no basis in law for the contention that the DPE plays no role in the supply of electricity, because as Madlanga J observed in *Vaal River* that *"[t]he Shareholder compact is enforceable as between Eskom and its shareholder, the state".*[118] The learned judge went on to set out the public interest principles that should underpin the enforcement of the agreement, and concluded that Eskom does not exist for the pursuit of profit.

110 In *Vaal River* the court said the following about the Conversion Act:

> *"The Conversion Act did not privatise Eskom. Upon conversion, the state was Eskom's sole shareholder. Its conversion required Eskom and the Minister of Public Enterprises to enter a Shareholder compact. The Shareholder compact is defined in section 1 of the Conversion Act to mean "the performance agreement to be entered into between Eskom and the government of the Republic of South Africa". In doing so, the Minister was required to take account of the "developmental role of Eskom" and "the promotion of universal access to, and the provision of, affordable electricity, taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom".* ***[70]***

111 The Conversion Act thus legislates that Eskom has a developmental role, underscoring the White Paper's policy position that it must be managed as a public good. The manner in which electricity is to be managed as a public good

[118] *Vaal River* para 73

is governed by NEA. NEA was promulgated to "*to ensure that diverse energy resources are available, in sustainable quantities and at affordable prices; …to provide for energy planning; increased generation and consumption of renewable energies; contingency energy supply; …adequate investment in, appropriate upkeep and access to energy infrastructure…*".

112 Thus, NEA empowers the state, through the Ministry and Department of Minerals and Energy to legislate for among others, energy planning, which includes the increased generation of renewable energy, an alternative energy supply and investment in and the upkeep of energy infrastructure.

113 This collective framework means that the respondents have constitutional and statutory obligations to ensure that the public receives an uninterrupted electricity supply.

114 There is thus no merit to the contention that the President and DPE play no role in the supply of electricity. Equally devoid of merit is the assertion that because DPE is not responsible for the transmission of electricity and does not determine the load reduction. This argument relates to how Eskom operates its fleet. It does little, if nothing at all to address the duties owed by Eskom to DPE, as its sole shareholder under the Eskom Conversion Act. The provisions of the Conversion Act, as set out above, are material, since it is the precursor to the obligations imposed on DPE by the National Energy Act ("NEA").

115 The DPE therefore plays a significant role. It develops the law and policy that directs how electricity must be supplied. It is enjoined to do so in a manner that facilitates the promotion of universal access to electricity.

Eskom's constitutional and statutory obligations

Obligations arising from public law relationship with the public

116 Eskom's duty of continued supply of electricity to the public arises, first and foremost, from the special cluster of relationships created between it, municipalities and the public in terms of the Constitution, the ERA and other legislation.

117 That this is so has been settled by a number of cases decided in the Republic's superior courts. These cases include the Constitutional Court's decisions in *Vaal River* and *Joseph v City of Johannesburg and Others* ("***Joseph***");[119] the Supreme Court of Appeal's decision in *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others* ("***Resilient***");[120] as well as the decision of the Full Court of this Division in *Cape Gate (Pty) Ltd and Others v Eskom Holdings (Soc) Ltd and Others* ("***Cape Gate***").[121]

118 Read together, these decisions establish that Eskom, municipalities and the public have a constitutional and statutory relationship which imposes a public law duty on Eskom to provide continued electricity supply, which the public receives as a matter of public law right.

119 In *Joseph*, having considered sections 152 and 153 of the Constitution, the Constitutional Court held that:

[119] Joseph v City of Johannesburg and Others 2010 (4) SA 55 (CC)

[120] Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others 2021 (3) SA 47 (SCA)

[121] Cape Gate (Pty) Ltd and Others v Eskom Holdings (Soc) Ltd and Others 2019 (4) SA 14 (GJ)

"*Taken together, these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity. The applicants are entitled to receive these services. These rights and obligations have their basis in public law. Although, in contrast to water, there is no specific provision in respect of electricity in the Constitution, electricity is an important basic municipal service which local government is ordinarily obliged to provide. The respondents are certainly subject to the duty to provide it.*"[122] (Our emphasis).

120 The Constitutional Court clarified that the duty imposed on municipalities existed as a matter of public law, notwithstanding that there was no direct contractual relationship between the municipality and the applicants. The Court said:

"*The focus of the enquiry therefore is the relationship, if any, between City Power as a public service provider and users of the service with whom it has no formal contractual relationship. This is similar to the approach adopted by Sachs J in Residents of Joe Slovo, in which the lawfulness of the occupation of municipal council land by homeless families was considered. Sachs J observed that this question—*

> *'must be located not in the framework of the common law rights of landowners, but in the context of the special cluster of legal relationships between the council and the occupants established by the Constitution and the Housing Act. . .. The very manner in*

[122] *Joseph* at para 39

which these relationships are established and extinguished will be different from the manner in which these relationships might be created by the common law. . .. They flow instead from an articulation of public responsibilities . . . and possess an ongoing, organic and dynamic character that evolves over time.'

I am of the view that this case is similarly about the "special cluster of relationships" that exist between a municipality and citizens, which is fundamentally cemented by the public responsibilities that a municipality bears in terms of the Constitution and legislation in respect of the persons living in its jurisdiction."[123]

121 It is now settled that the "*special cluster of relationships*" referred to in *Joseph* in respect of municipalities and the public also exists in respect of Eskom and the public. The "cluster of rights" or relationships has been recognised by our court as being indispensable to and an inherent part of the rights in the Bill of Rights. They supplement the rights meaning that certain "rights", even though not expressly guaranteed in the Constitution could be treated as rights if they supplement rights that are expressly provided in the Constitution. An example is *Stransham-Ford v Minister of Justice and Correctional Services,*[124] in which Fabricius J recognised the right to die with dignity supplemented the right to human dignity. This cluster imposes a duty on Eskom to provide continued electricity supply. In this regard, the following is trite:

[123] *Joseph* at paras 23-4

[124] 2015 (4) SA 50 GP

121.1 The public law relationship between Eskom and the public, and Eskom's duty to the public to give continued electricity supply exists notwithstanding that there is no direct contractual relationship between Eskom and the public, and that Eskom mainly supplies electricity to the public via municipalities. The relationship is analogous to the one in *Joseph*.[125]

121.2 The public law relationship exists simply because, as the Constitutional Court pointed out in *Vaal River*, when it supplies electricity to municipalities "*Eskom is well aware that the municipalities receive electricity from it for onward supply to the residents*".[126]

121.3 The relationship is a matter of logic since, as the SCA pointed in *Resilient*, if Eskom fails to supply electricity downstream to municipalities, the latter cannot discharge their constitutional and statutory mandate to provide it to the public.[127]

122 The public law relationship between Eskom and the public, and Eskom's duty to provide continued electricity supply in terms of that duty, were most aptly captured by the Full Court of this Division in *Cape Gate*:

> "*First, by parity of reasoning with Joseph, there exists a 'special cluster of relationships' between Eskom, Emfuleni and retail consumers of electricity such as the applicants. Eskom supplies electricity to Emfuleni,*

[125] *Vaal River* at para 268

[126] *Vaal River* at para 271

[127] *Resilient* at para 58

knowing full well that Emfuleni reticulates it through to the applicants. The applicants pay Emfuleni, knowing full well that Emfuleni, having deducted its margin, on-pays those very funds to Eskom for that very supply of electricity. Emfuleni is thus, in the Joseph sense, a mere conduit: it passes on from Eskom upstream the electricity downstream to the applicants (on the way it retains some of it for its other consumers, and for itself); and it passes back upstream the applicants' payment (on the way it retains some of it, its margin, for itself).

Second, Eskom has a public-law duty — founded in the ERA and its licence — to supply electricity to Emfuleni; and in turn, Emfuleni has a public law duty — founded in the Constitution and the Systems Act — to on-supply that electricity to the applicants.

Third, Emfuleni has, as a corollary to the public-law duty that Eskom owes it to supply the electricity to it, the right to enforce against Eskom the right to just administrative action by Eskom in Eskom's supply of electricity to it.

Fourth, Emfuleni has a public-law duty to supply electricity to the applicants; and the applicants have, as a corollary to the public-duty that Emfuleni owes them, the right to enforce against Emfuleni the right to just administrative action by Emfuleni in its supply of electricity to them.

Fifth, the concept of a 'right' in this scenario is not to be understood in the usual circumscribed private-law sense. It has a wider, more generous, meaning here, in a public-law sense. And as has been seen, public law

imposes a duty on each supplier of electricity, top down; and reciprocally proper discharge of that duty can be enforced upwards.

In these circumstances it would be incongruous if the ultimate beneficiary of and payer of the electricity stream downwards did not have the right to enforce due performance by the initiating supplier of the electricity of a public-law duty owed by it to the conduit of the electricity and for the payment of it."[128] (Our emphasis)

123 It is evident from the above that our courts have been unequivocal: given its role as an initiating supplier in the realisation of end-users' public law right to receive electricity, Eskom has a public law duty to supply electricity downstream to the public, which it carries out via municipalities.

124 What is also clear from the jurisprudence of our courts is that Eskom's obligations to render the continued supply of electricity go further than the public law right of end-users to receive electricity. They also arise from, and are connected to, various other rights in the Bill of Rights, it being trite that the provision of electricity is necessary for the protection, promotion and fulfilment of many rights in the Bill of Rights.

Eskom's obligations arising from other rights in the Bill of Rights

[128] *Cape Gate* at paras 130-5

125 Eskom is an organ of state as defined in section 239 of the Constitution. In terms of section 8(1) of the Constitution, the Bill of Rights is binding on all organs of state like Eskom.

126 Moreover, section 7(2) of the Constitution places a duty on Eskom, as an organ of state, to "*respect, protect, promote and fulfil the rights in the Bill of Rights*".

127 The section 7(2) obligation to respect the rights in the Bill of Rights requires, at the very least, that the state should not pursue retrogressive measures that interfere with constitutional rights that are currently being enjoyed by people in the Republic.[129] We have shown that this is precisely what load shedding does.

128 In *Vaal River*, the Constitutional Court (correctly, we submit) took it as common cause that the interruption of electricity supply actively infringed the rights of the applicants enshrined in the Bill of Rights, which included—

> "*[t]heir right to dignity, their right of access to healthcare services, their right of access to sufficient water, their right to an environment that is not harmful to health or well-being and the right to basic education. The residents add that there is even a threat or real risk of infringement of the right to life.*"[130]

129 The Court held that this infringement was in breach of Eskom's section 7(2) duty to respect the fundamental rights of the residents. In this regard, it said:

---

[129] *Vaal River* at para 267

[130] *Vaal River* at para189

"*In terms of section 7(2) of the Constitution which, amongst others, provides that the state must respect the rights in the Bill of Rights, Eskom (an organ of state) had a duty not to conduct itself in a manner that would result in an infringement of those rights. It had a duty to respect those rights through refraining from acting in a manner that would cause their infringement.*"[131] (Our emphasis).

130 The Court in *Vaal River* also took the time to describe in detail the humanitarian crisis that had resulted as of Eskom's breach of its duty to respect the residents' rights:

"*[T]he inadequate supply of electricity has caused the water purification system to malfunction, further affecting the provision of potable water negatively. That means even if there was no faeces in the water, there would still be an inadequate supply of potable water as a result of the malfunction of the water purification system which, in turn, results directly from the reduction in the electricity supply. There is the spectre of loss of human life and general adverse consequences in the provision of proper healthcare services at hospitals and old age nursing homes. This is as a result of the fact that the hospitals and old age nursing homes in the affected areas have not been spared the effects of the reduction of electricity supply. Economic activity has been affected to such an extent that there is a risk of closure of some businesses and loss of jobs. Children of school going age are also victims as all schools from*

[131] *Vaal River* at para 266

high schools to nursery schools are negatively affected due to lack of electricity for many hours per day."[132]

131 The gross violations of the residents' rights described by the Constitutional Court above, to which it referred as a "*human catastrophe*",[133] are almost exactly the same as the gross violations which have been put forward by the applicants in this case.

132 In the premises, it is undeniable that Eskom's interruption of electricity supply via load shedding breaches the constitutional rights relied upon by the applicants. Once the breaches have been established, it behoves this Court, as a guardian of fundamental rights enshrined in the Bill of Rights, to protect these rights by granting the interim relief *pendente lite* sought in Part A of this application, pending the full-blown challenge which the applicants will bring in Part B.

Eskom's obligations arising from legislation

133 In addition to its constitutional obligations to do so, Eskom has a number of statutory obligations which oblige it to render the continued supply of electricity.

134 We summarise these in the section dealing with the state's obligations.

135 The unambiguous authorities referred to above make it clear that the Constitution and legislation impose public law duties on Eskom in respect of electricity provision, and that the public receives electricity from Eskom via municipalities as a matter of public law right. They also clarify that it matters not that unlike the

[132] *Vaal River* at para 258

[133] *Vaal River* at para 284

right to water, the Constitution has enshrined no express right in respect of electricity. As found by Madlanga J in *Vaal River*

> *"[190] At the outset, let me clarify that I make no holding on whether the residents have a constitutional right to the supply of electricity by Eskom.[128] I do not find it necessary to make that holding because, even though the residents did assert that right, they rely on several other constitutional rights and those other rights are dispositive of the matter. I will focus only on those other rights"*

136 In the face of these authorities, it is remarkable that the respondents nonetheless seek to resist the relief sought by the applicants on the basis that the Constitution has no justiciable right to electricity. We return to this below.

137 The authorities also make it evident that the interruption of electricity supply breaches a number of rights, and that the applicants are entitled to relief in respect of these breaches. This is uncontroversial. Once the breaches are established, this Court is duty bound to provide the applicants with effective relief. The duty of courts to provide effective relief for breaches of constitutional rights has been emphasised by the Constitutional Court time and time again.[134]

138 Thus, the applicants have a constitutional right to electricity. Their case is not merely that their right to electricity is the means by which all their other constitutional rights are recognised. Rather, it is that they have a right sourced in the Bill of Rights to be supplied with electricity because the rights they seek to

[134] The locus classicus is *Hoffmann v South African Airways* 2001 (1) SA 1 (CC).

enforce constitute fundamental rights. And if, as in *Joseph*, basic services, which comprise fundamental rights, included a right to electricity justiciable and enforceable against a municipality, there is no reason why the same right cannot apply to Eskom as an SOE and the respondents.

139 This very approach was recognised by the minority decision of Unterhalter J in *Vaal River*. After contending that the case before him was not one seeking to enforce a right to electricity sourced in the Bill of Rights, he found:

> *"[111] I should not be understood to hold that such a case could not be made out. It may be that the right in section 27(1)(c) to social security is wide enough to include access to basic services, including electricity. I make no finding whatsoever on this score. If, for the sake of argument the provision of electricity forms some part of the right to social security, Eskom may be required in its decision-making to promote and fulfil that right. However, that is not the case before us".*

140 But it is precisely the case before this court. Whilst it is correct that no right in the Bill of Rights gives express recognition to the right of every person to electricity, it is implicit in the very constitutional guarantees that the applicants contend Eskom and the state respondents have contravened. To understand why, one needs to look no further than the reasoning in *Joseph* as to why residents have an enforceable fundamental right to access electricity against their municipalities. The *Joseph* court held

> *"The provision of basic municipal services is a cardinal function, if not the most important function, of every municipal government. The central*

mandate of local government is to develop a service delivery capacity in order to meet the basic needs of all inhabitants of South Africa, irrespective of whether or not they have a contractual relationship with the relevant public service provider. The respondents accepted that the provision of electricity is one of those services that local government is required to provide. Indeed, they could not have contended otherwise. In Mkontwana, Yacoob J held that 'municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty.' Electricity is one of the most common and important basic municipal services and has become virtually indispensable, particularly in urban society.

141 The nature of the right does not change simply because it is being enforced against a different organ of state. The right to electricity is inherent to the entrenched fundamental rights contravened because it is indispensable to the exercise of these rights. If it is indispensable to the exercise of the rights contravened, then it is a right itself, and not merely the mechanism through which the other rights are achieved.

142 But if this is not correct, then the applicants contend that it is not necessary for them to rely on an established right to electricity, because the other rights they rely on, which have not been contravened are dispositive of the matter, and these "*multiple rights protected in the Bill of Rights can be violated by a single*

action."[135] In this case that act is the state's failure to provide electricity, and the rights can be vindicated only by "*the reversal of the causative act*." [136]

143 So, the applicants have a constitutional right to electricity and the respondents contravened that right by not implementing their Generation Recovery Plan and adopting several prejudicial policy decisions. In fact, as shown in these heads, the conduct of the respondents shows that they have no plan at all to redress these contraventions. They have:

143.1 Deferred maintenance on the fleet since 2008;

143.2 Stepped back on its aggressive maintenance policies and unduly focussed on REIPPs at the expense of maintaining the fleet since 2018;

143.3 Failed to generate sufficient power, which at least since 2018 is as a result of jettisoning its aggressive maintenance policies; and

143.4 Failed to appropriately develop new generation capacity initiatives.

144 All of this was made worse by the adoption of an indiscriminate load reduction programme that failed to accord for the unique needs of critical loads and core sectors, as listed in paragraph 3 of the amended notice of motion. Thus, the state's policies on energy administration failed to provide for those most in need, as required by the Constitution.

---

[135] *Vaal River* at para 194

[136] Id

145 In *Women's Legal Centre Trust v President of the Republic of South Africa and Others*[137], the Court affirmed that "'implicit in s 7(2) is the requirement that the steps the state takes to respect, protect, promote and fulfil constitutional rights must be reasonable and effective'. As to what constitutes 'reasonable measures', the court in *Rail Commuters* held that it will depend on the circumstances of each case. The court held further that factors that would ordinarily be relevant to the inquiry as to what 'reasonable measures' encompass include…the performance of the duty.."

146 As a result of its unlawful conduct, the state has failed in terms of the second leg of the section 7(2) test as identified in *Women's Legal Centre*, namely, the performance of its duty. To be specific, that duty is the obligation to provide an uninterrupted supply of electricity.

The obligations of the President, his Executive and the other respondents

147 It behoves us to begin this section by addressing head-on the President's contention that he and the national government do not have a duty to end loadshedding.

148 With respect, the President's contention is jarring. It reveals the depth of the abdication of responsibility and blame shifting with which this loadshedding crisis has been met by the State, and why the applicants contend that it is time for judicial intervention to ameliorate the gross rights violations occasioned by the

[137] 2022 (5) SA 323 (CC) at para 81

crisis. Since the state insists on denying its obligations, it is up to the courts to compel compliance with them.

149 In law, there can be no doubt that the Constitution and various statutory instruments impose a range of constitutional and statutory obligations on the President and the national government to ensure the uninterrupted supply of electricity to the public they were elected to serve. They are also legally obliged to respond with swift and effective measures where the non-provision of electricity has resulted in gross violations of people's fundamental rights. That the President contends otherwise is regrettable.

150 We begin with the obligations imposed by the Constitution.

The obligations imposed on the President and the national government by the Constitution

151 As we read the President's answering affidavit, the gravamen of his argument is that neither he nor the national government have a constitutional obligation to end loadshedding because:

151.1 The obligation to deliver electricity constitutionally lies in municipalities; and

151.2 There is no justiciable right to electricity under the Constitution.

152 We are constrained to remind the President and this Honourable Court of the President's role in our democracy. Of this pivotal role, the Constitutional Court in

Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly ("***EFF***") said the following:

> "*The President is the head of state and head of the national executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight. To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of*

state affairs and the personification of this nation's constitutional project."[138]

153 What more could trigger these obligations if not the humanitarian crisis of the nature the Republic finds itself in as a result of loadshedding? We submit that the President has the following constitutional obligations in the face of the humanitarian crisis that is load-shedding, which we say he has breached:

153.1 In terms of section 83(c) of the Constitution, he has an obligation to uphold, defend and respect the Constitution, which includes the Bill of Rights.

153.2 In terms of section 84(2)(c) of the Constitution, he has an obligation to coordinate the functions of the relevant state departments and administrations in order to ameliorate the effects of and end the humanitarian crisis of load shedding.

153.3 In terms of sections 8 and 7(2) of the Constitution, he has obligations to respect, protect, promote and fulfil the rights in the Bill of Rights which are under gross violation by the humanitarian crisis of load shedding. As already shown, many of the rights are unqualified and immediately realisable, which requires immediate action on his part in discharge of his section 7(2) obligations.

[138] Economic Freedom Fighters v Speaker of the National Assembly; Democratic Alliance v Speaker of the National Assembly 2016 (3) SA 580 (CC) paras 97-9

153.4 As per the Constitutional Court in *EFF* above, he is constitutionally obliged to:

153.4.1 fight the threat that the humanitarian crisis of load shedding poses to the prosperity of the Republic, which the applicants have shown to be vast; and

153.4.2 ensure orderliness, peace, stability and devotion to the well-being of the Republic and all of its people, which are all no doubt imperilled by load shedding.

153.5 Constitutionally, the Republic pins its hopes on him to steer the country through the humanitarian crisis of load shedding in the right direction and to accelerate our journey towards a peaceful, just and prosperous destination.

154 The fact that the President says he has no obligations in terms of the Constitution in the face of the humanitarian crisis of load shedding is thus an unfortunate misreading of the Constitution, and a gross misunderstanding of his constitutional role as the head of state and head of the national executive.

155 The rest of the government respondents are also organs of state, and therefore also bear similar obligations in terms of sections 7(2) and 8 of the Constitution to respect, protect, promote and fulfil the constitutional rights that are being grossly violated under the humanitarian crisis occasioned by load shedding.

156 The President and his government also have statutory obligations imposed upon them. These obligations flow from :

156.1 The Eskom Conversion Act;

156.2 The ERA;

156.3 Section 6 of NEA, which obliges the Minister to develop, review and publish the IRP on an annual basis. In terms of section 6(2) the IRP must address, among others, the supply of electricity in a way that accounts for security of the said supply and economically available energy resources;

156.4 Section 2 of NEA, in terms of which the Minister draws the IRP to give effect to NEA's objects. These include to ensure an uninterrupted supply of energy to the Republic and to promote diversity of supply of energy and its sources;

156.5 Section 5 of NEA, which provides that, the measures adopted by the Minister must provide for universal access to energy or energy services for all the people of the Republic, and in terms of section 5(2)(i) the State must commit to provide free basic electricity to poor households;

156.6 Eskom's obligations and powers as a licensee to supply electricity as set out in section 14 of the ERA, and its powers and duties as a licensee, which is set out in section 21; and

156.7 For the sake of completion, the President's obligations under section 83 and 85 of the Constitution to uphold, defend and respect the Constitution, which vest only in him because as first citizen of this country he occupies a position indispensable for the effective governance of our democratic

country".[139] These obligations are expressly imposed on the President because *"[a]s the head of state and the head of the national executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office bearers can do*." [140] and must *ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy."*

157 We submit that the discussion above shows that loadshedding is not an inevitable fact of life, as the respondents have for years conveyed to the public, and now sought to convince this Court. Eskom and the other State respondents have constitutional and statutory obligations to *prevent* loadshedding and ensure the continued supply of electricity. They have breached those obligations, plunging the Republic into a humanitarian crisis. In what follows, we show that there is indeed nothing inevitable about loadshedding – all that is required is for the respondents to perform their obligations in line with the Constitution and legislation. We show below that the proposals made by the applicants are sound, achievable and realistic.

[139] Id at para 20; see also Public Protector and Others v President of the Republic of South Africa and Others 2021 (6) SA 37 (CC) at para 189

[140] Id at para 26

NO MORE EXCUSES – THE RELIEF SOUGHT IS POSSIBLE

158 From the outset, the applicants have made it clear that it is not their intention to dictate to the respondents exactly how they ought to fulfil their obligations. Rather, they seek only to ensure that they do fulfil their obligations.

159 That is why the applicants have also sought an order in the alternative that alternative energy for the parties listed in prayer 3 ("**vulnerable entities or critical sectors**") must be procured.

160 This court must take into account that on Eskom's own version prayer 3 can be implemented. In respect of prayer 4 the core of the opposition is that municipalities have no remote-controlled switching capability and therefore it is impossible for Eskom to instruct them to implement rotational or targeted load shedding.[141]

161 But Eskom's Dr Minnaar explains that the distribution network can be reconfigured through direct feeder lines for larger institutions that Eskom directly supplies with electricity, and the roll-out of a network of remote-controllable switches or circuit breakers and a smart meter infrastructure on both Eskom's and a municipality's low voltage network.[142] Eskom argues only that it is not the preferred policy choice because it is too expensive and will take longer to implement than its Generation Recovery Plan.[143] In the section dealing with the alleged lack of money, this excuse is unpacked and roundly dismissed.

---

[141] F04:23 at para 345.4

[142] F13:103,121 Annexure "**AA39**"

[143] F03:29 at para 363

162 However, there is one important distinction which must be borne in mind with respect to prayers 3 and 4 on the one hand, and prayer 5 on the other. The respondents do not contend that the procurement of alternative energy (prayer 5) is impossible because doing so would trigger a national blackout. In fact, in his *Technical Memorandum on protecting designated customers from load shedding attached*[144] Eskom's Dr Minnaar identifies two solutions to provide at least hospitals with an uninterrupted supply of electricity. He says that the first solution is to "*provide it with its own controlled feeder*", and second emergency back-up power, which he goes on to conclude constitutes "*good engineering practice and is entrenched in many regulatory standards.* He identifies batteries and diesel/petrol generators as the emergency power sources. Eskom's contends that it is not feasible on the basis of practicalities only.

163 Thus, in respect of prayer 5, the respondents cannot purport to justify their failures in the name of the greater good, nor can they frighten the Court with prophecies of doom. None of that is relevant to determining whether alternative energy can be procured. And when the arguments around financial constraints are dismissed as undeserving, there is no reason why the solution Dr Minnaar identified for the health sector cannot be rolled out to other critical sectors. The only question that this court need consider is whether there is any merit to the respondents' run of the mill excuses.

164 In sum, when it comes to prayers 3 and 4, the applicants rely on the same excuses as they do in respect of prayer 5, but also contend that there is a risk of a national blackout. Importantly, if the respondents do procure alternative energy,

[144] EAA F13: 596, Annexure **AA39**

then this is not a risk in respect of prayers 3 and 4 either, and it should make no material difference whether the end-user is supplied with electricity by Eskom or through a municipality as its conduit.

165 The respondents' excuses will be dealt with in turn below.

166 However, as a starting point, it is useful to summarise what the contested alternative sources of energy are:

166.1 "Green" alternatives, like solar and wind power;

166.2 Independent Power Production from the private sector ("**IPPs**");

166.3 Continuing to operate coal power plants which Eskom has closed, or is planning to close;

166.4 Improving the quality of coal used in coal plants;

166.5 Using gas through jet engine turbines;

166.6 Running open cycle gas turbines for a greater proportion of time;

166.7 Borrowing or buying power from neighbouring countries;

166.8 Installing generators / maintaining generators / purchasing diesel for generators for vulnerable entities.

First excuse: there is not enough money

167 The first excuse put forward by the respondents is simply that Eskom does not have enough money to implement any of the measures listed above. To justify this point, Eskom goes to great lengths to describe that it is in a great deal of debt, that the electricity tariffs have been set too low for too long, and that it is typically granted a smaller budget then what it requests.

168 Before entering into the detail of Eskom's finances, there are two crucial issues which must be kept in mind:

168.1 Every complaint about the cost of procuring alternative energy must be compared to the cost of not doing so, and the cost of continuing load shedding. The economic costs of load shedding are[145]:

168.1.1 R500 million per hour of stage 6 load shedding;

168.1.2 R4 billion per day of stage 6 load shedding;

168.1.3 R1.2 trillion, which is a quarter of South Africa's GDP since load shedding began.

In light of these truly devastating amounts, it is not enough for the respondents to simply say that solutions are expensive. If a solution costs less than R4 billion, the money spent could be recouped within one day.

[145] F03:68

If it costs less than R28 billion, the money spent could be recouped within one week.

Importantly, the respondents do not deny the accuracy of these figures.

168.2 Throughout these papers, the respondents repeatedly take the position that the matter is not in their hands, but rather, in the hands of some other respondent or government entity. Thus, they each shake their heads and pass the buck. That, with respect, cannot be countenanced by this Court. The entire government of South Africa is party to these proceedings. The whole cannot be permitted to blame its parts. This Court has the inherent power to grant relief that is just and equitable, and if that requires that orders be carefully worded, then so be it. The time for evasion is past.

How much does each alternative really cost?

169 According to Eskom it would cost:

169.1 R400 million to supply a 500kVa generator to all 381 public hospitals, and R762 million to supply a 1000kVa generator to all 381 hospitals.[146]

169.1.1 That amounts to the cost of 48 minutes of stage 6 load shedding, and 1 hour and 32 minutes of stage 6 load shedding respectively.

[146] EAA F13:158 at para 406

169.1.2 Notably, Eskom also avers that all public hospitals should already have generators.[147] Therefore, on Eskom's version, the cost would be drastically reduced to paying for diesel only, as generators would already be in place. Thus, Eskom is drastically exaggerating the costs.

169.2 R356 million to implement "combined solutions" to "insulate all public hospitals"[148] from load shedding.

169.2.1 That is the equivalent of 43 minutes of stage 6 load shedding. It is clearly a worthwhile investment.

169.3 R2 billion to install micro-grids at 1158 police stations at R1.8 million each.[149]

169.3.1 However, the Government avers that of the 1158 police stations, 1086 police stations are already equipped with generators.[150] meaning the actual cost would be R129.6 million.

169.3.2 This is one of many examples of Eskom drastically exaggerating the costs of these solutions. In this case, they have exaggerated the cost by 93%, or just under R1.9 billion.

[147] EAA F13:149 at para 386

[148] Id F13:160 at para 410

[149] Id F13: 158-159 at para 408

[150] Id F13:59 at para 116.3

169.3.3 It is also telling that Eskom has provided the costing for micro-grids, an alternative not raised by the applicants, but not for several of the alternatives which were raised. Clearly, Eskom has elected to focus on the most expensive and least relevant option to create an impression of unaffordability.

169.4 R250 million per day to run Open Cycle Gas Turbines at baseload,[151]

169.4.1 This is the equivalent of 30 minutes of stage 6 load shedding;

169.4.2 In other words, this solution which Eskom contends is prohibitively expensive is half as expensive to the economy as the solution they currently rely on – stage 6 load shedding.

169.5 R8 billion per year to generate 5000MW using jet engines at a 5% load factor (low efficiency), or R159 billion per year to produce 5000MW at a 90% load factor (high efficiency).[152]

169.5.1 5000MW is the equivalent of 5 stages of load shedding;

169.5.2 In terms of cost, this is the equivalent of 2 days of stage 6 load shedding or 40 days of stage 6 load shedding respectively. It is clearly a worthwhile investment.

169.6 R120 thousand to install a single 5kW solar PV system;[153]

[151] Conradie Affidavit, F13:726 at para 222

[152] Id F13:699 - 700 at para 140

[153] Id F13:690 at para 117

169.6.1 which extrapolates to R24 million to install enough systems to produce 1MW;

169.7 R10.2 billion to extend Camden by 5 years, and R13.2 billion to extend it by 10 years.[154]

169.7.1 That is the equivalent of 2.6 days and 3.3 days of stage 6 load shedding respectively. Clearly it is a worthwhile investment.

169.8 R12.5 billion to extend Hendrina,[155]

169.8.1 which is the equivalent of 3.2 days of stage 6 load shedding. Clearly it is a worthwhile investment.

170 But, importantly, even if Eskom does not have the immediate funds or liquidity to implement these solutions, given that each one costs a pittance compared to the amount that the country is haemorrhaging as a result of load shedding, there is no apparent reason why the Government could not or would not provide this, given that the creation of new generation capacity is prescribed by section 34 of the ERA, and was a principle of government policy since the release of the White Paper on Energy in 1998. In fact, several of these solutions would actually reduce the losses the Government is facing.

171 In the same vein, Annexure AA8 to Eskom's affidavit contains a particularly telling passage:

[154] Id F13:681 - 682 at para 95.1

[155] Id F13: 683 - 684 at para 98

"Analysis of the cost impact of adding 5GW of renewable energy capacity to the system is equally surprising. Based on Eskom's 2020/21 Financial Year… the additional 5GW of wind and solar would have created a net annual saving of R2.5Bn for Eskom. This takes no account of the economic benefit of avoiding load shedding but is merely the net cash saving to Eskom driven primarily by the reduction in quantity of diesel burned."[156]

172 Notably, the respondents do not give any indication as to the costs of any of the other alternatives raised by the applicants. To the contrary, they say that:

"In the limited time Eskom has had to respond to this application, Eskom has not had the opportunity meaningfully to cost the roll-out of alternative sources…"[157]

173 Therefore, not only does Eskom admittedly have no basis for averring that the other alternatives are too expensive, it has also inadvertently admitted that it has not investigated all the alternatives as thoroughly as it would have the Court, and the public, believe.

174 Importantly, the generation of these new modes of capacity was identified as a priority as early as 1998 in the White Paper on energy policy. To date the state has not implemented any policy to generate new capacity at all, much less at the scale needed to meet the country's consumption requirements. Yet, in the face of this glaring omission it decided in 2018, under the leadership of Eskom's

[156] EAA F13:236, Annexure **AA8**

[157] EAA, F13: 157 at para 404

current administration to retire its only generating tool, Eskom's fleet. As part of the policy towards retiring the coal fleet, plants were not managed.

175 These decisions are irrational by all accounts. Despite not implementing its projects on new generation capacity, which means that its JET programme is still in its infancy, the state elected to retire and not maintain Eskom's fleet.

176 Eskom's repeated exaggerations are notable and accord with Blom's position being that most of Eskom's quoted statistics can be divided by a factor of four.[158]

How much can Eskom pay?

177 Clearly, the alternatives are far more affordable than Eskom attempts to portray them as. Moreover, the papers also reveal that Eskom has a lot to answer for in terms of how it spends the funds which it has been allocated. The following examples are notable:

177.1 Eskom has an annual revenue of R200 billion;[159]

177.2 Eskom has an asset base of R1.3 trillion;[160]

177.3 In 2015, Eskom received a settlement of USD19 million.[161] It is not explained how this money was used;

[158] RA (Conradie) F19:11-12 at para 22

[159] Id at para 20

[160] Id

[161] EAA F13:37 at para 68

177.4 In 2016, Eskom had sufficient liquidity to corruptly pay out R1.6 billion and R659 million to Tegeta.[162] Similar amounts would be enough to pay for a number of the solutions identified above;

177.5 Eskom has R9 billion with which to repurpose Komati.[163] It provides no indication of how or when it will spend that R9 billion;

177.6 In 2015, Eskom had R200 billion from private investments.[164] It gives no indication of how this money was spent;

177.7 Eskom has received R136.8 billion from the government for use in 2020-2023;[165]

177.8 The DPE has provided Eskom guarantees to the amount of R350 billion;[166]

177.9 Eskom paid R81 billion towards its debt in 2023.[167] It does not explain why it was necessary to begin repaying its debt rather than ensuring the immediate protection of human rights;

177.10 Eskom has R9.5 billion for planned outages for the year;[168]

[162] EAA F13: 56 - 57 at para 124.8

[163] Id F13:103 at para 251

[164] Id F13:45 at para 88

[165] Id F13:54 at para 115

[166] Id F13:55 at para 120

[167] Id F13:56 at para 121

[168] Id F13: 78 at para 175

177.11 Eskom has been allocated R131 billion for generation;[169]

177.12 Eskom has received 848 million USD and 10 million Euro to repurpose power stations,[170] which makes it doubtful that Eskom would need to direct any of its other funds to this purpose, thereby leaving those other funds available; and

177.13 Eskom has received 400 million USD and 700 million Euro for various other aspects of the Just Energy Transition, which makes it doubtful that Eskom would need to direct any of its other funds to this purpose, thereby leaving those other funds available.[171]

178 The glaring question is: where did all this money go?

179 Perhaps every cent of the above amounts has been properly and scrupulously spent on managing the electricity crisis. However, given De Ruyter's own description of Eskom as a "feeding trough," this is doubtful to say the least. In the circumstances, if Eskom truly wanted to convince this Court that it has no money, it ought to have explained what is has been doing with the money it does, or did, have.

180 It is true that Eskom is in significant debt. But this debt must also be assessed within the framework of the recent decision by the state to take over R254 billion of Eskom's debt. Eskom takes great pains to set out in detail how that debt arose. What Eskom does not do, however, is actually explain why the existence

[169] Id F13:93 at para 216.1

[170] Mkhatswa Affidavit F13:1557 at paras 58.1 - 58.3

[171] Id at paras 58.4 – 58.6

of that debt, which it and the government have allowed to accumulate essentially uninterrupted for many years now, must be paid off now, even if it means load shedding must continue, and at the cost of human lives.

181 What this Court will not find anywhere in these papers is any clear statement to the effect of "Eskom has this many rands to end load shedding." Rather, despite creating the illusion of giving a great deal of factual detail by giving the Court a history lecture, Eskom is actually exceedingly vague as to its budget for ending loadshedding specifically. It has elected to keep this Court in the dark as to what it can, in measurable terms, afford to do.

Second excuse: Insufficient Time and the Generation Recovery Plan

182 The respondents' second excuse for why they have not procured, or cannot procure, alternative energy in the manners set out above is that doing so will take too long. Troublingly, when one considers the timeframes put up by the respondents, it quickly becomes clear that this issue is rife with contradictions.

183 According to Eskom, it would take:

183.1 24 months to generate an additional 6000MW in terms of its Generation Recovery Plan;[172]

[172] EAA F13: 17 - 18 at para 19

183.2 18 to 24 months to plan for an outage in order to conduct maintenance[173] and three months to complete scheduled maintenance on a coal plant which occurs while the plant is out.[174]

183.2.1 Unless these time frames are an exaggeration, this means that Eskom's Generation Recovery Plan could not be implemented in 24 months.

183.2.2 The plan depends, *inter alia*, on maintenance of existing plants. If it is true that from the date the plan is adopted there will need to be 24 further months to plan each specific outage, which will then last another 3 months, it is simply impossible for the respondents to complete the plan in 24 months in respect of even one station.

183.2.3 Moreover, it is accepted that one could not have outages at all the plants at the same time. That means even more months well after the 24 planned months.

183.2.4 Either Eskom is seriously exaggerating these time frames, or it is being dishonest that its plan will be implemented within 24 months.

183.2.5 Notably, in several instances the respondents contend that other solutions, which could take 24 months to implement, are

[173] Id F13:79 at para 176

[174] Id F13:16 at para 15

pointless because by that time, the crisis will be solved. However, if the plan is not implemented within 24 months, that argument must fall away.

183.3 6 months for Units 2 and 3, and 12 months for Unit 1 of Kusile to return to service if the DMRE permits it to bypass the desulphurisation units;[175]

183.3.1 This is contradicted by the "Detailed Progress Report" annexed to the Government's answering affidavit. That report says that all three units will only be offline for 6 months.[176] The respondents are unable to present a consistent version.

183.3.2 It is also troubling that these time frames are conditional on certain conduct by the DMRE, which conduct has in no way been guaranteed.

183.4 24 to 36 months from the date of "financial closure" for an estimated 2000MW worth of private generators on leased Eskom land to be connected to the grid;[177]

183.4.1 Once again, this time frame is irreconcilable with the suggestion that the respondent's plan will be implemented in 24 months. What is the date of this "financial closure"? We are not told. The plan relies, *inter alia*, on the connection of these private generators to the grid. If it will take 24 months or longer for that

[175] Id F13:84 at para 190

[176] GAA F14:204

[177] EAA F13:107 - 108 at para 267

to happen, it is simply impossible that the plan will be implemented within 24 months.

183.4.2 Once again, either the respondents are grossly exaggerating this timeframe, or the respondents are being disingenuous when they suggest that the plan will be implemented within 24 months.

183.5 12 to 36 months to install a dedicated MV feeder (a 'direct line'),[178] which removes the problem of embeddedness;

183.5.1 We are not told why this must be so. For instance, we are not given any detail as to where the equipment can be sourced from, what the time frames for that sourcing and whether any regulatory approvals will be necessary. A random set of months is just given. But even if one were to accept that this time frame is not an exaggeration, an installation in 12 months' time means at least 1 less year of avoidable deaths and 1 less year by which Black students will be forced to fall behind their wealthy and white counterparts.

183.5.2 NUMSA's expert has in any event already debunked this assessment. But on Eskom's assessment it is impossible that load shedding will actually be over within 24 months. At least one of those periods is untrue. That means that there is no good

[178] Id F13:141 at para 364.1

reason to wait out the implementation of the plan before taking these steps. Simply put the plan is either not being implemented, or constitutes no plan at all.

183.6 12 to 36 months to implement combined solutions to insulate all public hospitals from load shedding;[179]

183.6.1 The Government puts up a different version which is that it would take:

183.6.1.1 12 to 14 months to insulate 11 hospitals from load shedding;[180]

183.6.1.2 15 to 26 months to insulate a further 24 hospitals from load shedding; and[181]

183.6.1.3 More than 26 months to insulate a further 11 hospitals from load shedding.[182]

183.6.2 Clearly, the Government and Eskom are not cooperating productively on implementing this solution, as they cannot even agree what the timeframe for it is.

184 In sum, either the respondents are grossly exaggerating the time periods it would take to implement each of these alternatives, or it is grossly understating the time

[179] EAA F13: 160 at para 410

[180] GAA, Government Report F14: 77 at para 15.1

[181] Id at page 78 at para 15.2

[182] Id at page 79 at para 15.3

it would take for it to implement its plan, supply an additional 6000MW to the grid, and end load shedding. In either case, there is no merit to the contention that the alternative solutions should not be implemented because of the time they will take.

Third excuse: the codes, regulations, contracts, and statutes which prevent the implementation of the alternatives

185 The respondents, and Eskom in particular, repeatedly contend that they are unable to act in the ways necessary to implement the relief sought (be it in terms of prayers 3, 4, or 5) because they are bound by existing codes, regulations and statutes, and even private contracts which prevent it from doing so.

186 The obvious problem with this approach is that not one of these laws can trump the Constitution itself. Aside from President Ramaphosa, who goes to great lengths to deny his personal responsibility, the respondents do not meaningfully deny that the status quo is an ongoing violation of the Bill of Rights.

187 Insofar as any of these laws prevent the respondents from fulfilling their obligations in respect of the Constitution (which is, of course denied) those laws are invalid. In fact, if that truly were the position of the respondents, the respondents themselves ought to have approached the Court to have the relevant law declared invalid and set aside.

188 The second obvious problem with this approach, is that a National State of Disaster has been declared. The very nature of a National State of Disaster is that regulations and laws which might ordinarily apply, can be legally suspended,

relaxed, or circumvented. As was set out above, the respondents cannot be permitted to pass the buck on this issue by saying that it is the responsibility of some other person or entity to suspend or relax those laws. The entire government is a party to this application.

189 In any event, the Government informed South Africa in an address to the nation that "*We are cutting red tape.*"[183] The respondents cannot turn around in this application and rely on red tape as an excuse.

190 The third problem with the respondents' approach on this issue is that, in many instances, these laws do not prevent them from acting in the necessary manner to implement the relief sought.

191 For example, it is untrue that the NRS 048-09 Code prohibits "blanket exclusions."[184] To the contrary, it expressly provides for the exemption of categories of customers. Similarly, the requirement of "equity"[185] does not require that Eskom treat every single customer exactly the same. That is simply not what equity means. Lastly, insofar as there is any doubt as to whether the applicants' or the respondents' interpretations of these provisions is correct, the Court is obliged to prefer any reasonable interpretation which would give effect to the Bill of Rights. Clearly, that is the applicants' interpretation.

[183] GAA F14:2 -185

[184] EAA F13: 22 at para 26.4.2

[185] Id F13:146 at para 381

Fourth excuse: the power is in someone else's hands

192 The fourth excuse, which has already been referred to above, is the respondents' repeated attempts to blame one another, or some other government entity, for its failure to act. As much as President Ramaphosa may deny any conflict between the various government actors,[186] the papers paint a different picture.

193 For example, Eskom:

193.1 Blames the Government for its "keep the lights on" policy;[187]

193.2 Blames the Department of Forestry, Fisheries and the Environment for not postponing the implementation of the Minimum Emission Standards ("**MES"**);[188]

193.3 Blames the Department of Mineral Resources and Energy for refusing its diesel wholesale license;[189]

193.4 Blames the Department of Basic Education, for any failure to procure backup generators for public schools;[190]

193.5 Blames the Municipalities, for not paying it.[191] Eskom also contends that it has no ability to act in respect of end users who are supplied by the

[186] GAA F14: 38 at para 62

[187] EAA F13: 37 at para 70

[188] Id F13: 42 at para 81

[189]Id F13: 121 at para 311

[190] Id F13: 163 at para 420

[191] Id F13: 30 at para 47.7

Municipalities[192] – its attitude in this respect is essentially one of "it's not my problem, it's theirs;"

193.6 Blames the National Treasury, for refusing its requested budgets[193] and for taking too long to make decisions;[194]

193.7 Blames NERSA, for imposing non-cost reflective tariffs;[195] and

193.8 Denies any responsibility to procure alternative sources of energy,[196] but rather, respective Departments must do so.[197]

194 On the other hand, the Government:

194.1 Denies responsibility for determining which areas of the Republic may be load shed, as only Eskom can do that;[198]

194.2 Blames NERSA for imposing non-cost reflective tariffs;[199]

194.3 Denies responsibility for exercising oversight over Eskom, as this is the obligation of the Department of Public Enterprises;[200]

[192] Id F13: 151 - 153 at paras 393 – 394.4, 1

[193] Id F13: 40 at para 78

[194]Id F13: 9 at para 77.1

[195]Id F13: 24 at para 30

[196] Id F13: 154 -155 at para 397

[197] Id F13: 155 -156 at para 398

[198] GAA F14: 27 at para 45.2

[199] GAA F14: 37 at para 61.3

[200] GAA F14: 38-39 at para 64

194.4 Denies responsibility for procuring new energy, which it alleges falls to the Department of Minerals and Energy;[201] and

194.5 Blames Eskom for not meeting the conditions required for it to obtain a diesel wholesale licence.[202]

195 Notably, Minister Mantashe not only blamed Eskom for load shedding, but effectively accused it of implementing load shedding to overthrow the state.[203] Such a statement is not typically made in an environment of cooperation and mutual responsibility.

196 What all of this amounts to is a concerted effort by each respondent to avoid accepting responsibility for the crisis. It is deeply concerning that these same entities ask the Court, and South Africa, to simply trust them that all is under control and there is no need for additional oversight by this Court.

197 In such circumstances, this Court cannot get swept up into the respondents' infighting. People are dying, children's futures are at stake, businesses are being destroyed and livelihoods along with them. There is no more time for petty finger-pointing.

Fifth excuse: embeddedness

198 The primary reason put up by the respondent's as to why exemptions for the vulnerable entities cannot be implemented is that they are too embedded. In

[201] GAA F14: 39 at para 66

[202] GAA, F14: 40 at para 69

[203] Caselines, F01: 42 at para 101 footnote 6

other words, is they were to be exempted, then thousands of surrounding customers would also need to be exempted. That would mean that load shedding would be ineffective, and there would be a risk of a national blackout.

199 However, much like with every other excuse presented by the respondents, this is a gross exaggeration. There are ways in which even a highly embedded entity can be separated out from those surrounding it, such that it and only it can be exempted. What is more, these methods are identified by Eskom itself. They include reconfiguring the grid and the installation of smart meters.

200 Eskom concedes that an embedded grid can be reconfigured with a direct feeder line to the customer concerned. Eskom, as set out above, contends that this is not feasible because it would be too expensive and would take too long. Those excuses have already been dealt with above. In many ways, embeddedness is just a more specific manifestation of the same excuses. However, there are a few points unique to this issue which are worth noting.

201 Firstly, Eskom has contradicted itself in respect of both the price and the time period required to isolate public hospitals. On the one hand, it contends that it would cost R2,35 million per km of underground installation and would take 12 to 36 months to install even one feeder line. On the other, it contends that it would cost only R352 million, and take only 12 to 36 months to isolate all the hospitals.

202 Given Eskom's exaggerations, one can assume the lower estimate is much closer to the truth. Further, whilst Eskom contends that it would take up to 36 months to isolate critical sectors and instal direct feeder lines, NUMSA's expert has shown this to be wrong. He contends that, with cooperation amongst all role-

players and the assistance of a planning committee, it should take no longer than six months.

203 Unfortunately, the contradictions do not stop there. In particular, the respondents seem unable to determine whether Chris Hani Baragwanath Hospital ("**CHB**") is already exempt from load shedding.

204 The Government contends that CHB has been exempt from load shedding for 10 years.[204] This is put up despite the Head of Care at the hospital describing the devastating consequences she has personally witnessed at the hospital. Insultingly, the Government suggests that maybe Professor Mathiva confused unplanned power outages with load shedding.[205]

205 But this version is not contradicted only by Professor Mathiva. It is also contradicted by Eskom. According to Eskom CHB was "*not included in the Department of Health's initial list of hospitals."*[206] That means that, at the very least, CHB was not exempted 10 years ago.

206 It is also telling that Ms Mokwena indicates that Eskom effectively changed its mind about whether CHB, which must surely be one of the most embedded hospitals on the grid, could be exempt.[207] This belies the respondents position that it is simply impossible for any more hospitals to be exempted.

[204] GAA, Government Report, F14: 81 at para 22

[205] GAA, Government Report, F14: 82 at para 24

[206] Mokwena Affidavit, F13: 2414 at para 23.4

[207] Mokwena Affidavit, F13: 2414 at para 23.4

207 Thus, CHB is a useful example because it reveals that the Government is completely out of touch with how load shedding is operating, and that there is a serious breakdown of communications between it and Eskom. Secondly, it demonstrates that the position the respondents have taken, that nothing more can be done, is not true. When asked to reconsider an earlier decision, it found that a vulnerable entity actually could be exempted.

Sixth excuse: It is local government's responsibility

Local Government's Role

208 The President contends that the obligation in law to provide electricity lies with the municipalities. He sources this obligation in three independent constitutional provisions. First, section 100 of the Constitution, which allows for intervention by the national executive in provincial government, where the latter has failed to carry out a constitutional obligation. Here, so the argument goes, the applicants have not argued that any provincial government has failed to carry out an executive obligation that warrants the intervention of the national executive. Second, the President relies on section 139 of the Constitution contending that the national executive can intervene only where the provincial government has intervened in the affairs of the local government concerned and failed to carry out a constitutional obligation.

209 Relying on this framework, the President argues that "[i]t is not the applicants' case that provincial governments "cannot" or do not fulfil an executive obligation in terms of the Constitution or legislation, such that the "National Executive"

under the President should have intervened "by taking any appropriate steps to ensure fulfilment of that obligation, in this case to stop load shedding".

210 But the President improperly construes the terms "cannot" and "do not". For the purposes of this case, they are not used to denote the failure to properly execute or execute at all a constitutional obligation. Rather, they indicate the absence of any duty on municipalities to supply the nation with an uninterrupted supply of electricity. This is the applicants' case.

211 The same misconstruction of the applicants' case appears at paragraph 27 of the President's answering affidavit where it is contended that:

"The Constitution does not make provision for the President or the National Executive to intervene in local government affairs or when a municipality cannot or does not fulfil an executive obligation…"

[own emphasis]

212 The applicants do not contend that local government did not fulfil an executive obligation. Since inception, the applicants have argued that the obligation to supply electricity is that of the national government. If there is no local government competence or duty to speak of the intervention defences and the reliance on section 100 and 139 have no bearing on the facts of this case. In *Premier, Gauteng and Others v Democratic Alliance and Others*,[208] the Constitutional Court affirmed that sections 100 and 139 serve the limited purpose

[208] 2022 (1) SA 16 (CC) at para 57; see also Johannesburg Metropolitan Municipality v Gauteng Development Tribunal and Others 2010 (6) SA 182 (CC) at paras 43-44

of enabling intervention because the local government cannot fulfil its executive obligations. The court went on that *"it empowers the provincial government to intervene in such circumstances for the obligations that have not been carried out, but only to the extent necessary for the purposes referred to in section 139(1)(a), (b)(i)-(iii) and (c)".*

213 Thus, in order for the President's reliance on sections 100 and 139 to find any application there must be an identifiable obligation which the municipality failed to carry out. There is no such obligation and neither can the President's reliance on section 73(1) of the Systems Act purport to create one. On this score the President contends that it is the municipalities who hold the obligation in law to provide electricity because under Schedule 4 Part B of the Constitution electricity and gas reticulation fall within the competence of local government. The President justifies this contention by relying on section 73(1) of the Municipal Systems Act, and concludes that *"[i][t is clear from the provisions of the Systems Act that it is the local sphere of government, which is in law required to provide basic municipal services such as electricity to the people…"*

214 This reasoning seems to be based on the finding of the Constitutional Court in *Joseph*,[209] where the court held that "*these provisions impose constitutional and statutory obligations on local government to provide basic municipal services, which include electricity*". The provisions referred to the obligation of local government, in the framework of national and provincial housing legislation, to

[209] *Joseph* at para 39

ensure that services in respect of water, sanitation and roads and electricity were economically efficient.

215 Two points require elucidation. First, a constitutional obligation that municipalities supply electricity can arise only where the Constitution and the law prescribes such a duty for local government. This is the ceiling for the obligation created by section 73(1) of the Systems Act, as argued by the President and as interpreted by the Constitutional Court in *Joseph*. So section 73(1) must be read together with the legislative package governing the full conspectus of the supply of electricity, with the starting point being Schedule 4 of the Constitution.

216 Schedule 4 provides that municipalities have concurrent competence with the provincial and national government to '*reticulate*' electricity. The regulatory framework for the supply of electricity is the ERA. The ERA regulates the generation, transmission, distribution, reticulation, trading and the import and export of electricity and gives a very specific meaning to the term '*reticulation*', which it defines as *"trading or distribution of electricity and includes services associated therewith"*.

217 Reticulation, as appears from its definition, occurs only when electricity is traded or distributed, activities which take place on a distribution system. A distribution system in turn originates at the relevant substation. It includes all infrastructure for the flow of electricity such as lines, poles, transformers and other equipment. Its purpose is to deliver power to customers at the required voltages.

218 The delivery of electricity is the last step in the value chain and comprises the concurrent local government competence of reticulation referred to in Schedule

4. The sum total of local government's obligation is thus to deliver or reticulate electricity. This much was recognised by the Constitutional Court in *Vaal River,*[210] albeit in the minority judgment of Unterhalter AJ, where he held:

> *"[83] Municipalities have a central role to play in the distribution of electricity. In Joseph, this Court set out the constitutional and statutory basis of the public duty of a municipality to provide electricity to its residents. Under the provisions of the Local Government: Municipal Structures Act (Structures Act), municipalities are empowered to manage the bulk supply of electricity to end consumers. Municipalities procure bulk supplies of electricity from Eskom and must then discharge their duties to supply end consumers.*
>
> [own emphasis]

219 Thus, the caveat in the President's interpretation of section 73(1) and indeed the *Joseph* decision is that the municipal obligation to provide electricity can only ever be limited to the role of local government in the electricity value chain, since these provisions were never under attack in *Joseph*. As explained in *Vaal River* that role is to distribute electricity on a distribution network and to manage the bulk supply of electricity to end consumers. The bulk supply, as explained further by Unterhalter J, is procured from Eskom and the duty of the relevant municipality is to supply the end consumer.

[210] *Vaal River* at para 83

220 This is reinforced by the fact that section 27 of the ERA, which deals with the duties on municipalities, binds the executive authority of local government to comply with the "*technical and operational requirements for electricity networks*". In so doing it only prescribes minimum statutory interventions on a municipality's reticulation services, such as integrating it with its Integrated Development Plan; and the provision of reticulation services free of charge to certain end users.

221 For the sake of clarity, this case does not concern how and whether a municipality has carried out its duties under section 27 of the ERA. Rather, the applicants seek an uninterrupted supply of electricity for the sectors identified in prayer 3 of the notice of motion. The relief is sought whether or not the electricity so supplied is reticulated by Eskom itself or the municipality in question.

222 The language used once again is significant. The ERA accords specific attributes to the supply of electricity, which it defines as encompassing much more than reticulation through a distribution network. Rather, the supply of electricity means " *trading and the generation, transmission or distribution of electricity*".

223 Municipalities have no power to generate[211] or transmit electricity. They do not supply electricity in the manner as defined by the ERA. Eskom is the only entity

[211] Even the three sets of Regulations on New Generation Capacity (4 May 2011; 4 November 2016 and 16 October 2020) limit the role of a municipality to procure or buy new generation capacity. To the extent that the Regulations can be construed as applying to municipalities 'procuring' the ability to generate new capacity, that is not relevant for this application. This application relates to the supply of electricity from the current generating fleet in terms of Eskom's licence with NERSA. In any event the New Generation Capacity Regulations cannot be construed as empowering municipalities to generate power since the Minister has no authority to licence such conduct. This is exclusively NERSA's function and regulations create no role for NERSA.

licensed by the Regulator, NERSA to supply electricity for the purposes of the ERA. In so doing Eskom supplies bulk electricity to municipalities by conveying electricity through its transmission power system.

224 The transmission of electricity is also regulated by the ERA. In terms of section 21(5) an agreement for the bulk supply of electricity is generally concluded between Eskom and the relevant municipality. A municipality is therefore a customer to Eskom for the supply of electricity. The relationship is a matter of logic since, and as the SCA held in *Resilient,*[212] if Eskom fails to supply electricity downstream to municipalities, the latter cannot discharge their constitutional and statutory mandate to provide it to the public.[213] Thus to the extent that Eskom fails to supply a municipality with electricity, there is of course no electricity to distribute or reticulate. *Resilient* therefore aptly describes the breach that has occurred and the challenge before this court, namely, the contravention by Eskom, as an organ of state and the government of their collective obligation to supply electricity downstream, either to municipalities for reticulation or directly to end-users.

225 This obligation has nothing to do with the constitutional obligation of municipalities to reticulate electricity because, as held by a Full Bench of this court in *Cape Gate*[214] a municipality is "*a mere conduit: it passes on from Eskom upstream the electricity downstream to the applicants (on the way it retains some of it for its other consumers, and for itself); and it passes back upstream the*

[212] *Resilient* at para 58

[213] Ibid

[214] *Cape Gate* at paras 130 – 135

applicants' payment (on the way it retains some of it, its margin, for itself). Therefore, a municipality does not supply electricity as contemplated in the ERA. This obligations is Eskom's and the national government and they must be held liable for any ensuing contravention of constitutional rights when municipalities cannot reticulate electricity because Eskom has not supplied them with electricity. This much was recognised by Madlanga J, writing for the majority in *Vaal River* where he held that:

"[199] What is particularly relevant in section 7(2) is the obligation resting on the state (which includes Eskom as an organ of state) to respect the rights in the Bill of Rights. Of the four section 7(2) obligations (respect, protect, promote and fulfil), I single out "respect" because I am not dealing with the matter on the basis that Eskom bears a direct, positive duty to supply electricity to the residents. The section 7(2) obligation to respect the rights in the Bill of Rights entails that the state must refrain from unreasonable conduct that results in the infringement of rights in the Bill of Rights. I use the reasonableness standard based on the majority judgment in Glenister v President of the Republic of South Africa[215] There Moseneke DCJ and Cameron J held that "[s]ection 7(2) implicitly demands that the steps the state takes must be reasonable".[216]

[200] The sudden and substantial reduction of the electricity supply which – according to the residents was made without notice ***[133]*** *– was the trigger*

[215] [2011] ZACC 6; 2011 (3) SA 347 (CC); 2011 (7) BCLR 651 (CC)

[216] *Vaal River* at para 194

that resulted in the catastrophic infringements of the residents' rights. Therein lies the basis of the residents' case that Eskom failed to respect several of their rights protected by the Bill of Rights. In terms of section 7(2) of the Constitution the state (including Eskom) bears an obligation to respect the rights in the Bill of Rights. If the conduct – howsoever arising – has the effect of infringing the residents' rights, that is the focal point. The question is: is there a rights violation arising from Eskom's conduct?

226 The differentiation between a substantial reduction in electricity and no electricity at all is a matter of degree, and thus Madlanga J's reasoning applies unequivocally to the facts of this matter. The trigger is the failure by Eskom to supply or transmit electricity to municipalities, resulting in the contravention of the rights identified in the application. The only difference here is that the rights violation has not been denied, and therefore must be taken as established, leaving the question before this court one of appropriate remedy only.

227 Thus, the duty to supply electricity is not a local government competence, but rather the constitutional and statutory obligation of the national government. In the next section these heads discuss how that duty arises and the manner in which it was contravened by Eskom, the state respondents and the President.

THE REMEDY IS JUST AND EQUITABLE

228 Prior to addressing why the relief sought in this case is just and equitable, we address head-on a theme that runs through the respondents' papers – which is

that the relief sought by the applicants to address the humanitarian crisis of load shedding is impossible due to budget constraints.

229 First, as we have already shown above and show further below, there is no merit to the suggestion that the relief sought is impossible.

230 Second, importantly and in any event, the requirement of reasonableness when the state acts to fulfil its constitutional obligations limits the extent to which the state may rely on budgetary constraints to field off the relief sought.

231 As the Constitutional Court noted in *TAC*, the courts have made a range of decisions and orders that similarly implicate the national economy and budgets of organs of state in the past in order to remedy rights breaches – in such cases, the state simply "*has to find the resources to do so*".[217] In the process, the courts have recognised the following key principles:

231.1 Where the state seeks to invoke resource constraints to justify failure to realise a constitutional right, "the precise character of the resource constraints, whether human or financial, in the context of the overall resourcing of the organ of state will need to be provided";[218]

[217] *TAC* para 99

[218] Rail Commuters Action Group v Transnet t/a Metrorail 2005 (2) SA 359 (CC) para 88

231.2 It is “not good enough for the [state] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its obligations.”[219]

232 Courts have made orders that directly affect the allocation of budgetary resources at significant scale in a range of contexts, including:

232.1 setting aside reductions in financial allocations for school subsidies made during a financial year on the basis that the state had made an enforceable promise to pay;[220]

232.2 ordering the state actually to provide resources, or to reallocate them, in diverse contexts, including for example:

232.2.1.1 the national provision of nevirapine to prevent mother-to-child transmission of HIV, ultimately contributing to a national antiretroviral programme among the largest in the world;[221]

232.2.1.2 finding that the overall system for the allocation of police human resources for the Western Cape Province unfairly discriminated on the basis of race

[219] City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd 2012 (2) SA 104 (CC) para 74

[220] KwaZulu-Natal Joint Liaison Committee v MEC Department of Education, Kwazulu-Natal 2013 (4) SA 262 (CC)

[221] Minister of Health v Treatment Action Campaign (No 2) [2002] ZACC 15; 2002 (5) SA 721; 2002 (10)

and poverty, requiring the province to revise this system of allocation;[222]

232.2.1.3 ordering the state to provide various aspects of school infrastructure at provincial scale, most recently in ordering the state to reinstate the national school nutrition programme.[223]

233 The principle in *Blue Moonlight* that an organ of state will not be permitted to rely on budgetary constraints if it had a prior obligation to budget in order to fulfil the rights in question has been applied in a number of contexts by courts in subsequent cases. In the context of the right to basic education, the court in *Madzodzo* said the following after considering the remarks in *Blue Moonlight*:

> "*[35] These remarks, made in the context of evaluating the reasonableness of steps taken to realise a progressively realisable right of access to housing are apposite to this matter. As already indicated, the respondents have been aware since at least May 2011 that there is a very serious shortage of furniture in public schools and that this lack of furniture constitutes a serious impediment to the enjoyment of the right to basic education that the Constitution guarantees. Accordingly, the respondents have been well aware for a considerable time that proactive steps need to be taken to address this shortage and to fulfil the right to basic education as required by ss 7 and 29 of the Constitution. <u>In these</u>*

[222] Social Justice Coalition and Others v Minister of Police [2018] ZAWCHC 181; 2019 (4) SA 82 (WCC)

[223] Equal Education and Others v Minister of Basic Education [2020] ZAGPPHC 306; [2020] 4 All SA 102 (GP); 2021 (1) SA 198 (GP)

circumstances it is not good enough to state that inadequate funds have been budgeted to meet the needs and that the respondents therefore cannot be placed on terms to deliver the identified needs of schools within a fixed period of time. Nor is it good enough to state that the full extent of the needs is unknown. The information available to the respondents from 2011 was such that reasonable estimates of the funding required could be made, and reasonable steps taken to plan for such expenditure.

[36] In my view the open-ended approach urged by the respondents is unreasonable. Learners in this province are entitled as of right to have immediate access to basic education. They are also entitled as of right to be treated equally and with dignity. The lack of adequate age and grade appropriate furniture in public schools, particularly public schools located in deep rural and impoverished areas, undermines the right to basic education, and the persistent failure to deliver such age and grade appropriate furniture to public schools constitutes an ongoing violation of the right to basic education. This court, in the exercise of its jurisdiction, is obliged to give effect to the fundamental rights enshrined in the Constitution and to make appropriate orders to vindicate those rights where such orders are required. In the circumstances of this matter this court is called upon to exercise its supervisory jurisdiction to ensure that the executive authorities charged with responsibility for ensuring the right

of access to basic education act reasonably to fulfil their constitutional obligations."[224]

234 Similarly in *Equal Education*, the court rejected an argument based on budgetary constraints in the following terms:

"*[194] The obligation upon the respondent to provide basic education has been in existence since 1996 when the Constitution was born, 22 years ago. Thus the respondent has had adequate time to plan and budget for all its duties in respect of the right to basic education. Even accepting that apartheid left gaping disparities and a wide gap in education infrastructure, with the proviso in subreg 4(5)(a) there is no hope that such a gap will ever be closed or, if so, to a significant extent. The proviso provides the respondent with a lifetime indemnity against discharging the duty she owes in terms of s 29(1)(a).*

[195] The natural consequence flowing from the stance assumed by the Minister is that she cannot make any commitment regarding the basic norms and standards for the infrastructure in public schools. This is unpalatable, given that the requirement here is for a minimum requirement for basic infrastructure, nothing more, nothing less. It is also inconsistent with the Constitution.

[196] In Rail Commuters supra [186] the court held that the Constitution affirms accountability as a value and requires reasonable steps to

[224] Madzodzo and Others v Minister of Basic Education and Others 2014 (3) SA 441 (ECM) paras 35-6

be taken by the relevant organs of state to comply with their legislative and constitutional obligations. Our courts have always rejected the reliance on budgetary constraints as a justification for failure to provide essentials.

[197] In response, whilst resisting the relief sought by the applicant, the respondent offers absolutely nothing. This is untenable. There is an incongruity manifested in the acceptance on the one hand of the reality of the substandard public-school infrastructure and the inherent dangers created thereby, and on the other hand not offering anything. This open-ended approach is unreasonable and thus unacceptable."[225]

235 The issue of loadshedding has been known to the respondents at least since 2007. They cannot rely on their failure to budget accordingly in order to meet their constitutional and statutory obligations to deliver uninterrupted electricity supply to the public. This Court is obliged to give effective relief to the applicants.

236 The respondents argue that the relief sought by the applicants is *'dangerous'*.[226] Several reasons are offered. What follows is an evaluation why these reasons are without merit and the remedy sought is just and equitable.

Comparison of Solutions: Time and Cost

237 The respondents' hope, throughout this application, has been to cast the impression that by intervening this Court will do more harm than good. That is,

[225] Equal Education and Another v Minister of Basic Education and Others 2019 (1) SA 421 (ECB) paras 194-7.

[226] EAA F13:139 140 at para 359

with all due respect, simply false. When one directly compares the cost and time it would take to implement the relief sought with the costs and time it will take the respondents to implement their purported plan, it is clear that by intervening, this Court will only do good.

Costs and Time Periods for Exemptions

238 Eskom contends that there are two ways that embedded institutions could be isolated from the grid such that they be exempt from load shedding. For large institutions connected to medium voltage networks, such as hospitals, a direct feeder line with circuit breakers would need to be installed.[227] For low voltage networks, remote controllable switches or circuit breakers, together with smart meters would need to be installed.[228]

239 Eskom contends that installing a single dedicated feeder would take anywhere between 12 and 36 months[229] and would cost more than R2,35 million per km for underground installations and over R1 million per km of above ground installation.[230]

240 By contrast, Eskom contends that the rollout of smart meters is *"a more feasible network solution."*[231] Having embarked on the project in 2021, it has installed approximately 150 000.00 smart meters so far.[232]

---

[227] Id at para 362.1

[228] Id at para 362.2

[229] Id at para 364.1

[230] Id at para 364.2

[231] Id at para 366

[232] Id

241 As for cost, Eskom avers that replacing all the existing basic meters on the network with smart meters (about 7 million of them) would cost R15 billion and would take 4 years to complete.

242 However, Eskom is deploying a sleight of hand in this paragraph. It speaks only of the cost and time of replacing all the basic meters. It gives no estimate as to the time and cost of replacing meters in a targeted fashion to exempt the vulnerable entities from load shedding. If 7 million can be replaced in 4 years for R15 billion, logic dictates that 1,75 million could be replaced in 1 year for R3.75 billion (which is less than load shedding costs the economy in one day of stage 6 load shedding).

243 However, Eskom goes on to say that implementing combined solutions to insulate all public hospitals from load shedding would cost only R356 million and would take between 12 and 36 months.[233] This is incongruous with that set out above, and indicates that exemptions may be much cheaper than first suggested.

244 The government, on the other hand, simply avers that exempting the vulnerable entities is impractical and impossible.[234]

245 It also contradicts Eskom's version that insulating all hospitals would cost R356 million, by saying that exempting only 46 hospitals would cost R356 million.[235] In other words, according to the government it would cost about R7.7 million to exempt a single hospital.

[233] Id at para 410

[234] GAA F14:28 at para 45.5

[235] Id F14: 77 at para 14

246 As for timing, the government contends that it will take 12 to 14 months to exempt 11 hospitals,[236] a further 15 to 26 months to exempt a further 24 hospitals,[237] and more than 62 months to exempt a further 11 hospitals.[238] This is a direct contradiction of Eskom, who alleged that it would take 12 to 36 months to exempt a single hospital. From the evidence of NUMSA's through General Holomisa's affidavit, this is in any event not the case. A coordinated effort, he indicated, would take approximately six months.

247 What emerges from the above, is that the respondents repeatedly contradict not only one another but also themselves as to the feasibility, cost, and timing for providing exemptions. The version put up is entirely inconsistent. According to the respondents:

247.1 It would cost R356 million to exempt 46 hospitals, but also R356 million to exempt all public hospitals;

247.2 It would cost R2,35 million per km of underground installation for single hospital, but also R356 million to exempt all hospitals, and also R7.7 million to exempt a single hospital;

247.3 It would take 12 to 36 months to exempt one hospital, but also 12 to 36 months to exempt 35 hospitals;

[236] Id at para 15.1

[237] Id F14: 78 at para 15.2

[238] Id F14:79 at para 15.3

247.4 Exempting institutions is impractical and impossible, but the government is going to exempt a further 46 hospitals; and

247.5 Eskom needs to focus all of its energies on ending load shedding, and cannot focus on installing smart meters, but Eskom is still currently rolling out smart meters and plans to complete the project within four years.[239]

248 In the circumstances, the respondent's version is so inconsistent that it cannot be relied upon. It has, as a result, failed to cast any doubt as to the affordability of exempting the vulnerable institutions, and as discussed above, the respondents' 'plan' is no plan at all.

Costs and Time Periods for the Respondents' plan

249 The respondents set out that their plan will end load shedding within 24 months. For reasons already set out, that it simply impossible on the respondents' own versions. Thus, the arguments that exemptions would take longer to implement than, or as long to implement as, the respondents' plan must be rejected.

250 As for the cost of implementing the respondents' plan, the respondents are especially evasive and fail to take this Court into their confidence.

251 Not once in the thousands of pages filed do the respondents provide even an estimate of what the implementation of the plan would cost. One can only infer that they fail to do so because, were they to do so, it would quickly become

[239] EAA F13: 121 at para 313

obvious that respondents could afford to exempt the vulnerable entities in the meantime.

252 Alternatively, the Court could infer that the respondents do not tell it how much it would cost to implement the plan because they simply do not know. That, of course, renders the decision to implement it at the expense of exempting the vulnerable entities completely irrational. It also means that the plan must fall far short of the required standard of clarity and detail.

253 The closest that Eskom comes to providing its total budget for the "plan" is to allege that the government has committed a total of R136.8 billion to it for the period of 2020 to 2023.[240] However, Eskom itself indicates that that money is earmarked for other purposes.[241]

254 It also avers that it has increased its funding for planned outages to R9.5 billion. However, this too is of no assistance in establishing the true budget of the plan or to enable a comparison of the cost between it and the exemption relief sought.[242]

255 By contrast, Eskom happily provides the estimated cost of implementing the transmission development plan, which is R118 billion.[243] Notably, that is significantly more expensive that the R15 billion it contends it would cost to replace 7 million basic meters with smart meters, which would make exemptions

[240] EAA F13: 690 at para 115

[241] Id

[242] Id F13: 712 at para 175

[243] Id F13: 115 at para 289

possible. It is also significantly more expensive than the R356 million it claims it would need to insulate all public hospitals from load shedding.

256 Conradie indicates, in his affidavit, that the budget for maintenance only in 2022 was R19.1 billion.[244] Importantly, that amount of maintenance has taken the respondents no closer to ending load shedding. He also estimates that, this year, the cost for maintenance will increase to about R20,5 billion.[245] One can thus infer that the budget for the plan (if one exists) would be significantly greater than R20 billion, and thus significantly greater than replacing all of Eskom's existing basic meters.

257 The closest Conradie gets to informing this Court as to the cost of the respondents' plan is to indicate that, already, the respondents face a shortfall of R13.1 billion for the FY 2023/2024.[246] There is no indication of the total.

258 The reality is that the respondents have simply failed to put up enough to cast serious doubt on the applicant's version.

259 As for timing, the respondents' suggested time period of 24 months is, based on the other allegations made by them, a logical impossibility. Moreover, based on their past conduct and failures, there no reason to trust that the respondents will deliver on their promises and plans without intervention in 24 months or ever.

260 As to cost, the respondents have elected not to play open cards with the Court. They happily provide figures (which are frequently exaggerated, as had

[244] Id F13: 13-662 at para 44.2

[245] Id F13: 13-662 at para 44.3

[246] Id F13: 662 at para 44.6

previously been shown) for the costs of exemptions and any other proposal put forward by the applicant, but are utterly silent as to their own budget. They cannot hope to cast serious doubt on the applicants' version by being so deliberately evasive.

261 When all of the above is considered, the only fair remedy to address the constitutional infringements is for the respondents to furnish the critical sectors with an uninterrupted supply of electricity, either in terms of prayers 3 and 4 or alternatively prayer 5.

262 Properly examined and considered, the facts of this matter cry out for the remedy sought. It can be crafted in a manner to ensure that any injustice is avoided[247], but what cannot transpire is that the applicants are left without a remedy. This is particularly so in circumstances where there is no serious dispute between the parties on the damaging effect of load shedding and its catastrophic human impact.

263 The applicants and respondents part ways only on how to address the infringement. The applicants have shown that the respondents either have no coordinated plan on how to address load shedding or that such plan is simply not being implemented. Therefore, the fate of vindicating the infringed rights cannot be left to an inoperative Generation Recovery Plan. The only remedy that will redeem the Constitution through the enforcement of the rights breached is to grant the relief in the amended notice of motion.

[247] Sekoko Mametja Incorporated Attorneys v Fetakgomo Tubatse Local Municipality [2022] JDR 0488 (SCA) at para 10

264 This is underscored by the fact that the respondents' so-called plan to end load shedding, is in fact no plan at all. This is shown below.

THE RESPONDENTS' PLAN IS NO PLAN AT ALL AND IS INCOMPATIBLE WITH THE CONSTITUTION

265 As set out above, one of the two key pillars of the respondents' defence is that there is a plan in place to end load shedding in 24 months. What follows will demonstrate that the purported plan is, in fact, no plan at all. It falls hopelessly short of what the respondents are required to produce in terms of the Constitution and the law.

266 Firstly, it is important to understand what is constitutionally and legally required of the state when it comes to such a plan.

267 We submit, as a point of departure, that any plan produced by the respondents must be properly characterised. We have shown that the respondents have breached numerous of their constitutional obligations, and have grossly violated a number of rights entrenched in the Bill of Rights. Any plan produced by the respondents is thus a plan to redress their own constitutional wrongs.

268 We submit that the core question that falls to be answered is this: what is the constitutional standard by which a court must measure a plan produced by an organ of state responding to a humanitarian crisis caused through its own conduct and that of other related organs of state, which has resulted in gross violations of human rights?

269 In our submission, the answer lies in section 7(2) of the Constitution. When the state produces a corrective plan remedying its own breaches of rights in the Bill of Rights, that plan must fulfil the state's obligations to respect, protect, promote and fulfil the rights in question. As is trite, those obligations require the state to act reasonably.[248]

270 We submit that what is procedurally and substantively required of such a plan must comport with the features of reasonableness which the courts have developed in the context of assessing the state's positive obligations in sections 26(2) and 27(2) to fulfil rights in the Bill of Rights. This standard is apposite when assessing a corrective plan by the state in undoing its own retrogressive measures, since it makes no difference that the fulfilment of the rights in question is being restored pursuant to such retrogressive measures.

271 We accordingly submit that in order for the plan in question to be reasonable, it must be characterised by the following:

271.1 First, the plan must make appropriate distinctions between differently situated people, under the Constitution. If we accept, as we must, that load shedding interferes with rights in the Bill of Rights, then reasonableness requires a rights-specific approach, which is based on the critical needs of the forebearers of each of the rights with which load shedding interferes. Under Eskom's current approach, the default

[248] *Vaal River* para 199

position is indiscriminate: 'everybody gets loadshedding'. This is unreasonable.

271.2 Second, the plan must comply with the reasonableness features developed in *Grootboom*,[249] *TAC*,[250] *Mazibuko*[251] and various other related cases from the Constitutional Court.

271.3 Third, the requirement of reasonableness limits the extent to which the state may rely on budgetary constraints to resile from its obligations to the rights bearers whose rights are impinged by load shedding.

272 In terms of the applicable case law, the following is required of a plan in order for it to pass the reasonableness test:

272.1 First, the plan must account for the degree and extent of the denial of the right, should it be denied or interfered with. In this regard, the Constitutional Court said in *Grootboom*:

> "*To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness*

[249] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46

[250] Minister of Health and Others v Treatment Action Campaign and Others 2002 (5) SA 703

[251] Mazibuko and Others v City of Johannesburg and Others 2010 (4) SA 1 (CC)

to show that the measures are capable of achieving a statistical advance in the realisation of the right."[252]

272.2 Second, the plan must cater for the needs of the most vulnerable in society. A plan will not be reasonable if it excludes the most vulnerable in society by failing to cater for the urgent short-term needs of those who live in intolerable conditions inconsistent with human dignity.[253] In this regard, it was held in *Grootboom* that—

"*[t]he Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.*"[254]

272.3 Third, the plan must be balanced and flexible and cater for short, medium and long term needs.[255]

272.4 Fourth, the plan must "clearly allocate responsibilities and tasks to the different spheres of government and ensure that the appropriate financial and human resources are available".[256]

[252] *Grootboom* para 44

[253] *TAC* para 78. *Grootboom* paras 44, 64, 68 and 99

[254] Ibid

[255] *Grootboom* paras 43, 68, 78 and 95

[256] Grootboom para 39

272.5 Fifth, the plan must be a "coherent, comprehensive and co-ordinated" measure capable of realising the rights in question.[257]

272.6 Sixth, the plan must be consistently reviewed and revisited by the functionary concerned,[258] and be reasonably conceived and implemented.[259]

272.7 Seventh, the plan must be publicly known and transparent.[260]

273 When measured against what the Constitution requires, it is evident that what has been produced by the respondents falls hopelessly short.

274 In addition, the amended Treasury Regulations promulgated on 9 October 2019 under section 76 of the PFMA define the basics of any government 'plan ' as including two essential components. The first is a strategic plan with content as set out in Regulation 5.2. Given its importance, it is inserted in full. Regulation 5.2 provides:

> *5.2.3 The strategic plan must—*
>
> *(a) cover a period of at least three years and be consistent with the institution's published medium term expenditure estimates;*
>
> *(b) include specific Constitutional and other legislative, functional and policy mandates that indicate the output deliverables for which the institution is responsible;*
>
> *(c) include policy developments and legislative changes that influence programme spending plans over the MTEF period;*

[257] *Grootboom* paras 39 – 41

[258] *Mazibuko* para 67

[259] *Grootboom* paras 40 – 43

[260] *TAC* para 123

(d) include the measurable objectives, expected outcomes, programme outputs, indicators (measures) and targets of the institution's programmes;

(e) include details of proposed acquisitions of fixed or movable capital assets, planned capital investments and rehabilitation and maintenance of physical assets;

(f) include details of proposed acquisitions of financial assets or capital transfers and' plans for the management of financial assets and liabilities;

(g) include multi-year projections of income and projected receipts from the sale of assets;

(h) include details of the Service Delivery Improvement Programme;

(i) include details of proposed information technology acquisition or expansion in reference to an information technology plan;

(j) for departments, include the requirements of Chapter I, Part III B of the Public Service Regulations, 2001; and

(k) include details of specific plans that the executive authority, Parliament or the relevant provincial legislature may direct the institution to report on.

275 The plan put up by the respondents falls far short of the standard required by the Constitution and the law. However, the plan also falls short of the standard of common sense. The following problems are immediately observable:

275.1 The plan is internally contradictory:

275.1.1 Of the 10 focus areas, the first is aimed at "increased maintenance" and the second is "defer maintenance;"[261]

275.1.2 Eskom claims that it reinstated "mothballed" stations including Komati, Camden and Grootvlei.[262] And yet, it also contends that

[261]EAA F13: 76 – 77 at para 171

[262] Id F13:83 at para 185

these stations are at the end of their life and must be decommissioned.

275.2 The plan includes the very same priorities and behaviours which the respondents' contend caused load shedding in the first place such as:

275.2.1 deferring maintenance;

275.2.2 aggressive cost cutting;[263]

275.2.3 working with corrupt contractors;[264] and

275.2.4 relying extensively on Medupi and Kusile which are fundamentally flawed builds, or in De Ruyter's words, completely "vrot."

275.3 The unbundling of Eskom will begin with Transmission[265] and end with Generation, despite the respondents' position that load shedding is a result of problems with Generation.

276 It has also already been set out above, that on Eskom's own timeframes as to the implementation of various aspects of this plan, it is simply impossible that it could be completed within 24 months.

[263] Id F13: 76 - 77 at para 171

[264] Id F13: 84 - 85 at para 191

[265] Id F13: 109 at para 273

277 In the circumstances, the plans put up by the respondent's fall short not only of that which the Constitution requires, but even of basic logic and common sense.

CONCLUSION

278 The respondents have essentially put up two defences:

278.1 If load shedding is not conducted to the extent that, and in the manner that it is currently being conducted, there will be a national blackout of unforetold duration and proportion. In other words, there is nothing more which can be done; and

278.2 There are extensive plans in place to ensure that, within the next 24 months, load shedding will effectively be solved. There is no need for additional measures, plans, accountability, or oversight, because the respondents have everything under control.

279 The first is demonstrably untrue because:

279.1 There are a number of alternative energy sources which the respondents could procure. Their excuses as to the practicalities are just that – excuses. The solutions are not too expensive, will not take too long to implement, and are not actually prevented by any law.

279.2 Embeddedness is an avoidable problem. Load shedding could still be effectively implemented to match the supply and demand of electricity while exempting the vulnerable entities.

280 The second is demonstrably untrue because:

280.1 On Eskom's own timeframes, the plan could not be implemented within 24 months;

280.2 The plan falls short of the standards required by the Constitution and the law;

280.3 The plan falls short of the basic dictates of logic and common sense.

281 In the circumstances, the relief sought in Part A of the amended notice of motion should be granted.

282 For all of the above reasons, the applicants have made a case for the relief sought in the amended notice of motion, and seek an order in terms thereof.

T NGCUKAITOBI SC

R TULK

M Z GWALA

R RICHARDS

B MKHIZE

Y PEER

M RASESEMOLA

K DEWEY

N QWABE

COUNSEL FOR THE APPLICANTS