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IN THE HIGH COURT OF SOUTH AFRICA
Gauteng Division, Pretoria

CASE NO: **2023-003615**

In the matter between:

DEMOCRATIC ALLIANCE	Plaintiff / Applicant / Appellant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA,ESKOM HOLDINGS SOC LIMITED,PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA,MINISTER OF PUBLIC ENTERPRISES,MINISTER OF MINERAL RESOURCES AND ENERGY,MINISTER OF FINANCE,MINISTER OF FORESTRY, FISHERIES AND THE ENVIRONMENT,MINISTER OF TRADE, INDUSTRY AND COMPETITION,SOUTH AFRICAN LOCAL GOVERNMENT ASSOCIATION,PREMIER, WESTERN CAPE,PREMIER, NORTHERN CAPE,PREMIER, EASTERN CAPE,PREMIER, KWA-ZULU NATAL,PREMIER, MPUMALANGA,PREMIER, LIMPOPO,PREMIER, GAUTENG,PREMIER, FREE STATE,PREMIER, NORTH WEST,THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA,MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Defendant / Respondent

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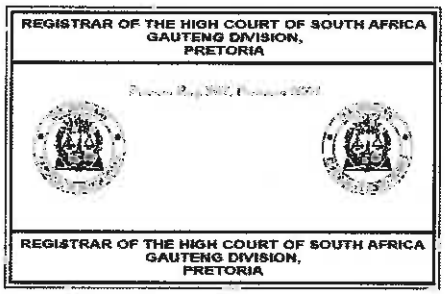
Founding Affidavit



ELECTRONICALLY SIGNED BY:

Registrar of High Court of South Africa , Gauteng Division,Pretoria

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.: 2023-003615

In the matter between:

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

THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA Nineteenth Respondent

MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS Twentieth Respondent

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FOUNDING AFFIDAVIT

I, the undersigned,

JOHN STEENHUISEN

state under oath:

1. I am the leader of the opposition and the federal leader of the Democratic Alliance (**DA**), the applicant in this matter. I am duly authorised to bring this application on the behalf of the DA.

2. The facts described in this affidavit fall within my personal knowledge, unless I state otherwise, or the context makes it clear that they do not. I confirm that those facts are to the best of my knowledge, true and correct.

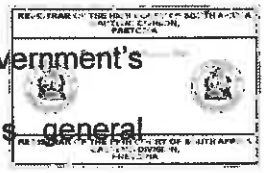
3. Some of the averments I make herein deal with matters of law. To the extent that I do so, I rely on the legal advice obtained from my legal representatives during consultation and in the preparation of this affidavit. I accept the correctness of that legal advice.

I INTRODUCTION

4. This is an application in two parts.

4.1. First, in Part A, the application seeks urgent interim relief pending the resolution of the relief sought in Part B. The DA seeks to interdict, pending Part B, the implementation of a decision taken by the National Energy Regulator of South Africa (**NERSA**) to increase electricity tariffs.

4.2. Second, in Part B, the application is a semi-urgent review of various decisions taken by the South African government relating to the ongoing energy crisis in South Africa. One of those decisions is NERSA's decisions to increase tariffs. Part B also challenges government's decisions to implement loadshedding and government's general response to South Africa's energy crisis.



5. With respect to Part A, on 12 January 2023, NERSA decided to approve the revenue for Eskom Holdings SOC Limited (**Eskom**) for the next two financial years.

6. NERSA decided that Eskom is entitled to recover R318 billion from all its customers in the 2023/24 financial year, and R352 billion in the next financial year. These revenues appear to translate to an increase in electricity tariffs of over 30% in the next two years.

7. I attach NERSA's decision as **FA1**. When I deposed to this affidavit, NERSA had not yet provided the reasons for its decision.

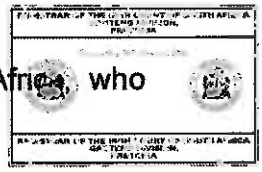
8. NERSA's decision is inconsistent with the Constitution of the Republic of South Africa, 1996. In Part B, the DA seeks to have the decision declared as such and set aside.

9. Pending Part B, NERSA and Eskom should not implement NERSA's decision. NERSA's decision is irrational, unlawful, and unreasonable.

10. First, NERSA's decision constitutes an irrational, unreasonable retrogressive measure.

10.1. Previously, NERSA required Eskom to subsidise generally the price of electricity by imposing below-cost tariffs.

10.2. These tariffs ensured that millions of people in South Africa, who otherwise could not afford electricity, had access to power.



10.3. NERSA has abandoned that policy by steadily increasing Eskom's tariffs over the last several years, and by drastically increasing the tariffs for the next two financial years.

10.4. NERSA now requires *all* customers to pay at least 30% more for electricity in the next two years: mining companies and indigent persons alike. Since 2007, Eskom's tariffs have increased 653% for *all* customers.

10.5. NERSA has abandoned its general subsidy policy without considering or taking steps to ensure that those reliant on the general subsidy can continue to access electricity.

10.6. NERSA's decision means that on 1 April 2023, people will no longer have access to electricity, when on 31 March 2023 those people had that access.

10.7. NERSA took this retrogressive measure unreasonably and irrationally, without considering the impact its decision would have on vulnerable persons and without taking measures to ensure that those reliant on the subsidy can continue to access electricity.

11. Second, NERSA has irrationally licenced an entity in dire financial circumstances to recover more funds from customers.

11.1. At its core, NERSA's decision rests on the premise that an increase in tariffs will somehow assist Eskom in recovering from its dire financial circumstances and providing electricity services to customers.

11.2. But this premise is flawed.

11.3. Eskom cannot be saved by an increase in tariffs. Without significant structural reform, Eskom is a lost cause that cannot be saved or in any way assisted by making electricity customers pay more.

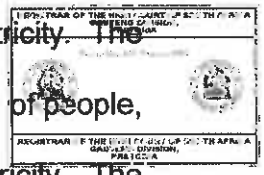
11.4. Making customers pay *significantly more*, while Eskom will only provide *less and less* electricity, and will incur *more and more* debt, is patently irrational.

12. The problems with NERSA's decision do not end there. Third, the process NERSA employed to reach its decision was irrational and unlawful on numerous fronts. Foremostly, NERSA failed to consider several relevant factors, including Eskom's latest annual financial statements, Eskom's explanations for its latest cost assumptions, and the energy availability factor for Eskom's plants.

13. At this stage, this Court does not need to determine whether these grounds of review exist on a balance of probabilities. In this application, this Court is seized with whether, pending the resolution of Part B, NERSA and Eskom should implement the tariff hikes.

14. The answer is clearly No.

14.1. The tariff hikes will result in reduced access to electricity. Indigent persons, foremostly, will not be able to afford access to electricity. The same is true of small-businesses and municipalities. Millions of people, potentially, will suffer an interruption to their access to electricity. The widespread inaccessibility of electricity spills over to violate numerous constitutional rights.



14.2. The harm caused by the increased tariffs and concomitant inaccessibility of electricity is irreparable.

14.3. If the tariffs are implemented, then set aside in Part B, people would either have not had access to electricity or paid too much for electricity. Their prejudice, at the stage of Part B, cannot be repaired.

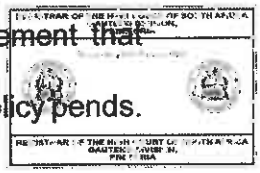
14.4. On the other hand, if the tariffs are not implemented pending the expedited hearing of Part B, and it turns out that the tariffs are lawful, Eskom can recover its lost revenue (for the few interceding weeks) through backdating.

15. In addition, Part B involves not only a review of NERSA's decision.

15.1. Part B concerns a broader constitutional challenge to the South African government's response to the ongoing energy crisis.

15.2. Part B, inter alia, seeks to declare government's response to the energy crisis, including loadshedding, inconsistent with the Constitution.

15.3. NERSA's decision to hike tariffs forms part of government's response. NERSA's decision, moreover, is a drastic, yet unconstitutional, measure responding to the energy crisis. NERSA should not implement that decision while a broader challenge to government's energy policy pends.



16. The purpose of this affidavit is to set out the requirements for the interim relief sought in Part A. To that end, the affidavit canvases:

16.1. The parties to this matter.

16.2. The ongoing energy crisis in South Africa, particularly loadshedding and the demise of Eskom, and that crisis' impact on constitutional rights.

16.3. The grounds and scope of Part B. I focus on the statutory and factual context to NERSA's decision. I explain how, fundamentally, NERSA has decided to exclude potentially thousands of people from accessing electricity for no legitimate reason. I then discuss the grounds for the relief sought in Part B.

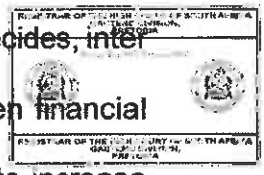
16.4. The requirements for interim relief. The affidavit discusses how, at its core, the harm done by not granting this relief (even if Part B succeeds) outweighs the harm caused by granting this relief (even if Part B fails).

16.5. The urgency of this matter and the remedy sought.

II THE PARTIES

17. The DA is a registered political party and the largest opposition party in South Africa. It brings this application in its own interest, in the interest of its members, and in the public interest.

18. The first respondent, NERSA, is the statutory body responsible for the regulation of energy, including electricity, in South Africa. NERSA decides, inter alia, how much Eskom can make and charge customers in a given financial year. NERSA is cited as a respondent since it took the decision to increase Eskom's revenues and tariffs.



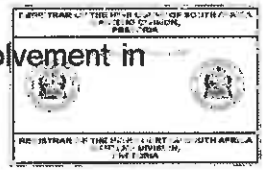
19. The second respondent is Eskom, the state-owned company responsible for the generation, transmission, and distribution of electricity in South Africa. NERSA decided to authorise Eskom to recover a drastic revenue in the forthcoming financial years and to significantly raise its electricity tariffs.

20. The third respondent is the President of the Republic of South Africa. He is cited as head of the executive, ultimately responsible for the executive's response to South Africa's energy crisis.

21. The fourth respondent is the Minister of Public Enterprises, the Minister currently responsible for overseeing the operations of Eskom. He is cited in his official capacity and for his involvement in the executive's response to the South African energy crisis.

22. The fifth respondent is the Minister of Mineral Resources and Energy. He is cited in his official capacity and for his involvement in the executive's response to the South African energy crisis.

23. The sixth to eighth respondents are the remaining ministers party to the "National Energy Criss Committee of Ministers" (**Neccom**), an inter-ministerial committee within cabinet. These ministers are the Minister of Finance, the Minister of Forestry, Fisheries and the Environment and the Minister of Trade, Industry and Competition. These Ministers are cited for their involvement in government's response to the South African energy crisis.



24. The ninth respondent is the South African Local Government Association (**SALGA**). SALGA represents South Africa's municipalities, which in turn are responsible for delivering electricity (procured from Eskom) to residents in their jurisdiction. SALGA is cited for any interest it, on behalf of municipalities, may have in this matter.

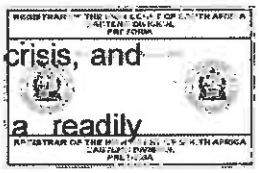
25. The tenth to eighteenth respondents are the premiers of the provinces. They are cited for any interest they may have in the application, including the extent to which government has failed to supply electricity to their provinces and the municipalities within their provinces.

26. The Nineteenth Respondent is the **THE GOVERNMENT OF THE REPUBLIC OF SOUTH AFRICA,** cited herein as it consists of the President and all the Cabinet Ministers who have the responsible to respect, promote and fulfil the rights as reflected in the Bill of Rights.

27. The Twentieth Respondent is the **MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS**, the Minister currently responsible for overseeing various Provincial Executives in respect of Local Government. She is cited in her official capacity and for her involvement in the executive's response to the South African energy crisis.

III SOUTH AFRICA'S ENERGY CRISIS AND HUMAN RIGHTS

28. Given the urgency of this matter, I cannot provide a full account of South Africa's energy crisis here. But the main features of South Africa's energy crisis, and its impact on numerous constitutional rights, have become a readily ascertainable, undeniable fact.



29. Since 2007, there have been widespread, national blackouts. These have euphemistically become known as "loadshedding".

30. With few exceptions, these blackouts effect all users of electricity, including residences, small businesses, large, electricity-intensive businesses, government departments, hospitals, public buildings, courts, and schools.

31. The causes of loadshedding are multiple, but they are primarily due to failing and outdated generation capacity, corruption and maladministration at Eskom, and acts of sabotage.

32. The initial cause of loadshedding followed the national government's failure to heed warnings about Eskom's declining ability to generate enough power to keep the lights on, and the failure to invest in new generation capacity.

33. Former president Thabo Mbeki apologised to the nation for loadshedding and took "collective responsibility" for the failure.

34. Loadshedding has increased over the years, with last year (2022) being the year with the most loadshedding on record.

34.1. The rate at which power supply fails is increasing, and (without taking further steps) will continue to increase.

34.2. Apart from a lull between 2009 and 2012, and then again between 2016 and 2017, the country experienced blackouts every year between 2007 and 2023.

34.3. Of great concern is that loadshedding increased both in terms of the number of days and gigawatts shed over the last three years.

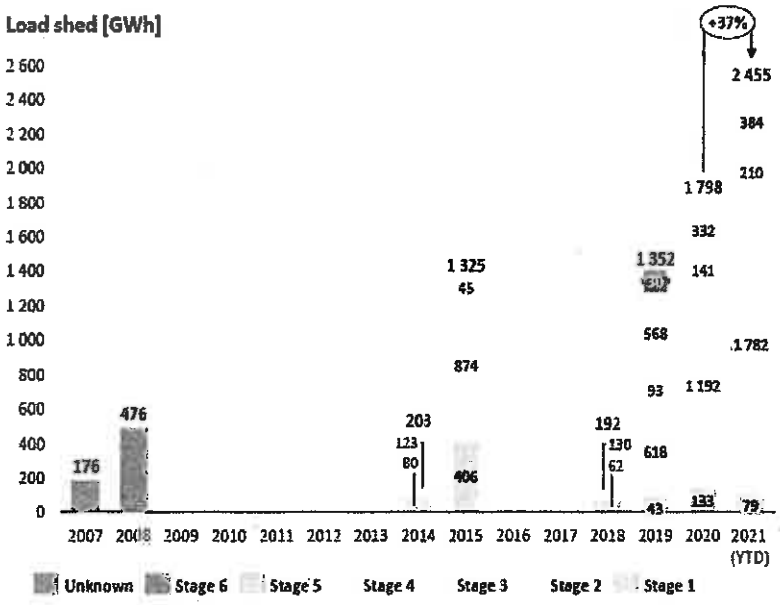
34.4. In 2020, South Africa experienced 52 days of load-shedding during which 1798 GWh were shed.

34.5. This increased to 2,416GWh in 2021 and 208 days of loadshedding in 2022 during which 5 761 GWh of energy was shed by September 2022.

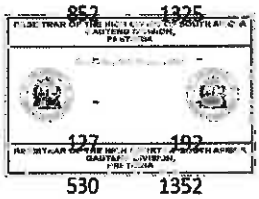
34.6. The tables below from the Council for Scientific and Industrial Research (CSIR) provide a trend analysis of loadshedding in South Africa between 2007 and September 2022:

South Africa Load shedding statistics

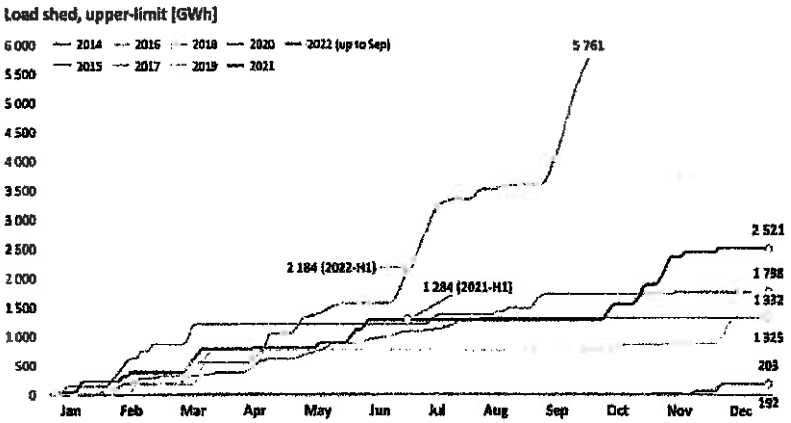
(last updated 30 Nov 2021 17:00)



Year	Duration of outages (hours)	Energy shed (GWh)
2007	-	176
2008	-	476
....	....	....
2014	121	203
2015	852	1325
2016	-	-
2017	-	-
2018	127	192
2019	530	1352
2020	859	1798
2021 (YTD)	1136	2455



Upper limit of cumulative loadshedding annually Jan 2014 – Sep 2022



Notes: Loadshedding assumed to have taken place for the full hours in which it was implemented. Practically, load shedding (and the Stage) may occassionally change/ end during a particular hour; Total GWh calculated assuming Stage 1 = 1 000 MW, Stage 2 = 2 000 MW, Stage 3 = 3 000 MW, Stage 4 = 4 000 MW, Stage 5 = 5 000 MW, Stage 6 = 6 000 MW; Sources: Eskom Twitter account; Eskom Hld SOC Ltd FaceBook page; Eskom se Push (mobile app); Nersa; CSIR analysis

Source: CSIR

34.7. At the end of 2022, Eskom indicated that major capital projects and repairs in the coming months would significantly reduce its generation

capacity and increase the incidence of load shedding over the next six to 12 months.

34.8. According to the Council for Scientific and Industrial Research (CSIR) outlook for 2023, Eskom would face a shortage of 2001MW or higher for 49 weeks of the year.

35. The situation at Eskom is financially dire and unsustainable. Eskom has suffered immense financial loss over the past few years. As of 31 March 2022, Eskom's debt totalled R396.3 billion according to its financial statements.

36. The reduced access to electricity occasioned by loadshedding has a deleterious effect on the rights of South Africans and the functioning of the South African economy.

37. Recurring and unpredictable interruption to power supply implicates numerous constitutional rights. Loadshedding and interruptions to electricity supply implicate various constitutional rights because of how electricity black outs prevent the delivery of critical services.

37.1. Sewage cannot be treated without electricity.

37.2. Water cannot be purified.

37.3. Hospitals and old age nursing homes cannot provide critical services.

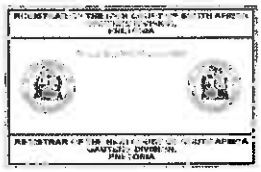
37.4. Schools cannot properly educate learners.

37.5. Thousands of businesses, employing tens of thousands of people, cannot operate and generate profit.

37.6. Residents cannot cook food in their homes, without resorting to burning their own (often less safe and less healthy) fuel or consuming less nutritious food.

37.7. Courts cannot function and hear matters in person.

37.8. Farmers cannot supply food and irrigate crops.



37.9. Rates of crime increase, and police services cannot function when there is no electricity.

38. Without any doubt, loadshedding thus undermines a substantial suite of constitutional rights. The rights to human dignity, life, freedom and security of person, freedom of trade, a safe environment, access to healthcare, food and sufficient water, access to courts, and basic education are all unjustifiably limited because of the South African energy crisis.

39. South African courts, including the Constitutional Court, have repeatedly acknowledged how limited access to electricity can undermine the above-mentioned constitutional rights.

39.1. The Constitutional Court has recently held in *Eskom Holdings SOC Ltd v Vaal River Development Association (Pty) Ltd and Others* (CCT 44/22) [2022] ZACC 44 at paras 257-260:

"The substantial reduction in the electricity supply has had an adverse effect on the treatment of sewage. As a result, raw faecal matter flows into the Vaal River, with dire consequences for the environment and health of the residents. The health hazard arises from the fact that the existing infrastructure for the extraction of water from the river is located such that it draws what is supposed to be potable water from the very area of the river into which the faeces flows.

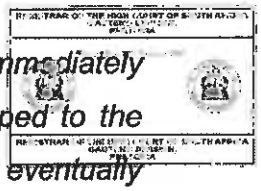
Relatedly, the inadequate supply of electricity has caused the water purification system to malfunction, further affecting the provision of potable water negatively. That means even if there was no faeces in the water, there would still be an inadequate supply of potable water as a result of the malfunction 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 high schools to nursery schools are negatively affected due to lack of electricity for many hours per day.

[. . .]

It is worth noting that Eskom has not cogently denied the facts asserted by the residents. If these facts do not demonstrate an infringement of several rights guaranteed in the Bill of Rights, nothing will. Of course, the implicated rights are the right to dignity, the right to life, the right of access to healthcare services, the right of access to sufficient water (I would add this must surely mean potable and generally usable water, not water contaminated with faecal matter and generally not cleaned properly), the right to an environment that is not harmful to health or well-

being and the right to basic education. The rights violations arise directly from Eskom's conduct."

39.2. In another matter, *Eskom Holdings SOC Ltd v Resilient Properties (Pty) Ltd and Others*; [2020] ZASCA 185; [2021] 1 All SA 668 (SCA); 2021 (3) SA 47 (SCA), the Supreme Court of Appeal accepted the following evidence of an applicant whose municipality experienced cuts in electricity:



"Firstly, when the power supply is cut, all sewage works immediately come to a standstill. This means that sewage is not pumped to the sewage processing plants but instead, will simply sit (and will eventually spill into the streets) for the duration of the cut-off, with the associated, serious risks to the health of the community.

Secondly, the minute the power is shut off, the water purification and processing plants as well as those pumping water to the community to ensure adequate water pressure come to an immediate standstill. This means that taps run dry, households run out of water, and critical water based facilities will cease functioning. Even worse, when the supply is reconnected, it will take some time for an adequate reserve to be generated to enable the community and business to recommence.

Thirdly … any process (industrial, commercial or domestic) that is dependent on electricity will immediately cease."

40. While loadshedding does not always entail a complete reduction in electricity supply, the amount of loadshedding has only increased in the last few years. As the crisis worsens, nearing a seemingly inevitable ultimate collapse of the South African energy system, the severity of the limitations worsens too.

41. Moreover, while loadshedding may only be planned for several hours at a time, there are numerous reports of electricity not being restored after a loadshedding period ends. This is often due to municipal grids and distribution services being undermined by the repetitive lack of electricity.

41.1. For example, in the City of Johannesburg, repetitive loadshedding has prevented the City's reserve batteries from charging.

41.2. The result is that municipal substations cannot switch back on after a loadshedding period, and have to be manually returned to operation.

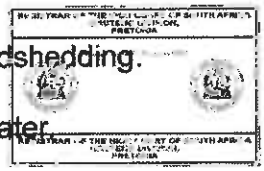
41.3. In turn, power outages do not end with the end of a loadshedding session. Often power outages extend beyond hours of loadshedding because local electricity supply cannot handle being turned on and off repeatedly.

42. As for the economy, the current stage of loadshedding, "stage 6", costs the South African economy around R4 billion per day. The South African Reserve Bank has stated that load-shedding could detract 0.6 percentage points from the country's GDP in 2023. Loadshedding literally costs taxpayers billions of rands.

43. I attach to this affidavit an application by the Western Cape Department of Local Government, Environmental Affairs and Development Planning for emergency funding from the Western Cape Treasury (**FA2**). The application provides an apt snapshot of loadshedding's localised impact.

43.1. Between January and November 2022, the volume of electricity delivered to the Western Cape was lower than any year between 2008 and 2021 over the same monthly period. There were 3 212 hours of loadshedding in 2022—650 of those hours were in November 2022.

43.2. Municipalities are struggling to provide water and sanitation services due to loadshedding. One issue is that the fuses in substations melt due to power surges when loadshedding ends. Municipalities are thus forced to bring substations manually back online after bouts of loadshedding. Residents, in the interim, have no access to electricity and water.



43.3. Municipalities have had to rely on the private sector to provide critical services. For example, municipalities have resorted to procuring potable and drinking water from Coca-Cola for their residents.

43.4. The application explains:

"Municipalities will not be able to ensure the continuous provision of potable water to communities and citizens, which will severely impact on the livelihoods and safety of people.

Municipalities will not be able to ensure that wastewater are treated to the required standard.

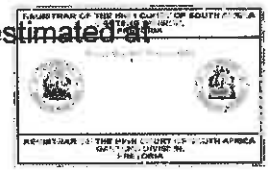
This may lead to pollution in rivers, oceans and underground water sources. It will further result that downstream users not being able to abstract water from rivers for domestic use.

Municipalities will not be able to ensure that the flow of sewage are continuously pumped to treatment works. This may result in spillages at

manholes and pumpstations, often located in public spaces, or near water courses.

Spilled raw sewage may cause a significant risk to both public and environmental health."

43.5. As for the economic effects of loadshedding, the application explains that the Western Cape alone is estimated to have lost between R48.6 billion to R61.2 billion in real GDP since load shedding commenced in late 2007. In 2022, the real GDP lost to the Western Cape was estimated at R8.2 billion.



43.6. The application also highlights how the Western Cape relies heavily on the agricultural sector, which is severely threatened by loadshedding.

43.7. The application seeks a total of R88 815 000 in emergency funding. This money is to provide generators to municipalities in the Western Cape, so that those municipalities can provide critical services during and after loadshedding.

43.8. This emergency funding does not even include the cost of diesel to run those generators. The application predicts that the costs of diesel will runs to hundreds of thousands of rands *per day* of loadshedding.

44. The Western Cape emergency funding application demonstrates what we all know is true. Reduced access to electricity undermines critical service delivery, violating a wide range of constitutional rights. No electricity, moreover, costs

taxpayers *billions* of rands every day, money that is desperately needed in numerous other aspects of the South African state.

IV THE GROUNDS AND SCOPE OF PART B

45. Part B of the notice of motion constitutes a two-prong constitutional challenge.

45.1. First, at a general level, Part B seeks to declare government's response to the energy crisis as inconsistent with the Constitution.

45.2. Second, Part B targets specific decisions taken by the respondents in relation to the energy crisis. The first decision is NERSA's decision. The second is the ongoing array of decisions to implement loadshedding. Part B seeks to declare these decisions unconstitutional and set them aside.

46. For the purposes of this application, the most important grounds of review are those pertaining to NERSA's decision. The applicant seeks interim relief only in respect of NERSA's decision. The applicant does *not* seek to temporarily suspend loadshedding, or government's general response to the energy crisis, pending Part B.

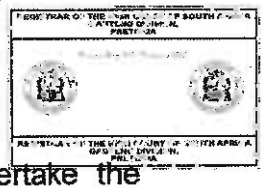
47. Accordingly, the bulk of this part focuses on the grounds for reviewing NERSA's decision. After canvassing those grounds, I briefly consider the grounds for the further relief sought in Part B.

(A) NERSA'S DECISION

48. I first set out the relevant statutory context to NERSA's decision. Second, I discuss the factual background to NERSA's decision. I then canvass the grounds of review.

(i) Statutory context

49. NERSA was established in terms of the National Energy Regulator Act 40 of 2004 (**NERA**). Its mandate is to, inter alia, regulate the generation, transmission, and distribution of electricity.



50. Section 4 of NERA, inter alia, provides that NERSA must undertake the functions set out in section 4 of the Electricity Regulation Act 4 of 2006 (**ERA**).

51. One of its core functions under the ERA is the consideration of applications for licences and issuing of licences, for the operation of generation, transmission or distribution facilities, and the regulation of electricity prices and tariffs.

52. Section 2 of the ERA sets out its objects. Two central objects of the ERA are to—

52.1. achieve the efficient, effective, sustainable and orderly development and operation of electricity supply infrastructure in South Africa; and

52.2. ensure that the interests and needs of present and future electricity customers and end users are safeguarded and met, having regard to the governance, efficiency, effectiveness and long-term sustainability of the

electricity supply industry within the broader context of economic energy regulation in South Africa. [5]

53. Section 14(1) of the ERA entitled "Conditions of licence" provides, inter alia that:

> *"(1) The Regulator may make any licence subject to conditions relating to—*
>
> . . .
>
> *(d) the setting and approval of prices, charges, rates and tariffs charged by licensees;*
>
> *(e) the methodology to be used in the determination of rates and tariffs which must be imposed by licensees."*

54. Section 15 of the ERA sets out the "Tariff principles". It provides:

> *'(1) A licence condition determined under section 14 relating to the setting or approval of prices, charges and tariffs and the regulation of revenues—*
>
> *(a) must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return;*
>
> *(b) must provide for or prescribe incentives for continued improvement of the technical and economic efficiency with which services are to be provided;*
>
> *[...]*

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

55. The Supreme Court of Appeal described the effect of these provisions in *NERSA v Borbet SA (Pty) Ltd; Eskom Soc Ltd v Borbet SA (Pty) Ltd* [2017] 3 All SA 559 (SCA) at para 12:

> *"The provisions set out above create a situation where licensees are the ones empowered to charge a tariff for electricity consumption within parameters set by the Regulator. Licences, as can be seen from the provisions of ss 14(1)(d) and (e) of ERA, may contain conditions relating to the setting and approval of prices, charges, rates and tariffs to be charged by licensees. Licences may be made subject to conditions relating to the methodology to be used in the determination of rates and tariffs which must be imposed by licensees (s 14(1)(e)). NERSA is therefore responsible for determining whether a licence should be granted; the terms of the licence; the methodology by which tariffs and charges are to be determined and the imposition of that methodology on the licensee by way of a licence condition; and the tariffs and charges that the licensee may recover from its customer. All of these are embodied directly or indirectly in the licence and the obligation to adhere to them flows from the licence."*

56. NERSA is bound by section 15(1)(a) of the ERA when determining what tariffs a licensee may charge. Any tariff which it determines "must enable an efficient licensee to recover the full cost of its licensed activities, including a reasonable margin or return".

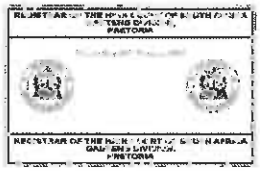
57. NERSA has, since 2006, determined Eskom's tariffs under a system of multi-year price determinations (**MYPDs**).

58. The MYPDs are governed by a methodology, developed by NERSA, to determine the allowable tariffs as well as their increases to be charged by licensees to consumers. These methodologies are labelled **MYPDMs**. NERSA has applied these methodologies to groups of years:

58.1. MYPDM1 applied from 1 April 2006 to 31 March 2009

58.2. MYPDM2 applied from 1 April 2010 to 31 March 2013.

58.3. MYPDM3 applied from 1 April 2013 to 31 March 2018.



58.4. MYPDM4 applies to the latest cycle which commenced on 1 April 2018. Though the methodology was meant to expire on 31 March 2021, the methodology applies to NERSA's current decision per the High Court's order (Millar J) dated 5 July 2022 (**FA3**). The background to this court order, and its underlying justification, are unknown to me. I reserve my right to supplement this affidavit once that background is disclosed in the rule 53 record.

59. MYPDM4 provides for a "cost plus" system of tariffs. Tariffs are to be set to recover Eskom's "allowable revenue" on the basis of projected electricity consumption.

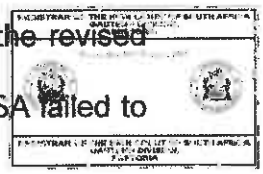
(ii) The facts leading up to NERSA's decision

60. On 29 July 2022, NERSA approved a "consultation paper" announcing that Eskom had applied for a tariff increase for the 2023/2024 and 2024/2025

financial years (**FA4**). NERSA published this consultation paper in a media statement on 5 August 2022 (**FA5**).

61. In the consultation paper, NERSA explains that Eskom submitted its MYPD5 revenue application on 2 June 2021. In this application Eskom requested an amount of R335bn and R365bn for financial years 2023/24 and 2024/25 respectively.

62. NERSA undertook to publish Eskom's application "together with the revised assumptions submitted in January 2022" by 1 August 2022. NERSA failed to do so—it only published the application on 5 August 2022



63. I attach Eskom's application dated June 2021 as **FA6.1**, **FA6.2**, **FA6.3**, and **FA6.4**, and its "Revised Assumptions" dated 23 January 2022 as **FA7**. I return to the relevant features of these documents when discussing the grounds of review.

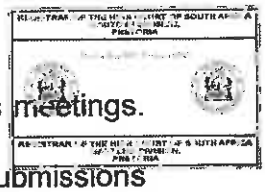
64. The consultation paper set out a timeline for public consultation leading up to NERSA's decision on Eskom's application. The timeline accorded with the Millar J order.

64.1. In the Millar J order, the High Court directed NERSA to determine Eskom's revenue application for 2023/24 and 2024/25 by 24 December 2022.

64.2. NERSA was to take this decision after publishing Eskom's application and conducting a public consultation process.

64.3. NERSA accordingly set a deadline for written submissions by 8 September 2022 and provided a schedule for public hearings throughout September 2022.

64.4. The Court apparently subsequently extended NERSA's deadline to decide on Eskom's application to 12 January 2023. I do not possess a copy of that court order, but NERSA announced on 21 December 2022 that it had applied for and obtained an extension.



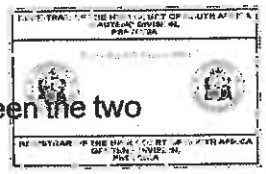
65. NERSA proceeded to receive written submissions and hold public meetings. Its consultation schedule sets out the timelines and dates for these submissions and meetings. As I understand it, NERSA received over 2000 written submissions and held five public hearings in September 2022 as advertised in its schedule. I did not attend any of those meetings. I reserve my right to supplement this affidavit once the minutes of these meetings are disclose in the rule 53 record.

66. I have not had sight of all the submissions made by members of the public. I have only had access to three submissions, by the Organisation Undoing Tax Abuse (**FA8**), Institute for Economic Justice (**FA9**), and the City of Johannesburg (**FA10**). Each of these submissions oppose Eskom's application.

67. After its public consultation process, on 12 January 2023, NERSA announced its decision approving the tariff raises. The salient features of the decision are:

67.1. NERSA approved an allowable revenue of R318 billion for 2023/24 and R352 billion for 2024/25.

67.2. In apparent contradiction with this approval, NERSA then decided to approve R300 billion revenue from standard customers in 2023/24, which translates to an R18.65% increase in tariffs. For 2024/25, NERSA approved a revenue of R334 billion, translating to a 12.74% increase in tariffs.



67.3. NERSA does not explain in its decision the discrepancy between the two allowed revenues.

67.4. NERSA explains that "The Reasons for Decision document will be available on the NERSA website at www.nersa.org.za in due course".

68. In its consultation document, NERSA explains that the new tariffs would commence from 1 April 2023 for non-municipal customers and from 1 July 2023 for municipal customers. To ensure that electricity prices in South Africa are implementable by 1 April 2023, Eskom is required to table in Parliament the approved tariff before 15 March 2023.

(iii) The grounds of review

69. I am advised that NERSA's decision constitutes administrative action, reviewable under the Promotion of Administrative Justice Act 3 of 2000 (**PAJA**). Alternatively, the decision constitutes an exercise of public power reviewable under the principle of legality.

70. The grounds of review for NERSA's decision are best divided into three groups.

71. The first ground of review concerns the retrogressive nature of NERSA's decision.

71.1. NERSA, in the past, prohibited Eskom from charging tariffs at a commercial rate. NERSA required Eskom to subsidise the cost of electricity generally by imposing tariffs that recovered revenue below the cost of providing electricity.

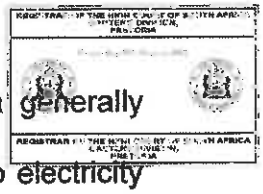
71.2. There can be no disputing that NERSA imposed tariffs on Eskom at below-cost. Eskom says as much in its application (at page 9):

"Eskom makes this revenue application, as it still migrates to a level that reflects to the efficient cost of providing the electricity service. This has been a journey that Eskom and NERSA have been on for many years. Thus the average price of electricity still does not cover the full efficient costs and cost of capital that are incurred. The implication is that all electricity consumers have been receiving a subsidy and will continue to do so during this application period."

71.3. The High Court has held that NERSA has imposed below-cost tariffs on Eskom by way of subsidy. In *Eskom Holdings Soc Limited v National Energy Regulator of South Africa* 2020 JDR 1524 (GJ), Kathree-Setiloane J held at para 30 that NERSA has repeatedly set tariffs below Eskom's costs.

71.4. These low tariffs ensured that persons who cannot afford electricity at a commercial rate could access electricity. These low tariffs were a *general subsidy* on electricity.

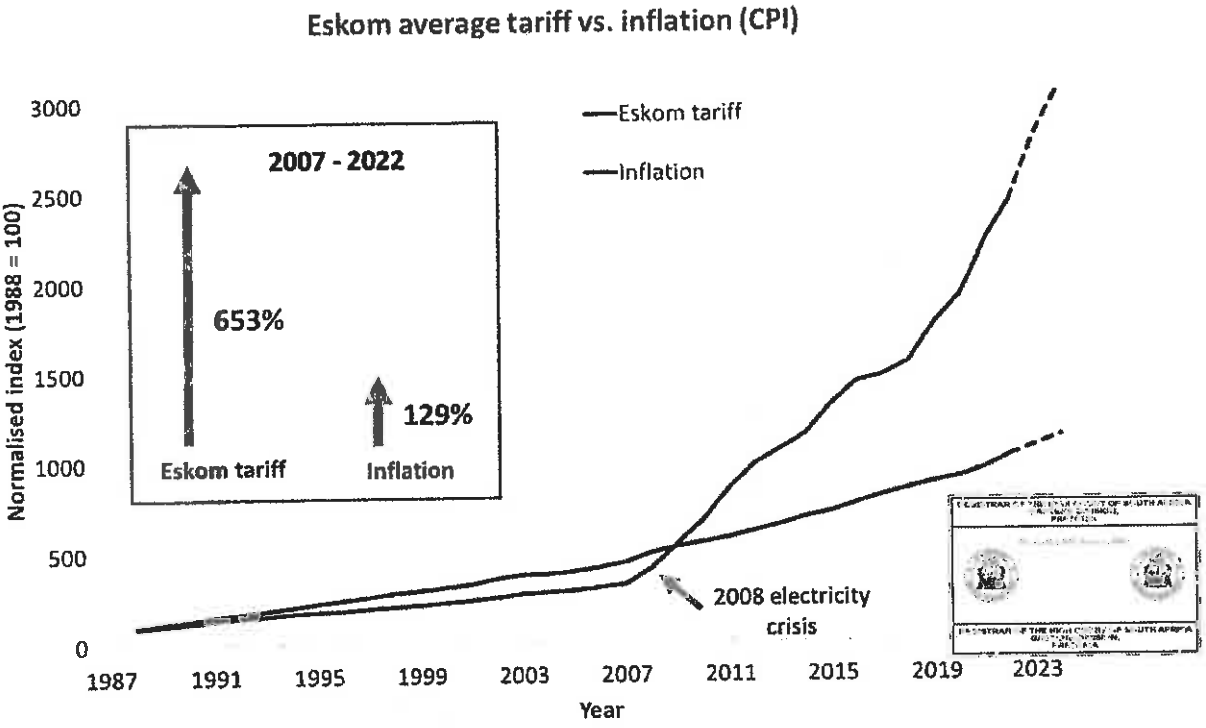
71.5. NERSA's decision to impose a general subsidy may or may not have been prudent or constitutional. It may have been better, for example, to require Eskom to impose different, specific tariffs on different customers depending on financial needs.



71.6. But what matters is that NERSA's decision to enforce a generally subsidised tariff ensured that indigent people had access to electricity when they otherwise would not have had that access.

71.7. NERSA's tariff increase *undoes* its policy of ensuring a general subsidy through low electricity tariffs. NERSA, by increasing tariffs so drastically, has abandoned its long-standing policy of a general subsidy.

71.8. This is especially so when one considers how NERSA has drastically increased tariffs since 2007. The graph below shows that Eskom tariffs from 2007 to 2022, plotted against CPI (Consumer Price Index) or inflation over the same period. It also shows projections up to 2024, based on expert forecasts and inflation projections.



71.9. NERSA has thus steadily, and now rapidly, abandoned its general subsidy policy.

71.10. Crucially, NERSA abandoned this policy without taking any further steps to ensure that those who require the subsidy to access electricity can continue to access electricity after the tariff increase.

71.11. In other words, NERSA took a retrogressive step. NERSA has deprived people of a general subsidy and has taken *no steps* to ensure that those in need of the subsidy can continue to access electricity.

71.12. Because of NERSA's decision, people who can afford to access electricity on 31 March 2023 may not be able to access electricity on 1 April 2023. NERSA has *taken away* access to electricity without even

considering alternative means of ensuring that those needing a subsidy could continue to access electricity.

71.13. I am advised that NERSA's decision is irrational, unlawful, and unreasonable. It is, moreover, an unjustifiable limitation on various socio-economic rights since it constitutes a retrogressive step.

72. The second ground of review concerns the irrationality of raising tariffs for a financially defunct state entity.

72.1. The premise of this ground of review is incontrovertible: NERSA should only allow a licensee to recover revenue and impose higher tariffs if that entity is financially sustainable.

72.2. Conversely stated, if revenue or tariffs will not prevent the financial demise of the licensee, there is no point in permitting that licensee to extract revenue and tariffs from customers. NERSA would effectively licence sucking customers' money into a black hole.

72.3. But this is exactly what NERSA has done in this case. Eskom, the licensee, faces inevitable financial ruin. Its debt of over R396.3 billion cannot be addressed through revenues and tariffs (for example, totalling around R318 billion this next year) aimed to cover Eskom's annual *costs*.

72.4. What is more, Eskom's debt is interlinked. Default on one facility can trigger default on other facilities with full outstanding capital and interest

amounts becoming immediately payable on demand by lenders (see *Eskom v NERSA* above at para 30.9).

72.5. In other words, NERSA expects customers to pay more to an entity that has a debt of close to R400 billion, with no clear roadmap to financial stability or recovery.

72.6. NERSA's decision is irrational and unreasonable. An entity with almost R400 billion in debt cannot be licenced to raise tariffs and revenue. Customers cannot be expected to pay such an entity. The payments are to no end.

73. The third set of grounds of review concern NERSA's process leading up to its decision. NERSA's process was flawed for various reasons.

73.1. NERSA determined Eskom's revenue without even considering Eskom's actual costs. NERSA, at the time of its decision, did not have Eskom's annual financial statement for 2021/22. NERSA irrationally decided how much Eskom should recover in 2022/23 without even knowing Eskom's costs for the preceding year.

73.2. Eskom submitted *two* applications for revenue approval, first in June 2021 and second in January 2022. The second application is defective in numerous respects, mainly in an omission of critical data and an explanation for significant alterations to projected costs. The second application is simply a table of adjusted figures, with no explanation or account. So, NERSA failed hold a fair hearing for members of the public,

and irrationally took a decision based on an application omitting critical data.

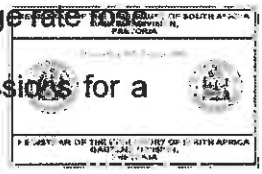
73.3. Eskom's application in large part turns on producing a return for its shareholder. NERSA appears to have acquiesced to Eskom's demand that Eskom turns a profit, including a R23 billion profit by 2025. The purpose of ensuring that Eskom profits from customers, in the context of Eskom's inevitable demise and consistent failure to provide electricity, is plainly irrational.

73.4. Eskom's application did not provide the energy availability factor (**EAF**) for each of its power stations. EAF is plainly relevant to how much electricity costs and how much Eskom should be able to recover. But NERSA took its decision without properly considering stations' EAF.

73.5. Eskom's application for more revenue invokes the rising costs of coal. But Eskom's application, and thus NERSA, failed to consider cheaper alternatives to coal, including renewable energy. NERSA, furthermore, failed to consider how the price of coal will only rise over the next few months, inevitably resulting in Eskom approaching NERSA for further tariff increases.

73.6. Health costs and true environmental costs were not included in Eskom's application. NERSA thus determined Eskom's revenue without considering these relevant factors.

73.7. When Eskom presented its costs for different forms of generation, Eskom invoked different calculations for different technologies. The result is that NERSA relied on manipulated, inaccurate generation costs when it determined Eskom's revenue. For example, Eskom's storage costs are presented at an exchange rate of R18 per USD, which Eskom says is as an average of the 2021 dollar range exchange (page 91 of Generation Licensee Submission). But the exchange rate for 2021/2020 shows that there were only one or two dates that the exchange rate rose about R18 per USD. I refer to page 11 of OUTA's submissions for a graph setting out the exchange rates.



73.8. Eskom never explained the basis for its Regulatory Asset Base in its application. NERSA took its decision without knowing how or why Eskom valued certain assets as Eskom did.

73.9. Eskom's costs are largely inflated by costs attributed to independent power producers. Eskom and NERSA failed to consider alternative pricing models, including renewable energy, when determining Eskom's costs.

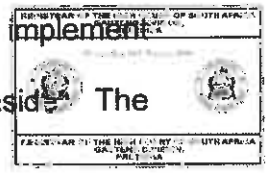
73.10. Normally NERSA would consolidate inputs from municipalities, business, civic organisations and residents, and evaluate the inputs as part of their assessment and evaluation in making a determination on price adjustments. However, in this case, NRESA did not respond individually to respective and individual submissions. Indeed, the role these submissions played in NERSA's decision remains opaque.

74. For these reasons, NERSA's decision stands to be declared unconstitutional and set aside.

(B) LOADSHEDDING AND THE GENERAL RESPONSE TO THE ENERGY CRISIS

75. Part B concerns the constitutionality of NERSA's decision. But Part B goes further in two respects.

76. First, Part B challenges government's bundle of decisions to implement loadshedding. It seeks to declare the ongoing decisions to implement loadshedding unconstitutional and to have those decisions set aside. The grounds for this challenge are:



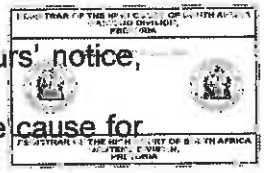
76.1. The respondents, including Eskom, are not empowered by any statutory provision to impose loadshedding. On the contrary, Eskom is only empowered to generate, transmit, and distribute electricity. Eskom lacks the authority to decide to stop providing electricity, on a national scale, in the manner that it does.

76.2. The decisions to implement loadshedding, now daily, are taken irrationally and arbitrarily. There is no reason for how and why Eskom decides to turn power off in certain areas and not others. Often these decisions are taken in a manner unrelated to consumption and demand (rural areas, for example, which may use very little electricity suffer the same amount of loadshedding as densely populated urban areas).

76.3. Additionally, the respondents implement loadshedding as a knee-jerk reaction to generation issues. Loadshedding does not form part of a

plan to alleviate the energy crisis; it is not some temporary evil people are expected to endure while government addresses the energy crisis. On the contrary: loadshedding is Eskom and government's primary tool to preventing a full collapse of the South African grid. Employing loadshedding in this fashion, effectively as a long-term solution for an increasing energy crisis, is plainly irrational.

76.4. Loadshedding occurs without any procedural fairness. Eskom communicates its loadshedding schedules within a few hours' notice, sometimes with almost no notice at all. It cannot be that the cause for loadshedding effectively warrants no notice *every time* there is loadshedding. On the contrary, often the causes for loadshedding are foreseeable, meaning that Eskom could consult and provide notice for how black outs should occur to manage demand.



76.5. Loadshedding is unreasonable. As explained above, loadshedding comes at a huge cost to rights and the economy. Eskom, and the executive generally, have a variety of alternative measures available to them, most obviously increasing the generation capacity for electricity. These alternatives do not intrude on people's rights and can only improve South Africa's economy.

76.6. But Eskom and government has consistently failed to opt for these alternative measures, contenting themselves with cutting "demand" (i.e., depriving people of electricity) when Eskom experiences supply shortages. This is simply unreasonable. No reasonable energy

company would consistently opt for cutting services in the face of generation incapacity *over 15 years*. A reasonable decision-maker would decide to increase generation capacity as a matter of urgency.

77. Second, Part B seeks a declarator that government's response to the energy crisis is unconstitutional. Part B seeks a declarator that the current energy crisis, due to government's response, violates a suite of constitutional rights.

77.1. This declarator can hardly be opposed.

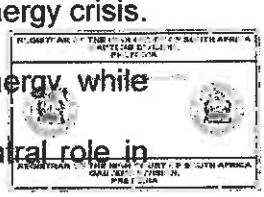
77.2. As I explained above, loadshedding has violated numerous constitutional rights. These violations are a direct result of government's decisions, including the failure to increase electricity generation and the consistent preference for black outs.

77.3. Additionally, government has failed in its duties under section 7(2) of the Constitution. I am advised that these duties entail government taking reasonable steps to protect, promote, fulfil and respect the rights in the Bill of Rights,

77.4. Government's actions, accordingly, are unconstitutional. Government has failed to avert an energy crisis, which in turn has undermined various constitutional rights. It has failed to act reasonably in the face of decreasing generation capacity. Had it acted reasonably, we would not be in the position we are in today.

77.5. A key prong in this challenge is that government has consistently failed to provide a clear plan to avert the energy crisis. Government, at best, has been reactionary, adopting *ad hoc* plans in response to crises as they arise.

77.6. At worst, government has been opaque and contradictory. Most prominently, the executive has consistently contradicted itself on the use of renewable energies and the role of coal in averting the energy crisis. The Minister for Energy has decried the use of renewable energy, while the President has stated that renewables must play a central role in resolving the energy crisis. I attach a statement by the DA demonstrating this inconsistency (**FA11**).



77.7. Government's failure to communicate a clear path out of loadshedding is unconstitutional. Government must have a structured plan, and that plan must be made public.

77.8. Consequent upon declaring government's conduct unconstitutional, this Court can grant any order than is just and equitable. In the circumstances, Part B seeks an order directing government to file with this Court within 30 days a report setting out the executive's plan to avert the energy crisis, including short-, medium-, and long-term steps.

77.9. After the filing of the report, interested parties may approach this Court on supplemented papers for just and equitable relief.

78. I reserve my right to supplement these grounds of review once I receive the rule 53 record.

V THE REQUIREMENTS FOR INTERIM RELIEF

79. A litigant seeking an interim interdict must show: a *prima facie* right even if it is open to some doubt; a reasonable apprehension of irreparable and imminent harm to the right if an interdict is not granted; that the balance of convenience favours the grant of an interim interdict; and that the applicant has no other satisfactory remedy.

(A) A PRIMA FACIE RIGHT

80. I am advised that prospects of success in the impending review constitute a prima facie right for the purposes of interim relief. Indeed, in an application for urgent interim relief *by Eskom* against NERSA, the High Court considered how Eskom had made out a strong case in the review to establish a prima facie right. See *Eskom Holdings SOC Ltd v National Energy Regulator of South Africa and Others* 2020 (5) SA 151 (GP) (***Eskom Part A***) at para 57.

81. As I demonstrated above, the applicant enjoys strong prospects of success in the review.

82. Additionally, NERSA's decision will result in a substantial reduction in electricity supply. Persons who previously relied on the subsidised cost of electricity will no longer have access to electricity. Municipalities, which already struggle with the extra costs of loadshedding, will either not afford electricity or will charge residents more to ensure payment to Eskom. Either way, NERSA's decision results in *less* access to electricity than before.

83. The reduction in electricity supply impacts on the various constitutional rights discussed above. The applicant invokes these rights, on behalf of its members and the public, to seek interim relief.

(B) IRREPARABLE HARM

84. As the Constitutional Court held in *Vaal River (above)* at para 291:

> *Irreparable harm would definitely ensue if the fundamental rights pleaded by the residents were not protected by an interim interdict. If there is no interdict, there can be no question that you cannot repair the continued indignity of denying people their usual supply of potable water and availing to them, instead, water full of faecal matter. I need make no illustration about the other rights that have also been, and continue to be, violated. It follows as a matter of course that the rights can only be protected through a reversal of the trigger event that resulted in their infringement. That trigger event is the reduction decision and the resultant actual reduction.*

85. At para 297, the Court held:

> *"As I have said, the substantial reduction of electricity supply has had the effect of violating several of the residents' rights guaranteed in the Bill of Rights. At the time the interim interdict was sought and obtained, the violation was continuing. But for the interim interdict, the breach would have been ongoing and the harm suffered would certainly be irreparable. In fact, I believe that much of the suffering the residents say they have been subjected to may not be repaired merely by the restoration of electricity. For example, how do you repair the deeply offensive indignity suffered as a result of being forced to choose between drinking or using water contaminated with faecal matter, on the one hand, and not drinking or using that water at all, on the other? Bear*

in mind that a significant many in our country live in conditions of extreme poverty. Bottled water is not an option for them."

86. The same is true here. The loss of access to electricity due to NERSA's decision will cause irreparable harm. People and municipalities who cannot afford electricity on NERSA's new tariffs will be subjected to indignity that cannot be repaired. The violations of their rights to basic education, sufficient food and water, healthcare, and a clean and safe environment cannot be repaired after the fact.

(c) BALANCE OF CONVENIENCE

87. The balance of convenience entails considering and weighing several factors:

88. *The harm to be endured by an applicant if interim relief is not granted.* I have discussed this factor above. The harm is that Eskom's customers, including municipalities, must pay an exclusionary tariff, or not have electricity, pending the outcome of Part B.

89. *The harm borne by the respondent if the interim relief is granted.* Eskom will suffer no irreparable harm if the interim relief is granted. At worst for Eskom, if Part B ultimately fails, it will be deprived of the higher tariff for the period pending the finalisation of Part B. But once Part B is finalised, Eskom could recover its expenses retrospectively.

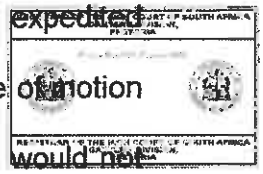
90. Moreover, as the High Court held in the *Eskom Part A* case at para 63:

"Ultimately the financial health and the survival of Eskom are matters that fall squarely within the remit of the political sphere of government,

influenced by the prevailing economic realities as well as the legitimate demands of the developmental state. It cannot be that a tariff determination for effectively a single year should be elevated to determining the survival or the demise of a significant state-owned entity and nor is it desirable to leave that determination to a court."

91. In other words, Eskom cannot possibly allege that it will suffer financial demise if the new tariff is not implemented pending the outcome of Part B.

92. Additionally, the applicant is amenable to resolving Part B on an expedited basis. The applicant has set out a timetable for Part B in its notice of motion ensuring the speedy resolution of Part B. Moreover, the applicant would not oppose this Court ordering parties to approach the office of the Deputy Judge President to arrange a case management meeting to set an agreed date for the hearing of Part B. If Part B is resolved quickly, then at worst for Eskom it will lose out on tariffs for only several weeks.



93. *The prospects of the applicant's case*. The stronger the prospects of success in the pending review, the more the balance of convenience favours the applicant. As I discussed above, the applicant enjoys strong prospects of success.

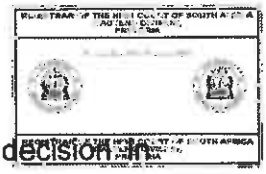
94. *The separation of powers*. If a state functionary would be restrained from exercising statutory or constitutionally authorised power, then a court should only grant an interim interdict after considering the separation of powers.

95. This factor has two important dimensions that affect its weight: the type of right invoked and the type of power sought to be constrained.

95.1. If the right is a fundamental or constitutional right, then the separation of powers has lesser weight.

95.2. If the decision is administrative in nature, and not executive or policy-laden, then the separation of powers similarly has lesser weight.

95.3. If the right is not a constitutional right, and the impugned power is executive in nature, then the interim interdict can only be granted in the clearest of cases.



96. In this case, the applicants invoke constitutional rights *and* the decision in question is of an administrative nature. So, the separation of powers, while relevant to the balance of convenience, has little weight. The separation of powers, given the administrative nature of the impugned decision, is outweighed by the fundamental nature of the rights involved, as well as the harm to the applicant and the lack of irreparable harm to the respondents.

(D) NO ALTERNATIVE REMEDIES

97. The applicant has no alternative to an interdict pending the finalisation of Part B. There are no internal appeals or alternative remedies against NERSA's decision.

VI URGENCY

98. The applicant has brought Part A of this application urgently, and Part B of this application semi-urgently.

(A) PART A

99. In Part A of its notice of motion, the applicant provides:

99.1. The respondents' answering affidavits, if any, should be filed by Friday 10 February 2023. That is approximately three weeks from the time of launching this application.

99.2. The applicant will file its replying affidavit, if any, by Monday, 20 February 2023.

99.3. The matter is set down for Tuesday, 7 March 2023.

100. With respect to Part A, the applicant cannot obtain substantial redress in the ordinary course.

101. As explained above, if Part B proceeds without interim relief, people will be subjected to exclusionary tariffs while the litigation pends. When Part B succeeds, nothing could be done to undo the consequences of the exclusionary tariffs. There is no chance of recovering the overpaid tariffs. There is, furthermore, no repairing the harm to people's constitutional rights occasioned by reduced access to electricity.

102. Additionally, the matter is urgent for the following reasons:

102.1. The respondents have three weeks to answer to this affidavit. That is more than enough time to present their case adequately.

102.2. The respondents will suffer no legally discernible prejudice from these timelines.

102.3. Given the above respective prejudices, the degree of relaxation of the court rules is commensurate with the urgency of the matter.

102.4. The strength of the case made by the applicant.

102.5. The applicant has no conduct whatsoever in self-creating the situation of urgency. NERSA announced its decision on 12 January 2023. The applicant urgently briefed counsel, who prepared this application within a week of NERSA's decision.

(B) PART B

103. In Part B of the notice of motion, the applicant provides:

103.1. The respondents are to file their rule 53 records by 1 March 2023.

103.2. The applicant will file its supplementary affidavit by 15 March 2023.

103.3. The respondents are to file their answering affidavits, if any, by 5 April 2023.

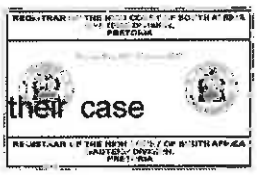
103.4. The applicant will file its replying affidavit by 19 April 2023.

103.5. The matter is set down for 9 May 2023.

104. As I explained above, the applicant is furthermore amenable to the Court directing that Part B is case managed by the Deputy Judge President.

105. The reasons for the semi-urgency of Part B mirror the reasons for the urgency of Part A.

105.1. As loadshedding and government's unconstitutional response to the energy crisis persists, irreparable harm is suffered by persons in South Africa. These rights violations and costs to the economy cannot be remedied in the ordinary course. The matter must be resolved urgently, before further irreparable harm is done.



105.2. The respondents have more than enough time to present their case adequately.

105.3. The respondents will suffer no legally discernible prejudice from these timelines.

105.4. Given the above respective prejudices, the degree of relaxation of the court rules is commensurate with the urgency of the matter.

105.5. The strength of the case made by the applicant.

105.6. The applicant has no conduct whatsoever in self-creating the situation of urgency. Loadshedding, over the 2022/23 festive season, sunk to new lows. The DA acted as quickly as it could in the new year in response to these new levels of energy interruptions.

VII REMEDY

106. For these reasons, the applicant seeks the relief sought in Part A and Part B of the notice of motion.

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JOHN STEENHUISEN

I certify that the deponent has acknowledged that he knows and understands the contents of this affidavit, which was signed and sworn to before me at Cape Town on this the 18 day of ~~October 2022~~ JANUARY 2023 LJI, the regulations contained in Government Notice No. 1258 of 21 July 1972, as amended by Government Notice No. 1648 of 17 August 1977, as amended having been complied with.

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