IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

Case No.: 2023/003615

On the roll: Monday 11 September – Friday 15 September 2023

Coram: Davis, Collis, and Nyathi JJ

In the matter between:

DEMOCRATIC ALLIANCE Applicant

and

NATIONAL ENERGY REGULATOR OF SOUTH AFRICA First Respondent

AND NINETEEN OTHERS Second to Twentieth Respondents

DEMOCRATIC ALLIANCE'S HEADS OF ARGUMENT: THE ENERGY CRISIS AND LOAD SHEDDING[1]

I INTRODUCTION

1. These heads of argument address the energy crisis and the appointment of a special master.

[1] For the convenience of the Court, the DA is submitting two sets of heads of argument. These heads deal with the energy crisis resulting in constant, recurring load shedding over a multi-year period. Separate heads of argument will concern the lawfulness of the tariff decision impugned in this application.

2. It is not in issue that:

   2.1. the energy crisis unjustifiably limits constitutional rights;

   2.2. the energy crisis was born out of corruption, mismanagement, and ill-conceived policies; and

   2.3. Eskom remains overburdened with debt, saddled with a dangerous fleet of dated power stations, unable to provide sufficient electricity to South Africans, and filled with corrupt officials.

3. Eskom, the President, NERSA, and certain cabinet ministers, notwithstanding their admissions, oppose the DA's declaratory relief and the appointment of a special master. Their opposition, bearing in mind their admissions and the common cause facts regarding the energy crisis, cannot succeed.

4. The crisis has reached the point where if it continues without successful intervention, the crisis will cause irreparable harm to South Africa, economically and socially. After 15 years of load shedding, there is little to no room for failure.

5. A special master is a mechanism available to this Court to mitigate the possibility of further and worse constitutional harm caused by the energy crisis. A special master will assist the respondents, this Court, the applicants, and the public in monitoring and implementing a plan to end the energy crisis.

6. In these submissions, we consider the declaratory relief sought, then the appointment of a special master.

II THE DECLARATORY RELIEF

7. Section 172(1)(a) of the Constitution states: a court considering a constitutional matter within its power *must* declare "any law or conduct that is inconsistent with the Constitution" to be invalid to the extent of its inconsistency.

8. The Constitutional Court has described section 172(1)(a) as "a special constitutional provision".[2] The section differs from the common law regulating the grant of declaratory orders. Under the common law, courts enjoy the discretion to grant an applicant declaratory relief.[3] Under section 172(1)(a), courts are *obliged* and *"impelled*" to declare law or conduct inconsistent with the Constitution as invalid.[4]

9. The DA seeks a declaration that government's failure to prevent the energy crisis is inconsistent with the Constitution.[5] The DA also seeks a declarator that government's failure to prevent the energy crisis failed to respect, protect, promote, and fulfil the rights in the Bill of Rights, and unjustifiably limited various constitutional rights.[6]

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[2] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at para 106.

[3] *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd* [2005] ZASCA 50; [2006] 1 All SA 103 (SCA) at para 18.

[4] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) at para 209.

[5] The DA's Amended Notice of Motion (DA Caselines 06-2). The Constitutional Court has declared a failure by an organ of state as inconsistent with the Constitution. In *Mwelase v Director-General for the Department of Rural Development and Land Reform* [2019] ZACC 30; 2019 (11) BCLR 1358 (CC); 2019 (6) SA 597 (CC), the Court dismissed an appeal against the Land Claim Court's order, which declared a failure by the Department of Rural Development and Land Reform to process land claims inconsistent with the Constitution. See fn 50.

[6] By "Government of the Republic of South Africa", the DA refers to the organ of the state representing national government. The Government is included in the DA's declaratory relief as a party incorporating the President and members of his cabinet, as the Government was cited in *Government of the Republic of South Africa v Grootboom* [2000] ZACC 19; 2001 (1) SA 46; 2000 (11) BCLR 1169 at fn 5.

10. By "energy crisis", the DA means the recurring, severe, unpredictable load shedding since 2008, which Eskom says it is forced to implement to avoid a national grid collapse.[7]

10.1. The DA does not seek a declarator that "load shedding" is unconstitutional. The DA accepts that load shedding *per se* may be necessary to avoid a grid collapse.[8]

10.2. The energy crisis that government should have prevented is the recurring, severe load shedding implemented to avoid a collapse of the grid.[9] This load shedding occurs regularly, for extended periods, and unpredictably.

11. The President,[10] Eskom,[11] NERSA,[12] the Minister of Electricity,[13] and the Minister of Mineral Resources and Energy,[14] accept that the energy crisis violates constitutional rights. The deleterious effects of the energy crisis on constitutional rights, the economy, South Africa's social fabric, and national security are common cause.[15]

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[7] DA Supplementary Affidavit at para 28; DA Caselines at 06-103.
[8] DA Supplementary Affidavit at para 26; DA Caselines at 06-102.
[9] DA Supplementary Affidavit at para 26; DA Caselines at 06-102.
[10] President's Answering Affidavit at para 61; DA Caselines at 011-32.
[11] Eskom's Loadshedding Answering Affidavit at para 18; DA Caselines at 08-257.
[12] NERSA never denies that the energy crisis unjustifiably limits rights. See for example NERSA's Answering Affidavit at paras 221-222; DA Caselines 07-110.
[13] DA Caselines 011-125.
[14] The Minister does not oppose the declaratory relief. See the Minister's Answering Affidavit at para 3.1; DA Caselines 09-14.
[15] These effects are set out by the Minister of Electricity in his Diagnostic Report at DA Caselines 011-128.

12. Nevertheless, the President and NERSA resist the DA's declaratory relief.[16] They allege that they are not responsible for or did not cause the energy crisis; so, their failure to prevent the energy crisis cannot be declared invalid for inconsistency with the Constitution.[17]

13. Why is there an energy crisis today? The President explains:[18]

13.1. In 1998, the 1998 White Paper warned government that by 2007 South Africa would need more energy generation capacity. Government needed to allow either (a) a competitive energy sector or (b) Eskom to build more power stations. Government did neither. Government failed to implement the 1998 White Paper.[19] Government failed to heed the White Paper's warning, and numerous subsequent warnings.[20]

13.2. Tragically, the need for generation capacity emerged from government's successfully electrification program. South Africa added 2.5 million households to the grid within four years after apartheid. Then government ignored the obvious implication of this success: more demand for electricity requires more supply of electricity.[21]

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[16] Eskom resists the UDM's declaratory relief. For the reasons given in the DA's Replying Affidavit at paras 17 to 30; DA Caselines 012-7, Eskom's opposition to the UDM's declaratory relief is no defence to the DA's declaratory relief.
[17] NERSA's Answering Affidavit at paras 221-222; DA Caselines 07-110. President's Answering Affidavit at para 57; DA Caselines 011-32.
[18] The Minister of Electricity adopts the same reasons. See the Minister's Supporting Affidavit at para 26; DA Caselines 011-94. See further the Minister's Diagnostic Report at DA Caselines 011-125.
[19] President's Answering Affidavit at paras 38-9; DA Caselines 011-25.
[20] DA's Supplementary Affidavit at para 98.3; DA Caselines 06-123.
[21] DA's Supplementary Affidavit at para 98.2; DA Caselines 06-123.

13.3. Eskom's management refused to approve and cancelled power purchase agreements from independent power producers (as it turns out, for corrupt reasons).[22] Had they not done so, 96% of load shedding would have been prevented today.[23]

13.4. Corruption and state capture caused the mismanagement of the construction of Medupi and Kusile, two power stations.[24] Today, as a direct result of this mismanagement and corruption, four units across these two power stations cause *three stages* of load shedding.[25]

13.5. Eskom deliberately refrained from maintaining its fleet and "ran plants harder than their design specification permitted".[26]

13.6. The national executive, "government", had a policy to keep electricity prices artificially low. The President describes this policy as "ill-conceived".[27] Together with NERSA's below-cost tariffs, "mismanagement and poor governance at Eskom over many years", and a high turnover of CEOs, Eskom could not operate sustainably.[28]

13.7. Sabotage, corruption, and criminal activity increased at Eskom's power stations. The story of state capture at Eskom is "long and sordid".[29]

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[22] President's Answering Affidavit at para 42; DA Caselines 011-26.
[23] UDM Caselines 13-46.
[24] President's Answering Affidavit at paras 41 and 44; DA Caselines 011-27.
[25] President's Answering Affidavit at para 45; DA Caselines 011-27.
[26] President's Answering Affidavit at para 46; DA Caselines 011-27.
[27] UDM Caselines 14-36.
[28] President's Answering Affidavit at para 47; DA Caselines 011-28.
[29] President's Answering Affidavit at paras 49-50; DA Caselines 011-28.

13.8. Eskom decided to centralise—inefficiently—its procurement process, resulting in delayed release of funds and an inability to maintain the fleet.[30]

14. These reasons for the energy crisis, which are essentially mismanagement, corruption, and "ill-conceived" policies, cannot justify the violation of rights caused by the energy crisis.

15. Moreover, these reasons, on the President's version, are attributable to government's deliberate decisions, or refusals to take decisions. The government, on the President's version, *caused* the energy crisis. Government ignored warnings for increased generation capacity, failed to address corruption, and took decisions such as reneging on independent power supply programmes.[31]

16. Government, including the President, NERSA, and Eskom, are responsible for the energy crisis. Their conduct failed to prevent it.

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[30] President's Answering Affidavit at para 52; DA Caselines 011-30.

[31] The allegation by the President that corruption, to a material extent, may not have been preventable is unfortunate (President's Answering Affidavit at para 57; DA Caselines 011-32). Corruption is not a *force majeure*. Where corruption occurs, the state, through some organ, is responsible for allowing that corruption to occur. The President accepts as much at President's Answering Affidavit at para 56; DA Caselines 011-28. See further *Glenister v President of the Republic of South Africa* [2011] ZACC 6; 2011 (3) SA 347 (CC) ; 2011 (7) BCLR 651 (CC) at para 175:

"The Constitution is the primal source for the duty of the state to fight corruption. It does not in express terms command that a corruption-fighting unit should be established. Nor does it prescribe operational and other attributes, should one be established. ***There is however no doubt that its scheme taken as a whole imposes a pressing duty on the state to set up a concrete and effective mechanism to prevent and root out corruption and cognate corrupt practices.*** *As we have seen, corruption has deleterious effects on the foundations of our constitutional democracy and on the full enjoyment of fundamental rights and freedoms. It disenables the state from respecting, protecting, promoting and fulfilling them as required by section 7(2) of the Constitution." (emphasis added).*

17. The DA has cited every organ of state involved in the electricity sector in South Africa.[32] Not a single organ has expressly acknowledged responsibility for the energy crisis.

    17.1. At best, there is a vague acknowledgement by the President that "there were failings".[33]

    17.2. At worst, the respondents have played a blame game. The President blames the "multiple" organs of state responsible for electricity, including NERSA.[34] Eskom blames NERSA for below-cost tariffs and blames the Minister of Mineral Resources for failing to authorise more power stations.[35] NERSA blames Eskom for running inefficiently.[36]

18. The DA's relief does not turn on whose fault the energy crisis is. There is an energy crisis that violates rights. Government, including the President, Eskom, and NERSA, was under a duty to prevent this crisis. It did not do so, for no good reason. Their failure to prevent the energy crisis, the severe and recurring violation of constitutional rights through load shedding, must be **<u>declared</u>** as what it is: inconsistent with the Constitution.

III THE SPECIAL MASTER

19. This Court's powers are not limited to declarations of invalidity. Section 172(1)(*b*) of the Constitution empowers this Court, "without any

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[32] Since this matter was launched, the Minister of Electricity was established and joined as a respondent.
[33] President's Answering Affidavit at para 57; DA Caselines at 011-31.
[34] President's Answering Affidavit at paras 37 and 47.1; DA Caselines 011-28.
[35] Eskom's SALGA Answering Affidavit at para 80.4.
[36] NERSA's Answering Affidavit at paras 127-8; DA Caselines 07-75.

restrictions or conditions”, to make any order that is just and equitable.[37] The Constitutional Court explained:

> *“The outer limits of a remedy are bounded only by considerations of justice and equity. That indeed is very wide. It may come in different shapes and forms dictated by the many and varied manifestations in respect of which the remedy may be called for.* ***The odd instance may require a singularly creative remedy****. In that case, the court should be wary not to self-censor. Instead, it should do justice and afford an equitable remedy to those before it as it is empowered to do.”[38] (emphasis added).*

20. The DA seeks the appointment of a special master. The DA’s notice of motion sets out the terms of this appointment.[39]

21. This Court may, if it is just and equitable, appoint a special master.[40] In making a just and equitable order, this Court is not bound by the terms of the DA’s notice of motion.[41]

22. A special master is an independent person, often with technical expertise, appointed by a court to act—by monitoring, evaluating, and reporting—within an organ of state as an extension of the court’s supervisory jurisdiction. A

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[37] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) at para 210.
[38] *Electoral Commission v Mhlope* [2016] ZACC 15; 2016 (5) SA 1 (CC); 2016 (8) BCLR 987 (CC) at para 83.
[39] DA Caselines 06-3.
[40] *Mwelase* at paras 65-6.
[41] *Economic Freedom Fighters v Speaker of the National Assembly* [2017] ZACC 47; 2018 (3) BCLR 259 (CC); 2018 (2) SA 571 (CC) at para 211:“The power to grant a just and equitable order is so wide and flexible that it allows courts to formulate an order that does not follow prayers in the notice of motion or some other pleading. **This power enables courts to address the real dispute between the parties by requiring them to take steps aimed at making their conduct to be consistent with the Constitution**.” (emphasis added).

special master does not take decisions for an organ of state; they report and evaluate the organ's decisions to the Court.[42]

23. At all times, a special master is subject to the Court's oversight.[43]

24. The rationale behind a special master is to assist the court, the applicant, and the respondent organ of state.[44]

24.1. *Assisting the Court.* A special master provides additional resources to a court in matters involving difficult, technical questions.[45] A special master can engage with parties in a manner a judge cannot. The special master "gathers all the threads, tie them together, and then presents them in a coherent manner to the court".[46]

24.2. *Assisting the respondents.* A special master assists the respondent organs of state by providing independent support and advice. A special master does the reporting to the Court for the respondent, saving the respondent the effort of compiling court reports.

24.3. *Assisting the applicants.* The special master reduces the burden of supervision, especially for litigants who do not have the resources to

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[42] A receiver, on the other hand, is a person appointed by a court to supplement or replace management of an organ of state. *Mwelase* at para 58.
[43] *Mwelase* at para 61. See further D Erasmus & A Hornigold 'Court Supervised Institutional Transformation in South Africa' [2015] 18(7) *Potchefstroom Electronic Law Journal* 48.
[44] *Mwelase* at para 22, citing the Land Claims Court's judgment in *Mwelase v Director-General for the Department of Rural Development and Land Reform* 2017 (4) SA 422 (LCC) (per Ncube AJ).
[45] M Farrell 'The Function and Legitimacy of Special Masters' (1997) 2 Widener Law Symposium Journal 235 at 284-285.
[46] Geoffrey F Aronow 'The special master School Desegregation Cases: The Evolution of Roles in the Reformation of Public Institutions Through Litigation' 7 Hastings Constitutional Law Quarterly 739, (Spring 1980) at 764.

ensure that an organ of state complies with a court order. A special master's reports further ensure that applicants can approach the court for relief, if the need arises, on papers containing comprehensive facts of the matter.

25. The Constitutional Court has appointed a special master twice.

25.1. In *Black Sash I*, after the South African Social Security Agency failed to ensure the payment of social grants.[47]

25.2. In *Mwelase*, after the Department of Rural Development and Land Reform failed to process land claims.[48]

26. For the five reasons that follow, the appointment of a special master would be just and equitable in this case.

(A) CONSTITUTIONAL RIGHTS ARE THREATENED AND VIOLATED SEVERELY

27. In *Black Sash I* and *Mwelase*, the Constitutional Court considered the severe threats to and violations of constitutional rights when deciding to appoint a special master.[49] The greater, more severe, and far reaching the rights violations, the more reason to appoint a special master.

28. In this case, constitutional rights are threatened and violated by the energy crisis. This is common cause. As an example, the Minister of Electricity writes

[47] *Black Sash Trust v Minister of Social Development and Others (Freedom Under Law NPC Intervening)* [2017] ZACC 8; 2017 (5) BCLR 543 (CC); 2017 (3) SA 335 (CC).

[48] For two US examples, concerning the appointment of special masters to oversee prisons, see *Brown, Governor of California v Plata* 563 US (2011) and *Taylor v Pernni* 503 F2d 899.

[49] *Black Sash I* at para 43; *Mwelase* at paras 41 and 49.

in his Diagnostic Report that the energy crisis poses an *immediate* danger to life and a threat to the state.[50]

<u>(B) A DEMONSTRATED INABILITY TO PERFORM CONSTITUTIONAL DUTIES</u>

29. In *Mwelase*, the Constitutional Court considered how the state had previously failed to perform its constitutional duties. Cameron J described the "patent incapacity or inability to get the job done" and how "institutional incapacity" "lies at the hear of this colossal crisis".[51]

30. In the present case, the respondents have failed over the course of 25 years to prevent an energy crisis foreseen in 1998. As explained above, this is due to ill-conceived policies, mismanagement, and corruption. There is a patent, consistent inability to ensure the supply of electricity and prevent an energy crisis.

31. The President, Eskom, and the Minister of Mineral Resources argue that the state has now turned a corner. Their argument is that the state may have failed in the past. But, so they allege, there is now a plan, (called the Energy Action Plan (**EAP**)) which the state is implementing capably.[52]

32. This argument is not a basis to not appoint a special master. Even if the respondents have not *yet* failed to implement their *current* plans, there is good reason to believe that they may and indeed will.

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[50] DA Caselines 011-128. See further the DA's Founding Affidavit at para 37; DA Caselines 01-28.
[51] *Mwelase* at paras 40-1.
[52] President's Answering Affidavit at para 110; DA Caselines 011-58. Eskom's Loadshedding Affidavit at para 377; DA Caselines at 08-432. Minister of Mineral Resource's Affidavit at paras 3.2-3.3; DA Caselines at 09-14.

33. **First**, Eskom's <u>current state</u>, on its version, implies that the respondents will—in all likelihood—fail to implement the EAP.

 33.1. Eskom is in a state of serious dysfunction, with no certainty that it will recover.

 33.2. Eskom is operating at a loss.[53] Eskom explains that, since the launch of this application, "sustainability in generation capacity remains a challenge",[54] and "there has, as yet, been no overall improvement in total unplanned outages".[55] Eskom's energy availability factor (**EAF**) performance has deteriorated further this year to 56%.[56]

 33.3. Eskom's power stations are literally on fire or falling apart.[57] Eskom laments that its "deteriorating financial position [. . .] has made it *impossible* for Eskom to fund all the maintenance and diesel fuel required to prevent loadshedding" (emphasis added).[58] Eskom maintains that the current tariffs imposed by NERSA, and the absence of new generation capacity, will prevent it from providing electricity and preventing load shedding.[59]

34. **Second**, the respondents have consistently failed to implement previous plans to avert the energy crisis.[60] Government, for the past 25 years, consistently got

[53] Eskom's Loadshedding Affidavit at para 28.3; DA Caselines 08-263.
[54] Eskom's Loadshedding Affidavit at para 41.2); DA Caselines 08-272.
[55] Eskom's Loadshedding Affidavit at para 42; DA Caselines 08-272.
[56] Eskom's Loadshedding Affidavit at para 39; DA Caselines 08-275.
[57] Eskom's Loadshedding Affidavit at para 47; DA Caselines 08-263.
[58] Eskom's Loadshedding Affidavit at para 56; DA Caselines 08-279.
[59] Eskom's SALGA Answering Affidavit at para 80.4.
[60] These plans are listed in the DA's Replying Affidavit at para 57; DA Caselines at 012-19.

it wrong. The proof is in the pudding: there is an energy crisis today, despite government attempting to take steps to prevent it. As a further example, as little as five years ago, Eskom was contemplating to *close* power stations because it projected that it would have enough power by 2023. Plainly, Eskom failed in implementing its plans—it turned out to be wrong.[61]

35. Consequently, there is reason to believe that the respondents will get it wrong again. Unfortunately, the history is such that it is simply a matter of time.

36. **Third**, much of the President's EAP is in its early stages. There is still room for error. For instance:

36.1. The Just Energy Transition Investment Plan (**JET IP**) is valued at USD8.5 billion. Eskom supports the JET IP, describing it as "crucial" to ending the energy crisis. But government has not yet entered any formal agreement "with immediate consequences" with the foreign partners to the JET IP. Cabinet approved the proposal on 19 October 2022. Since 19 April 2023, nothing has changed.[62]

36.2. A refrain in Eskom's response to the UDM application is that Eskom is yet to decide, finally, to close its power stations.[63]

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[61] Eskom's Loadshedding Affidavit at para 122; DA Caselines at 08-317.
[62] Eskom's Loadshedding Affidavit at paras 67.4, 69, and 72; DA Caselines 08-284.
[63] Eskom's Loadshedding Affidavit at para 79; DA Caselines 08-289.

36.3. The Minister of Electricity details various steps awaiting executive decisions, exemptions, or funding.[64]

37. It may have been different if the plan had been close to completion. But the EAP has only just begun. There is little reason, given government's track record and the early stages of the EAP, to suppose that government will be able to implement the plan.

38. The respondents may not have (yet) failed in their new and current plans. This does not mean that this Court should not appoint a special master.

(C) TECHNICAL EXPERTISE

39. Both *Black Sash I* and *Mwelase* concerned appointing a special master who would monitor the implementation of a technical plan to solve institutional issues.

40. The order in *Black Sash I* referred to "suitably qualified independent legal practitioners and technical experts" to evaluate the performance by the Minister of Social Development.[65]

41. In *Mwelase*, the Constitutional Court explained that in the US the special master "is more familiar in courts with heavier caseloads and complex lawsuits that test judicial capacity and expertise".[66] The Constitutional Court considered how special masters often have "expertise in specialist areas of government".[67]

[64] Minister of Electricity's Supporting Affidavit at para 27; DA Caselines at 011-98.
[65] *Black Sash I* at para 11 of the Court's order.
[66] *Mwelase* at para 56.
[67] *Mwelase* at para 56.

Special masters are experts precisely because they are deployed by a court to monitor a technical and complex problem.

42. The respondents in this case accept that implementing the EAP is a specialised and complex task. But they go further. They allege that because the EAP's implementation is policy-centric and complex, this Court should *not* appoint a special master. They submit that a special master's role is limited to overseeing bureaucratic or administrative functions.[68]

43. The respondents' allegation belies the Constitutional Court's precedents, and the rationale for the appointment of a special master. A special master is not appointed to monitor the implementation of straightforward plans. If a plan was straightforward, there would be no need to appoint a special master. A special master is appointed precisely in circumstances such as these, where a plan is complex, technical, and requires expertise.

44. The respondents further submit that because there are multiple organs of state involved, and given the breadth of the EAP, the special master's mandate would be too "massive".[69]

45. This submission falls to be rejected.

46. The special master will be concerned with the EAP's implementation. The respondents have not suggested that the EAP's scope is unreasonably broad

[68] President's Answering Affidavit at para 113; DA Caselines 011-59. Eskom's Loadshedding Affidavit at para 371; DA Caselines 08-431. Minister of Mineral Resources' Answering Affidavit at para 3.3.3; DA Caselines at 09-15.

[69] For example, Eskom's Loadshedding Affidavit at para 372; DA Caselines 08-431.

or ill-defined. If the plan is a reasonable one, then it should be capable of being monitored. Conversely, if the respondents are correct, and an office cannot monitor the implementation of the plan, then the plan would be unreasonable or irrational. There is no point to a plan so large and complex that no one knows if it is being implemented, properly or at all.

47. The President has explained that the Minister of Electricity is the plan's focal point.[70] The Minister oversees and monitors the EAP's implementation. If that is so, then the special master need only monitor the Minister of Electricity to obtain a significant overview of government's steps. Of course, the special master may decide to monitor other organs of state too. But if the EAP's implementation pivots around the Minister of Electricity, then the special master's role becomes easier, not harder.

(D) A STRUCTURAL INTERDICT WILL NOT BE EFFECTIVE

48. The respondents submit that the Constitutional Court in *Black Sash I* and *Mwelase* appointed a special master only after the organs of state had failed to adhere to previous court orders requiring the organs of state to report to the Court.[71]

49. This submission misconstrues the Constitutional Court's findings. In *Mwelase*, the Court considered whether a supervisory order would be *effective*. Given

[70] President's Answering Affidavit at para 68.
[71] For example, President's Answering Affidavit at para 101; DA Caselines 011-56.

the Department's previous failures to adhere to a supervisory order, the Court considered that another structural interdict would not work.[72]

50. In this matter, a structural interdict would not be effective for two reasons.

51. First, corruption. It is common cause that many of Eskom's officials and employees are corrupt, and that corruption "at the highest levels" contributed to the energy crisis.[73] The corruption is widespread, and exists to unknown extents. The good, at this stage, cannot be distinguished from the bad. The corruption surrounding Eskom and the energy crisis necessitates the intervention of an independent, third party.

52. Second, if the respondents are correct when they suggest that the implementation of the EAP is complex and involves many organs of state, then requiring them to report to this Court may be impractical. A special master avoids this problem. The respondents do not need to concern themselves with reporting—an appointed expert will do the reporting to this Court.

(E) FURTHER LITIGATION AND CORRUPTION

53. Government's plan to deal with and avert the energy crisis is in its early stages. Much of the plan involves taking further decisions, mainly procuring resources and services for the state.[74] These impending decisions imply two things. First,

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[72] *Mwelase* at para 48: "When egregious infringements have occurred, the courts have had little choice in their duty to provide ***effective relief***. That was so in *Black Sash I*, and it is the case here. In both, the most vulnerable and most marginalised have suffered from the insufficiency of governmental delivery." (emphasis added).

[73] See for instance the DA's Supplementary Affidavit at para 105; DA Caselines at 06-126.

[74] DA's Supplementary Affidavit at para 117; DA Caselines at 06-131.

the possibility of further corruption. Second, the probability of further challenges to government's steps to end the energy crisis.

54. Both these implications, further corruption and litigation, are reasons to appoint a special master. A special master will ameliorate the risk of corruption. A special master will ensure that this Court is well-placed to provide just and equitable relief, should parties challenge government's decisions down the line.

IV CONCLUSION

55. Cameron J in *Mwelase* addressed the issue of judicial complicity in constitutional crises. He held that the remedy of a special master—

> *"recognises our joint responsibility, as a country, for sustaining and growing and strengthening our institutions. And it acknowledges our judicial complicity in institutional and systemic dysfunction that impedes our attainment of shared constitutional goals and aspirations."*[75]

56. South Africa is amid a crisis. The constant, severe load shedding stands to undermine the attainment of constitutional goals. The state — including this Court — is under a duty to take all reasonable measures to avert the crisis and vindicate constitutional rights.

57. The DA submits that this Court must declare the government's failure to prevent the energy crisis as inconsistent with the Constitution.

58. The DA submits that the appointment of a special master is just and equitable.

[75] *Mwelase* at para 70.

59. For these reasons, the DA seeks the relief sought in its draft order, which it will annex to its practice note.

ANTON KATZ SC

ESHED COHEN

Chambers, Cape Town

Counsel for the Democratic Alliance

17 August 2023