HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

CASE NO: 005779/2023

(1) REPORTABLE: NO.
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.
DATE: 05 MAY 2023

SIGNATURE

In the matter between:

UNITED DEMOCRATIC MOVEMENT	First Applicant
INKATHA FREEDOM PARTY	Second Applicant
ACTION SA	Third Applicant
BUILD ONE SOUTH AFRICA	Fourth Applicant
DR LUFUNO RUDO MATHIVHA	Fifth Applicant
DR TANUSHA RADMIN	Sixth Applicant
LUKHONA MNGUNI	Seven Applicant
SOUTH AFRICAN FEDERATION OF TRADE UNIONS	Eighth Applicant
NATIONAL UNION OF METAL WORKERS OF SOUTH AFRICA	Nineth Applicant
HEALTH AND ALLIED INDABA TRADE UNION	Tenth Applicant
DEMOCRACY IN ACTION NPC	Eleventh Applicant

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

CASE NO: 003615/2023

MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS	Twentieth Respondent

CASE NO: B38/2023

In the matter between:

TEBEILA INSTITUTE	Applicant
and	
NATIONAL ENERGY REGULATOR OF SOUTH AFRICA	First Respondent
ESKOM HOLDINGS SOC LIMITED	Second Respondent
MINISTER OF MINERAL RESOURCES AND ENERGY	Third Respondent

Summary: The practice of "loadshedding" by Eskom to save the integrity of the national energy grid impacts prejudicially on, inter alia, Constitutional rights to health, security and education. The infringement of these rights justify judicial intervention, but to such a limited extent that the principle regarding the separation of powers is not overstepped.

ORDER

1. Pending the final determination of PART B of the application in case no: 005779/2023, in respect of users of electricity, whether supplied directly by Eskom Holdings SOC Limited ("Eskom") or by local authorities, the Minister of Public Enterprises shall take all reasonable steps within 60 days from date of this order, whether in conjunction with

other organs of state or not, to ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to the following institutions and/or facilities:

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

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

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

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

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

JUDGMENT

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

DAVIS, J (with COLLIS J AND NYATHI J)

Introduction

[1] "Loadshedding" is a process whereby Eskom Holdings SOC Ltd (Eskom) effectively cuts off the supply of electricity to areas of the country on a rotational and scheduled basis. It is done on different levels (currently ranging from level 1 to level 8) and is done to protect the integrity of the national energy grid when the demand for electricity exceeds the capacity generated by Eskom from time to time.

[2] The application in case no 005779/2023 (the UDM application) is not about the stopping or termination of loadshedding, but in PART A thereof, the applicants seek relief aimed at reducing the prejudicial impact of loadshedding on public health facilities, police stations and schools which do not have sufficient alternative energy sources available to them. The applicants claim that without such energy sources the Constitutional rights of citizens to healthcare, security and education are infringed upon. The dispute is about how to remedy these infringements and whether it is permissible for a court to order that it be done, having regard to the principle of separation of powers between different spheres of government.

The applicants in the UDM application

[3] Having regard to the identity of most of these applicants, the application has a distinct political flavor to it. All the applicants, however, seek to vindicate fundamental human rights, either in their personal or representative capacities. The representative applicants are the United Democratic Movement (UDM), the Inkatha Freedom Party, Action SA, Build One South Africa, the South African Federation of Trade Unions, the National Union of Metal Workers of South Africa, the Health and Allied Indaba Trade Union, Democracy in Action NPC,

Southern African Institute for Responsive and Accountable Governance, White River Neighbourhood Watch, the African Council of Hawkers and Informal Businesses, South African Unemployed People's Movement, the Soweto Action Committee, Mastered Seed Foundation and two companies, Ntsikie Mgagiya Real Estate (Pty) Ltd and Fula Property Investments (Pty) Ltd.

[4] These applicants were joined by three individuals in their personal capacities, being the fifth, sixth and seventh applicants. The fifth applicant is Dr Lufuno Rudo Mathiva who is an Adjunct Professor: Critical Care Medicine at Chris Hani Baragwanath Academic Hospital, being the largest hospital in Africa. The sixth applicant is Dr Tanusha Ramdin, a doctor and Head of Peadiatrics and Neonatal Unit at Charlotte Maxeke Academic Hospital. The seventh applicant is Lukhona Mnguni, a policy analyst.

[5] The respondents in the UDM application are Eskom, the Minister of Public Enterprises (the DPE Minister), the Director-General: Department of Public Enterprises (DPE), the President of the Republic of South Africa (the President), the Minister of Mineral Resources and Energy (the DMRE Minister), the Director-General of the Department of Mineral Resources and Energy (DMRE), the National Energy Regulator of South Africa (NERSA) and the Government of the Republic of South Africa (insofar as it may be competent to cite the government in this generalized fashion).

The UDM application itself

[6] Initially the UDM application started out as one of urgency and, although the urgency complained of by the applicants remained as part of a continuing wrong for as long as loadshedding continues, the matter was, after case management by the Deputy Judge President of this Division, referred for hearing by a full court of this Division in terms of section 14(1)(a) of the Superior Courts

Act 10 of 2013. The UDM application was to be heard jointly with two other applications in case numbers 003615/2023 and B38/2023 but the particulars of those matters are not relevant at this stage. It was further directed that, after the exchange of affidavits and Heads of Argument, paragraphs 3, 4, and 5 of PART A of the UDM application be heard separately on dates agreed to by the parties and that PART B be heard at a later date or dates together with the other applications. This separation was from the outset envisaged in the UDM applicants' Notice of Motion.

[7] This judgment therefore only concerns the hearing in respect of paragraphs 3, 4 and 5 of PART A, of the UDM application which was heard over the course of three days. In the amended Notice of Motion in this application, the following relief was sought in this part:

> "*3. In respect of users of electricity that are supplied electricity directly by Eskom Holdings SOC Limited ("Eskom"), the Minister of Public Enterprises and/or Eskom shall ensure that there shall be no interruption of supply as a result of loadshedding to the following institutions and/or facilities:*
>
> *3.1 all "public health establishments" as defined in the National Health Act 61 of 2003, including publicly owned hospitals, clinics, and other establishments or facilities;*
>
> *3.2 all "public schools" as defined in the South African School Act 84 of 1996;*
>
> *3.3 "electronic communications networks" as defined in the Electronic Communications Act 36 of 2005, and the infrastructure necessary for the operation of such networks,*

and any other infrastructure necessary for the operation of mobile phone and internet networks;

3.4 *the "South African Police Service" and "police stations" as envisaged in the South African Police Service Act 68 of 1995, including facilities and infrastructure providing municipal police services;*

3.5 *any entity responsible for the provision of water in terms of the National Water Act 36 of 1998; and*

3.6 *"micro", "very small" and "small" businesses as provided for in schedule 1 of the National Small Enterprises Act 102 of 1996, trading in perishable goods such as meat and milk and which depend on electricity for the storage of such goods.*

4. *In respect of users of electricity that are supplied electricity by a municipality where Eskom has entered into an agreement with that municipality, Eskom and/or the Minister of Public Enterprises shall ensure that any instruction to that municipality to reduce electricity and/or commence or continue loadshedding includes an instruction to ensure the exemption on the terms mentioned in paragraph 3 above.*

5. *Alternatively only to prayers 3 and 4 above that Eskom and the Minister of Public Enterprises must take immediate steps to procure alternative sources of electricity and/or energy for all the establishments and facilities contemplated in paragraph 3 of this amended notice of motion, including but not limited to solar panels and generators*".

[8] At a late stage in the proceedings, that is, at the conclusion of hearing argument on the first day thereof and after all the parties had already previously delivered extensive answering and replying affidavits and Heads of Argument, the applicants indicated that they will seek leave to further amend the relief sought. It was further indicated that this amendment and the consequences thereof would be debated amongst the applicants (which were separated into two groups, the third applicant being one such group and the remainder of applicants the other group) before being presented to the respondents. The respondents were similarly divided with Eskom constituting one grouping and the remainder of respondents another grouping (the government respondents) while NERSA had delivered a notice to abide and took no part in the proceedings concerning PART A of the application (other than by way of counsel with a watching brief).

[9] Despite the fact that the day after the first day of hearing was a public holiday (Human Rights day on 21 March 2023), it turned out that only the discussions amongst the applicants themselves and with Eskom regarding the proposed amendment could be finalized on that day. The first occasion that the remainder of the respondents got to know of the extent of the proposed amendment, was shortly before the continuation of argument on 22 March 2023. Not only did this result in a standing down of the matter for purposes of allowing those respondents to peruse and consider the proposed amendments and for their legal practitioners to obtain instructions in respect thereof, but it also resulted in an opposed hearing of an oral application to amend the Notice of Motion, which was done by way of the presentation of a proposed draft order. This draft order contained a detailed proposed structural interdict which the respondents (except for Eskom and Nersa) said would require further consultation and affidavits. This would have resulted in an inevitable and costly delay in the finalization of a matter in respect of which argument had already partially been heard. In the end, the amendment was refused and an ex-tempore judgment was delivered in this

regard. The remainder of the arguments in respect of the application then proceeded over the next two days.

[10] Although the amendment was not affected, the applicants elected not to pursue relief against Eskom, excluding it from the paragraphs of the Notice of Motion already quoted in paragraph 7 above. Eskom's counsel therefore remained in attendance, but took no further part in the argument, save to a limited extent in respect of the issue of costs.

The nature of the relief

[11] Before proceeding further, it is necessary to say something about the nature of the relief eventually sought by the applicants as this may have an impact on determining whether the requirements for the relief sought were met. The applicants couched the relief as being pending the determination of PART B of their Notice of Motion. Notionally this would make the compelling orders which they seek interim in nature as they may still be amended or varied by this court[1]. However, the applicants were constrained to concede that, once electricity is supplied, by whatever alternate means, that event has passed and no amount of revisiting will undo that. In that sense, even though the orders sought might be in the form of an interim interdict, the effects thereof are permanent in nature. This might oblige the applicants to satisfy the requirements for a final interdict, being the establishment of a clear right, an act of interference and the absence of another remedy[2]. This also accords with what the applicants actually seek, namely *"a permanent cessation of an unlawful course of conduct or state of affairs"*[3], the state of affairs being certain hospitals, police stations and schools being left

---

[1] The requirements for an interim interdict have for more than 100 years been: a prima facie right, an apprehension of irreparable harm, a favourable balance of convenience and the absence of an alternate remedy. See *Setlogelo v Setlogelo* 1914 AD 221.

[2] Prest, *The Law and Practice of* Interdicts, Juta, Chapter Five (Prest).

[3] Erasmus & Van Loggerenberg (formerly Jones & Bucle), *The Civil Practice of the Magistrates Courts of South Africa*, 8th Ed, as quoted in Prest at 43

without electricity during loadshedding. We shall therefore refer to the satisfaction of both these sets of requirements in the course of our judgment.

The obligation to provide electricity

[12] As a starting point, the applicants founded their argument in respect of the respondents' obligation to provide electricity, on the resultant infringement of fundamental Constitutional rights in the event that electricity is not sufficiently or consistently supplied.

[13] In the first instance, the right to access to health care services is enshrined in section 27 (1)(a)[4] of the Constitution. The fifth and sixth applicants have detailed the dire consequences for a healthcare facility should it not receive an uninterrupted supply of electricity. These consequences include life-threatening impacts on hospital operations, medical instability, and patient safety. Peadiatric and neo-natal units literally require the "lights to be on", critical organs and medical supplies need to be maintained at optimal temperatures, operating theatres need uninterrupted power supplies, life-supporting and monitoring equipment need electricity to run effectively and accurately and so the list goes on. In the most dire circumstances, the right to life, enshrined in section 11 of the Constitution becomes threatened. Section 27(2)[5] creates an obligation not to interfere with that right, which is what occurs when loadshedding is implemented.

[14] The next instance relied on, is the right to education, enshrined in section 29(1)[6] of the Constitution. The right to basic education protected in this section

---

[4] Sec 27(1)(a)
(1) Everyone has the right to have access to –
(a) health care services, including reproductive health care

[5] Sec 27(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

[6] Sec 29(1) Everyone has the right –
(a) to a basic education, including adult basic education; and
(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

is unqualified. In order to realise this right, which has enormous historical significance in South Africa[7] is to prevent schools from shutting down or closing, even temporarily, as a result of loadshedding. The consequences of interrupted (or no) power supply are particularly keenly felt in rural and township schools. Often, due to no alternate sources of electricity being available (generally in contrast to private schools), these schools close down for a particular day, thereby not only depriving leaners of education, but often also of their only guaranteed meal of the day. Iniquities created by our country's past injustices are, by the simple act of loadshedding, being perpetuated against a vulnerable segment of society.

[15] The applicants also argued that the right to freedom and security of the person, enshrined in Section 12[8] of the Constitution creates an obligation to ensure that the South African Police Service is able to perform their functions. When police stations are shut down or have to close due to a lack of electricity brought about by loadshedding, this obligation is not fulfilled.

[16] The applicants also relied on our courts having recognized that, even if there may not be a right to electricity mentioned in the Constitution in so many words, other fundamental rights such as those mentioned above, can only be exercised or manifested by way of an uninterrupted supply of electricity[9]. It has

---

[7] *Head of Department: Mpumalanga Department of Education and Another v Hoërskool Ermelo* 2010(2) SA 415 (CC) par 46.

[8] (1) Everyone has the right to freedom and security of the person, which includes the right—
(a) not to be deprived of freedom arbitrarily or without just cause;
(b) not to be detained without trial;
(c) to be free from all forms of violence from either public or private sources;
(d) not to be tortured in any way; and
(e) not to be treated or punished in a cruel, inhuman or degrading way.
(2) Everyone has the right to bodily and psychological integrity, which includes the right—
(a) to make decisions concerning reproduction;
(b) to security in and control over their body; and
(c) not to be subjected to medical or scientific experiments without their informed consent.

[9] *Cape Gate(Pty) Ltd v Eskom Holdings Soc and Others* 2019 (4) SA 14 (GJ) and *Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd (CCT 44/22)* [2022] ZACC 44 (23 December 2022) (*Vaal River)* par 198.

also been held that the state has a positive duty to take reasonable steps to realise those rights[10].

[17] The obligations of the State have further been statutorily prescribed and detailed. In terms of section 5(1) read with section 5(2)(ii)[11] of the National Energy Act 34 of 2008 (NEA) the Minister for Mineral Resources and Energy (the DMRE Minister) is obliged to take all reasonable steps to ensure that the State provides "energy services" to "all the people" in the country. In terms of this statutory obligation the key to unlocking electricity generation is held by the DMRE Minister.

[18] In terms of the National Energy Regulator Act 40 of 2004, NERSA was established with the duty to regulate the supply of electricity, piped gas and petroleum pipeline structures.

[19] Eskom is, in turn, licensed by NERSA in terms of sections 7, 14 and 21[12] of the Electricity Regulation Act 4 of 2006 (the ERA) to supply and distribute electricity.

---

[10] *Mazibuko v City of Johannesburg* 2010 (4) SA 1 (CC)

[11] Sections 5(1) and 5(2)(ii) provide as follows:

5(1) The Minister must adopt measures that provide for the universal access to appropriate forms of energy or energy services for all the people of the Republic at affordable prices.

(2) The measures contemplated in subsection (1) must take into account—

(i) the State's commitment to provide free basic electricity to poor households; and

[12] Sections 7, 14 and 21

7. (1) No person may, without a licence issued by the Regulator in accordance with this Act—

(a) operate any generation, transmission or distribution facility;

(b) import or export any electricity; or

(c) be involved in trading.

(2) Notwithstanding subsection (1), a person involved in an activity specified in Schedule 2 need not apply for or hold a licence issued by the Regulator.

(3)

(a) Nothing in this Act precludes a potential licensee from discussing the contemplated operation of generation, transmission and distribution facilities, the import or export of electricity, trading, or any other activity relating thereto, prior to filing a licence application with the Regulator.

(b) The Regulator must furnish an applicant contemplated in paragraph (a) with all information necessary to facilitate the filing of an application for a licence.

[20] Eskom, even though licensed by NERSA, may not generate and distribute electricity off its own bat, it may only do so in terms of a "shareholders compact" entered into between the DPE Minister and its board in terms of section 6(4) of the Eskom Conversion Act 13 of 2001 (the Conversion Act). In *Eskom Holdings Soc Ltd v Vaal River Development Association (Pty) Ltd* (*Vaal River)*[13] at par 73 the Constitutional Court has described the relationship between Eskom as a State Owned Corporation and its shareholder, the State, represented by the DPE Minister as follows: "*The Conversion Act did not privatize Eskom. Upon conversion, the state was Eskom's sole shareholder. Its conversion required Eskom and the Minister of Public Enterprises to enter a Shareholder compact. The Shareholder compact is defined in section 1 of the Conversion Act to mean "the performance agreement to be entered into between Eskom and the Government of the Republic of South Africa". In doing so, the Minister was required to take account of the "developmental role of Eskom" and "the promotion of universal access to and the provision of affordable electricity,*

---

(4) No request for further information, notification or discussions referred to in subsection (3) may in any way be construed as conferring any right or expectation on an applicant.

14. (1) The Regulator must decide on an application in the prescribed manner within 120 days-
(a) after the expiration of the period contemplated in section 12(2)(d), if no objections have been received; or
(b) after receiving the information contemplated in section I3(b).
(2) The Regulator must provide the applicant with a copy **of** its decision as well as the reasons for the decision.
(3) The Regulator must issue separate licences for –
(a) the operation of generation, transmission and distribution facilities;
(b) the import and export of electricity; or
(c) trading.
(4) The Regulator is not obliged to issue a licence and may issue only one licence per applicant for each of the activities contemplated in subsection (3).

21. (I) Any generation or transmission licence issued in terms of this Act is valid for a period of 15 years or such longer period as the Regulator may determine.
(2) Any distribution or trading licence issued in terms of this Act is valid for the period determined by the Regulator.
(3) A licensee may apply for the renewal of his or her licence.
(4) An application for renewal must be granted, but the Regulator may set different licence conditions.
(5) A licensee may not assign a licence to another party.

[13] (CCT 44/22) [2022] ZACC 44 (23 December 2022)

taking into account the cost of electricity, financial sustainability and the competitiveness of Eskom".

[21] In summary then, the collective framework for the generation, supply and distribution of electricity and the upkeep of the infrastructure to do so, is as follows: The DMRE Minister authorizes the generation of electricity including plans for the expansion thereof and dictates policy in respect of thereof. Eskom performs the actual acts of generation, supply and distribution in terms of its performance agreement with the State, represented by the DPE Minister and does so in terms of licences issued to it by NERSA, who in turn prescribes conditions or limitations to these licences by way of published codes. It is within these parameters that the various stages of loadshedding are determined. We shall refer to these more fully when dealing with the reasons why loadshedding is experienced.

[22] It is by way of this collective framework that the respondents are to comply with their respective statutory and Constitutional obligations.

Have there been breaches of the Constitutional obligations?

[23] The evidence placed before the court by Eskom Group Chief Executive Officer, Mr De Ruyter, indicated the following: load shedding is the controlled reduction of electricity demand. It is implemented by disconnecting "certain points" on the transmission and distribution networks on the national electricity grid. Load shedding is employed when electricity demand exceeds the supply of electricity to avoid a collapse of the electricity grid. Such a collapse would result in a complete lack of supply across the whole country (referred to as a "blackout"). Restoration of the supply of electricity after a blackout could take days or even weeks. During the period of a complete blackout, the country as a whole would suffer immense human suffering and economic harm. It would

result in the shutdown of water supply and sewerage treatment, the shutdown of telephone and internet services, payment services, fuel and diesel distribution and impact on food supply and the rendering of medical services.

[24] As already mentioned, Eskom operates under licenses granted to it by NERSA. The transmission and distribution licenses oblige Eskom to apply the South African Grid Code System Operation Code (the Grid Code). Apart from the licensing requirement, the ERA also statutorily obliges Eskom to adhere to the Grid Code as well as another code, the NRS 048-09 Code (the NRS Code). This lastmentioned code prescribes the Practice for Energy Load Reduction. These codes oblige Eskom to maintain a minimum critical load. A minimum critical load is that required to maintain the operational integrity of the grid "*to avoid a direct and significant impact on the safety of people, the environment and ... plants ... as agreed in writing by the licencee*". Eskom complies with these codes in maintaining a minimum critical load by way of various means, of which it says loadshedding is used as a means of last resort.

[25] Why then is loadshedding implemented if it is only to be used as a last resort? Eskom explains, through a series of affidavits from its Acting Group Executive-Generation, its Chief Financial Officer, its General Manager of Transmission, its Senior Manager of Climate Change and Sustainable Development in Eskom's Risk and sustainability Division, its Emerging Response Manager: Eskom Distribution Solutions, Research Testing and Development in the Office of the Chief Operation for Excellence in Eskom's Distribution Division, that the need for loadshedding exists because the demand for electricity currently exceeds Eskom's ability to supply electricity by anything between 4 000 to 6 000 megawatts (mw) at virtually any given time.

[26] Why is there insufficient supply of electricity? To answer this question Eskom began its explanation in 1990. It claims that since then there has been

insufficient investment in new energy capacity, a responsibility vested in DMRE Minister, in terms of the sections of the ERA already referred to above. Eskom pointed out that in 1990 only 35% of South African households had access to electricity. As part of a Reconstruction and Development Program, the electrification of an additional 2.5 million households by 2000, was achieved, resulting in South Africa achieving the highest annual electrification rate in the world.

[27] To maintain this, it was established that Eskom's generation capacity surplus would be fully utilized by 2007. To clarify: by that time the demand for electricity would equal the maximum available supply. New generation capacity would therefore be needed. This was explained to cabinet (and approved by it) in terms of the "1998 White Paper". This set out intended structural reforms for Eskom, including the unbundling of its generation, transmission and distribution divisions as well as the commissioning of generation capacity.

[28] Despite its acceptance, the 1998 White Paper was not implemented for some years and in 2001 Cabinet took the decision that Eskom was not allowed to invest in new generation capacity "in the domestic market". This resulted in Eskom's surplus generation decreasing over the years to about 8.2% in 2004. Later in that year Eskom was finally permitted to initiate plans for the construction of two new generation units, being Kusile and Medupi.

[29] A typical power station constructed in the 1980's took about 5 – 8 years to construct. This was typically for a two-unit power station. Medupi and Kusile were 6 unit stations. In the 16 years since the last power station had been constructed, Eskom had significantly lost its skills and capacity to build large scale power stations. Due to this, the use of "virtual designs" in the tendering process, the appointment of the Tokyo based conglomerate Hitachi Ltd in 2007, who had no experience working with South African coal and a vast number of

design errors, resulted in the first unit at Medupi only being commissioned in 2015 and the last unit only last year (2022). The first unit for Kusile was only commissioned in 2017 and the power station is to this day not yet fully commissioned.

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

[31] In addition to the above, Eskom has admitted that, in order to attempt to supply electricity at a continuous level, it ran it coal-powered plants harder than was advisable and deferred maintenance programs during which plants would be taken off-line. It is only fairly recently that maintenance programs have been re-implemented. The result is, however, frequent break-downs in non-maintained equipment and unavailability of units during repairs and maintenance.

[32] In summary, Eskom explained that, in addition to the historic failure to maintain its power generating fleet and the governmental failure to create new generation capacity, its inability to render sufficient electricity to the country was further hampered by the lack of cost-effective tariffs, the low reliability of the aging generation fleet, the previous management's refusal to conclude renewable energy independent power producer contracts, regulatory obstacles, high municipal debt and alleged state capture, corruption and sabotage damage.

[33] Having stated all the above, Eskom conceded that "*load shedding causes human suffering and has a detrimental impact on a variety of constitutionally protected rights, including those the applicants identify*".

[34] The representative of Eskom's shareholder (the State), being the DPE Minister, conceded that he had the oversight responsibility over Eskom as one of the public enterprises listed in Schedule 2 to the Public Finance Management Act 1 of 1999 (the PFMA). The Minister stated that the accounting authority of Eskom is its board (appointed by the DPE Minister) who submits information to him. Apart from the DPE Minister's executive oversight over Eskom's corporate structure in general and financial and strategic plans, he did not "... *have control over its day-to-day activities ... such as implementation of load-shedding, or the activities required by the relief contemplated in paragraphs 3, 4, and 5 of the amended notice of motion*"[14]. The Minister is a founding member of the National Energy Crisis Committee (the NECOM) which had been established and is chaired by the President. The establishment of NECOM has resulted in a National Energy Action Plan having been published in January 2023, which includes the unbundling of Eskom's transmission, generation and distribution structures (which had been proposed in the 1998 White Paper referred to earlier). While further stating that although the DPE itself will be involved in the implementation of the National Energy Action Plan "... *to arrest the prevailing energy crisis ...*", it is the DMRE Minister who is responsible for the "... *determination of new energy capacity needed to ensure the continued uninterrupted supply of energy and the types of energy sources from which electricity must be generated*".

[35] The DMRE Minister in turn aligned himself with the position of the President set out in a separate affidavit and, in respect of the current relief under consideration stated the following: "*None of the relief sought in prayers 3, 4 and 5 is directed at me or the Department. However, the national regulatory framework for the electricity supply industry, the power to determine new generation capacity needed to ensure the continued uninterrupted supply of electricity and the types of energy sources from which electricity must be*

[14] Second respondent's answering affidavit, par 21.

generated, and the percentages of electricity that must be generated from such sources, vests in me".

[36] The President, in his affidavit, commenced the opposition to the application by stating "*none of the government respondents have a Constitutional responsibility to supply electricity to the people of the Republic*". He then proceeded to deal with presidential accountability and the functioning of cabinet, who is accountable to Parliament. After objecting to relief claimed against the DPE Minister, who is not the person or entity determining or implementing loadshedding, the President, with reference to the affidavits delivered on behalf of Eskom, confirmed that the causes of loadshedding and "shortfall" of electricity capacity are the "*failure to invest in new generation capacity in the 1990's and early 2000's, which investment would then have produced sufficient capacity to meet future demand*" and "flaws" in the execution of the new build programs at Medupi and Kusile as well as the "*failure to conduct adequate maintenance in previous years as part of an ill-conceived strategy to 'keep the lights on' without regard for future consequences*".[15]

[37] It is clear that, whatever the President and his cabinet Ministers averred, the consequences of policy decisions resulted in the current need by Eskom to continue to implement various levels of loadshedding. The applicant's deponents described these consequences as disastrous and it had been labelled in Heads of Argument as amounting to a "human catastrophe".

[38] On a conspectus of all of the above, we find that there had been repeated breaches by the State of its Constitutional and statutory duties and that these breaches are continuing to infringe on citizens' rights to healthcare, security and education. We therefore find that both a "clear right" and sufficient acts of

[15] The quotations ascribed to the "governmental" respondents are taken from their respective individual answering affidavits.

interference have been established by the applicants to satisfy the first of the two requirements for a final interdict. Even if the relief sought were to be considered as only amounting to an interim interdict, we find that a *prima facie* right has been established and that the interferences also create apprehensions of irreparable harm in the form of prejudice to the right to life, particularly of vulnerable patients and the elderly in public healthcare facilities as well as the other Constitutional rights referred to earlier, thereby also satisfying the relevant requirements for an interim interdict.

Remedy and separation of powers

[39] The requirement that there is no other satisfactory remedy available for an applicant than to approach a court, is shared by both interim and final interdicts[16]. Linked to this, is the vexing question of whether the court, in granting relief in the nature sought by the applicants, would overstep the line delineating the separation of powers.

[40] Before dealing with the issue of separation, it is apposite to note that, once a court has found (as we have done here) that there is a breach or an infringement of Constitutional rights, a court is obliged to act in order to remedy that breach or prevent further infringements[17]. The relief that a court may grant, should be "appropriate". In terms of the Constitution, such relief must be construed purposely[18]. The government respondents argue that there is no need to formulate or grant any relief to alleviate the consequences of loadshedding suffered by medical facilities, schools and police stations that do not have any or sufficient electricity generating capacity or alternate sources of energy available, because the government already has a set of plans in place and that any interference with

---

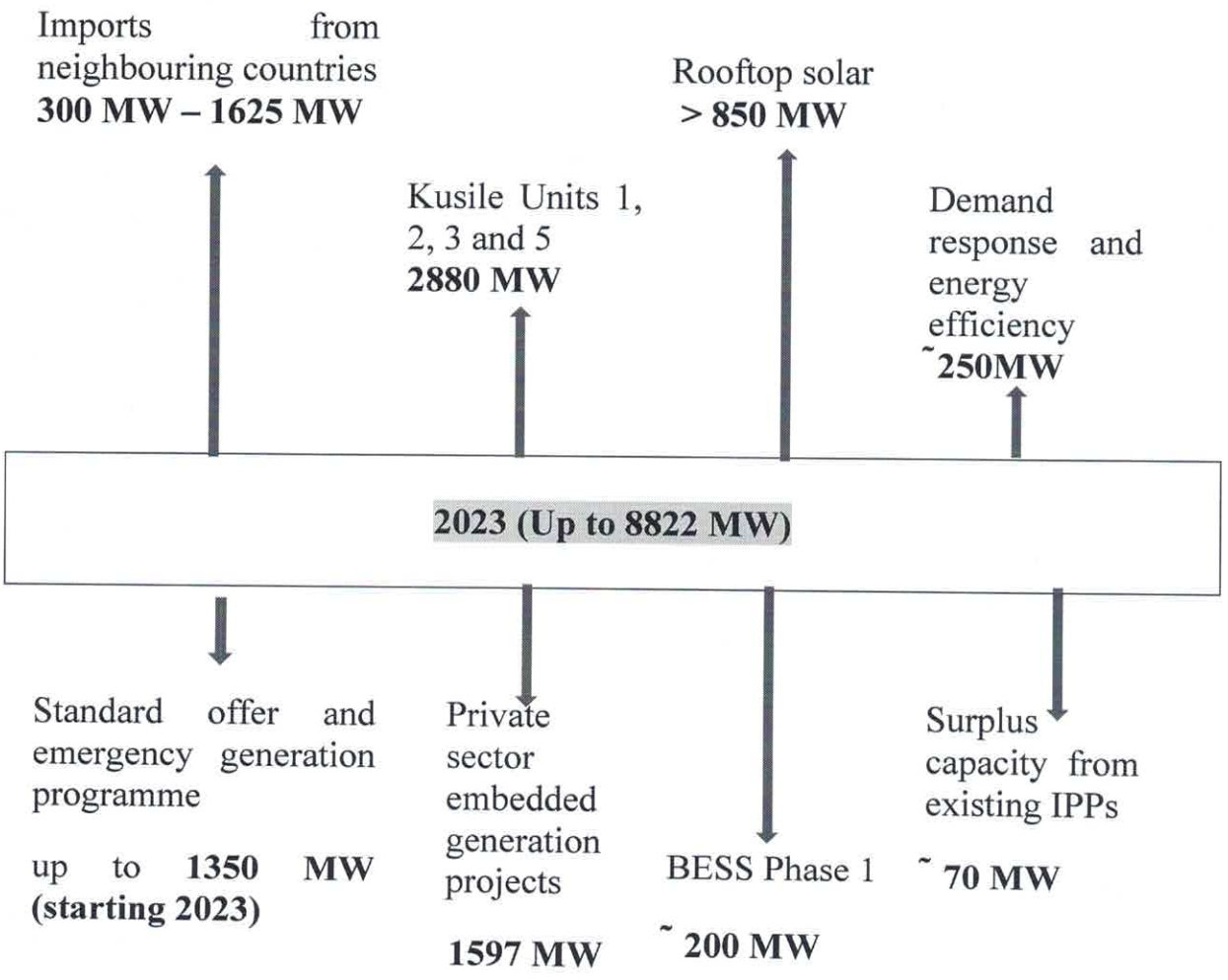
[16] *Prest* at 77.
[17] ss 38 and 172 of the Constitution
[18] *Hoffman v South Africa Airways* 2001 (1) SA 1 (CC) at par 42.

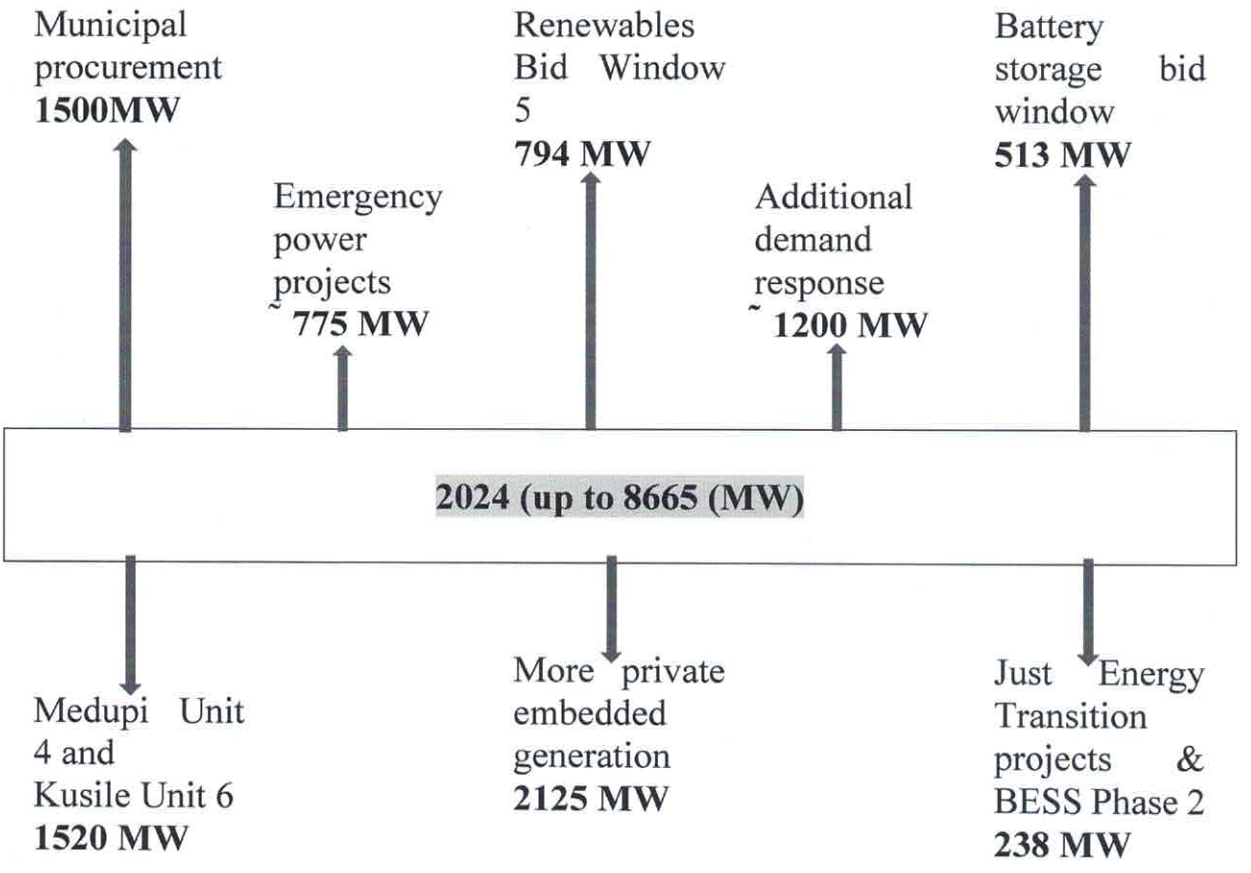
those plans would therefore cross the line delineating the separation of powers and would unjustifiably encroach upon the domain of the executive as a separate arm of government from the Courts.

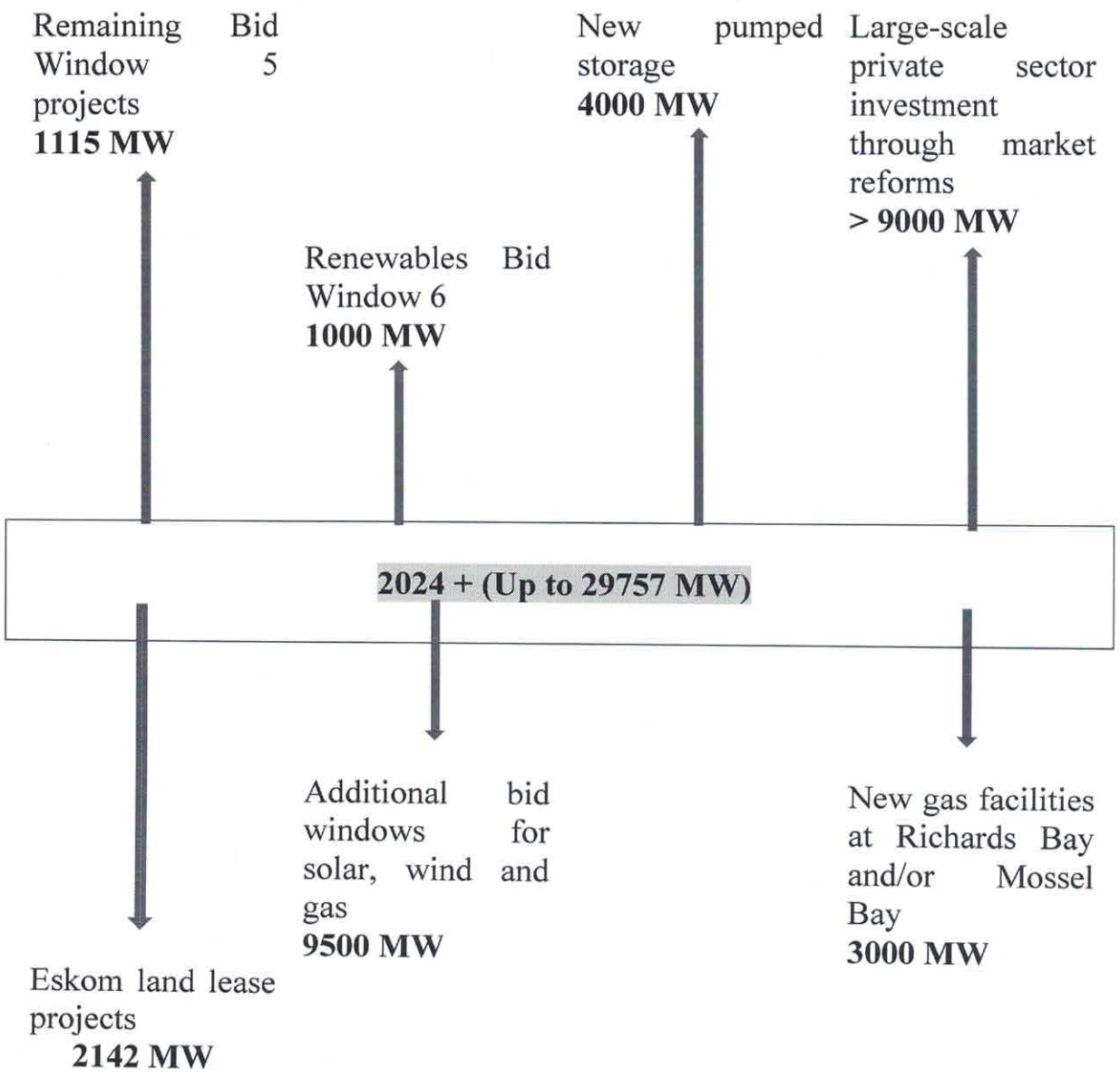
[41] The plans put in place by the government to alleviate and hopefully end loadshedding, were set out in the various affidavits of the respondents, including Eskom, and are contained in the National Energy Action Plan referred to in par 32 above (the plan). It caters for short-, medium- and long-term solutions.

[42] The plan envisages five "interventions": 1) "*Fix Eskom and improve the availability of existing supply system stability and increase generation capacity*", 2) "*Enable and accelerate private investment in generating capacity*", 3) "*Accelerate procurement of new capacity from renewables, gas and battery storage*", 4) "*Unleash businesses and households to invest in rooftop solar*" and 5) "*Fundamentally transform the electricity sector to achieve long-term energy security*".

[43] The plan also contains a "roadmap", indicating more specifics relating to the increase in generation capacity. This roadmap looks like this:


Imports from neighbouring countries
300 MW – 1625 MW
Kusile Units 1, 2, 3 and 5
2880 MW
Rooftop solar
> 850 MW
Demand response and energy efficiency
~250MW
2023 (Up to 8822 MW)
Standard offer and emergency generation programme
up to 1350 MW (starting 2023)
Private sector embedded generation projects
1597 MW
BESS Phase 1
~ 200 MW
Surplus capacity from existing IPPs
~ 70 MW


Municipal procurement
1500MW
Emergency power projects
~ 775 MW
Renewables Bid Window 5
794 MW
Additional demand response
~ 1200 MW
Battery storage bid window
513 MW
2024 (up to 8665 (MW)
Medupi Unit 4 and Kusile Unit 6
1520 MW
More private embedded generation
2125 MW
Just Energy Transition projects & BESS Phase 2
238 MW



[44] It was indicated that in this roadmap the actual capacity depended on multiple factors including market responses. It was also only an illustrative timeline of when additional power could be expected, and was subject to revision.

[45] The government respondents and Eskom argue that the granting of any of the relief, would have a detrimental and "cascading" effect on the plan and the roadmap. They further argue that the procurement and furnishing of emergency

generating power or electricity do not fall within any of their respective duties or authorities and that such supply would, for the classes of users identified by the applicants, be the responsibility of other state departments, such as the departments responsible for health, education or public works or otherwise that the electricity supply fall within the ambit of provincial or local governments.

[46] This court was from the outset acutely aware of the issue of separation of powers. This principle, although it is not expressly set out in so many words in our constitution, is firmly part of our law. More than two decades ago already, the Constitutional Court in *Minister of Health v Treatment Action Campaign*[19] at par 98 and 99 has proclaimed as follows "*This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the Court from one another, there are certain matters that pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to this separation. This does not mean, however, that Courts cannot and should not make orders that have an impact on policy*".

[47] The government respondents argue that the courts have also been warned that ours is a democracy and not a "judiocracy" and that courts should "stay in their lane" and not usurp the governance of the country[20]. However, when one has regard to the contents of the plan, the "interventions" contemplated therein and the "roadmap" mentioned earlier, there is a marked difference between those policy and planning items, both in their nature and in their magnitude and costs and the limited relief eventually applied for by the applicants. While the former clearly fall within the executive sphere of governance, the latter merely deals with emergency relief from loadshedding in limited areas where it is needed the most.

---

[19] 2002 (5) SA 721 (CC).

[20] *Electronic Media Network Ltd v e.tv (Pty) Ltd* [2017] ZACC 17; 2017 (9) BCLR 1108 (CC) and *Economic Freedom Fighters v Speaker of the National Assembly* [2016] ZACC 11, 2016 (3) SA 580 (CC), 2016 (5) BCLR 518 (CC).

Similarly, where the former constitute the exercise of public power separated from the powers of the court, the latter relief are aimed at vindicating infringements of Constitutional rights brought about by the respective government respondents' failure to uphold those rights. In similar fashion as, for example in *Minister of Health* (above) at par 101, we find that the granting of emergency relief, is disconnected from policy-making or executive governmental decisions and is justifiable. It is further clear from the uncertain nature of the contents of the roadmap and the timelines thereof, that, even if realized, it would not solve the urgent needs of the installations mentioned in the applicants' application. In the circumstances of this case, we find that the granting of such relief would fill a vacuum and would not breach the separation of powers principle[21].

Conclusions

[48] We therefore conclude that the applicants have demonstrated that there have been infringements of fundamental Constitutional rights, brought about by failures of organs of state and that appropriate relief is justified and called for and that such relief can be granted without crossing the dividing line indicating where the separation of powers lie. We find that this is the position, irrespective of whether the relief is characterised as interim or final. What then remains, is the formulation of the "appropriate" relief.

The formulation of the relief

[49] It is trite that courts can grant compelling orders against organs of state, such as, in this case, the DPE Minister[22]. The fact that this minister has been

---

[21] For similar examples see: *Minister of Health* (above) and *Fose v Minister of Safety and Security* 1997(3) SA 786(CC) ;1997(7) BCLR 851.

[22] *Sanderson v Attorney-General Eastern* Cape 1998 (2) SA 38 (CC) (1998 (1) SACR 227, 1997 (12) BCLR 1675; *New National Party of South Africa v Government of the Republic of South Africa* 1999 (3) SA 191 (CC), (1999 (5) BCLR 489) and *Minister of Health* (above) at par 105.

targeted is particularly apt in view of his concession that the department under his executive leadership (the DPE) would be directly involved in the implementation of the plan.

[50] As already mentioned, the applicants have, as the arguments have progressed, limited the compelling orders that they seek to apply only to the DPE Minister, excluding Eskom. They have also referred to the fact that, as far as they could ascertain, only 93 public hospitals have not been exempted from loadshedding. Exemptions from loadshedding are apparently granted on application by Eskom, but can only occur where such exemption would not compromise the critical load factors referred to above or the stability of the national grid and where embeddedness does not make such exemptions impossible. Embeddedness will, for example occur, where a healthcare facility is so "embedded" in its surrounding network, that to exclude it would result in a whole network or suburb (or town even) having to be excluded, which would result in no actual "load" being able to be shed, i.e. too much demand would remain, rendering the grid under pressure.

[51] Individual solutions therefore need to be devised in instances where the DPE Minister cannot secure exemptions, such as the provision of generators or alternate energy supplies. The government respondents, in a late further affidavit allowed by this court, claimed that all public hospitals have generators. The applicants, reliant on reports from hospitals dispute this, but this court need not solve that dispute. The affidavits make it clear that to claim that hospitals have generators and that there are technicians looking after these generators, is simply not good enough. These generators are often insufficient, do not nearly replace the electricity needed by healthcare facilities to run all their equipment and often, despite the alleged interventions, run out of diesel. The evidence is further that the hospitals have to buy their own diesel, depleting their budgets and utilizing

funds for diesel which funds have been earmarked for other essential expenses needed to run the hospitals, such as salaries and medicines. This, to our minds, also indicate that the applicants have demonstrated that there are no effective alternates for the beleaguered health facilities. The police stations and schools are even worse off, they simply close or shut down during loadshedding.

[52] The President's contention made in his answering affidavit that the relevant parties could have and still can raise these issues in Parliament and need not have resorted to this Court to obtain relief, simply has to be stated to indicate how inappropriate such a remedy would be. Even the affidavit produced by the government respondents regarding the generation capacity of public hospitals confirm that, despite that issue having been raised by way of a Parliamentary question earlier this year, it did not alleviate the problem. The circumstances of hospitals described earlier is clearly an untenable situation, justifying a remedy in the form of a compelling order. The same applies to other public healthcare facilities, police stations (of which there are an alleged 85 without alternate power) and public schools.

[53] Any compelling order should be couched wide enough to provide for different permutations and also be wide enough to leave it in the hands of the DPE Minister as to how he is going to rectify the situation. The applicants claim that this can be achieved by way of an appropriate formulation of the alternate relief claimed in the already above quoted prayer 5 of PART A of their application. The formulation of the relief should also allow the DPE Minister the freedom to enlist other organs of state to assist him in complying with the order of this court, without prescribing or shackling the Minister. Such enlistment would be a simple consequence of the "inter-relatedness" of organs of state[23], all

[23] *IEC v Langeberg Municipality* 2001(3) SA 925 (CC)

who have the duty to promote the Constitution and to prevent infringements of Constitutional rights.

Cost implications

[54] Of course these interventions will cost money and it comes as no surprise that the government respondents claim that they have not budgeted for these expenses. There appear to be two answers to this: firstly, on the figures produced by Eskom, when the costs of the alternative electricity supplies are compared to the losses caused by loadshedding and the other intended expenditure envisaged by the state in the plan, those costs pale almost into insignificance. Secondly, in circumstances comparable to these, our courts have held that a non-provision of a budget item, is no excuse. Budgets or intended expenditure should be re-prioritised as and when the need arises to remedy Constitutional infringements[24].

Order

[55] Consequently, the following orders are made:

1. Pending the final determination of PART B of the application in case no: 005779/2023, in respect of users of electricity, whether supplied directly by Eskom Holdings SOC Limited ("Eskom") or by local authorities, the Minister of Public Enterprises shall take all reasonable steps within 60 days from date of this order, whether in conjunction with other organs of state or not, to ensure that there shall be sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to the following institutions and/or facilities:

[24] *City of Johannesburg v Blue Moonlight Properties (Pty) Ltd* 2012 (2) SA 104 (CC).

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

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

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

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

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

N DAVIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.

C COLLIS
Judge of the High Court
Gauteng Division, Pretoria

I agree.

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

Date of Hearing: 20, 22 and 23 March 2023

Judgment delivered: 05 May 2023

APPEARANCES in Case No 005779/2023:

For the Applicants (excluding the 3rd Applicant):	Adv T N Ngukaitobi SC together with Adv R Tulk; Adv B B Mkhize; Adv Y Peer; Adv M Gwala; Adv R Rasesemola; Adv R Richards; Adv K Masutha; Adv M Molea and Adv B Mathathe
Attorneys for the Applicants (excluding the 3rd Applicants):	Mabuza Attorneys, Buthelesi Vilakazi Inc; Makangela Mtungani Inc; Mketsu & Associates Inc; Mphahlele & Masipa Inc; Madlanga & Partners Inc and Ntanga Nkhulu Inc. Attorneys, Johannesburg

	c/o Mphahlele & Masipa Inc., Pretoria
For the 3rd Applicant:	Adv B Dyke SC together with Adv G Benson and Adv Anusha Nadasen
Attorney for the 3rd Applicant:	Michael Herbst Attorneys, Pretoria
For the 1st Respondent:	Adv A Bham SC together with Adv M Du Plessis SC; Adv C Steinberg SC; Adv J Bleazard; Adv N Nyembe and Adv C Kruyer
Attorneys for the 1st Respondent:	ENSafrica, Johannesburg c/o Mothle Jooma Sabdia Inc., Pretoria
For the Government Respondents:	Adv K Tsatsawane SC together with Adv A Hassim SC; Adv D Chabedi and Adv K Ramaimela
Attorneys for the Government Respondents:	The State Attorney, Pretoria
For NERSA:	Adv N H Maenetje SC together with Adv P Sokhela
Attorneys for NERSA:	Malatji & Co Attorneys, Johannesburg