

**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: 7 JUNE 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

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

CASE NO: B38/2023

In the matter between:

TEBEILA INSTITUTE	Applicant
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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 applicants in a pending full court review application sought orders compelling documents to be furnished by various respondents, claiming that those documents were either necessary to complete the various records or to prosecute the applicants' claims relating to loadshedding and electricity management by the respondents. The description of documents sought was too wide and vaguely formulated and, the documents were not properly identified. No detailed case was made out regarding shortcomings in the record. An alleged decision in respect of one of the review applications had not yet been taken. The interlocutory application was therefore refused with costs.*

ORDER
(Granted on 16 May 2023)

1. The applicants' interlocutory application in case no 005779/2023 heard on 5 May 2023, is dismissed.
 2. The applicants are ordered to pay the opposing respondents' costs, including the costs of three counsel, where employed.
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J U D G M E N T

This matter has been heard via MS Teams virtual platform 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.

NYATHI, J (with DAVIS et COLLIS JJ)

Introduction

[1] These are the reasons for orders granted in respect of an application heard on 5 May 2023. The order was made on 16 May 2023. The application was an interlocutory one launched in terms of rule 30A and 6 (11) of the Uniform Rules of court. Its aim was to compel Eskom and the Government respondents to deliver a

“full” record of decisions which are the subject matter of a review application under case number 005779/2023. The review application is in part B of the application and will be heard together with two other applications brought under case numbers B38/2023 and 003615/2023.

[2] The interlocutory application was opposed by those respondents against which it was directed. It is apposite to mention that the 3rd applicant (Action SA) was not part of this application.

The interlocutory relief sought

[3] The applicants asserted that they require the full record to pursue their applications to review and set aside several decisions. In terms of the applicants’ amended notice of motion these decisions are: the President’s decision to accept US\$ 8.5 billion in loans from the United States of America and other European countries, Eskom’s decisions to close certain power stations namely Komati, Camden, Hendrina and Grootvlei and Nersa’s decision to recover R318 billion in respect of the 2023/2024 financial year from electricity users.

[4] A case management meeting had been held on 13 March 2023. On 24 March 2023, Eskom’s attorneys, ENS, circulated a Dropbox link with access to the record. NERSA has filed its index and record on the same day. The Government respondents did not file a record.

[5] The applicants alleged that Eskom has failed to furnish a complete record. The applicants sought further to compel the Government respondents to file a record, since they have failed to do so.

[6] The applicants therefore alleged that this has necessitated the interlocutory application to compel the furnishing of records and that the records were needed at this stage for the applicants to determine whether to amend and/or supplement their review application.

[7] In addition to the records, the applicants claimed that they required “information” pertaining to the newly commissioned power stations of Kusile and

Medupi. This was prompted by the allegations which were made by the former chief executive officer of Eskom, Mr. de Ruyter, that Kusile was beset with corruption.

[8] Kusile and Medupi were touted as heralding newer and greener technology and would add capacity to the grid as well as give effect to the Government respondents' long-term emissions reduction goals, an integral part of the Just Energy Transition Programme (the JET).

[9] The applicants allege that these records and information were material to the decision to decommission power plants, given the underlying relationship between the decision to decommission and the success of the new builds. The applicants alleged in their affidavit that the following items constitute examples of the documents or information required:

- 9.1 *The Medium-Term Risk Mitigation Project for Electricity (2010 -2016) Keeping the Lights on:* which records that the electricity supply and demand balance will remain tight until such time as Medupi and Kusile are put into operation.
- 9.2 The Department of Environmental Affairs' November 2021 *Appeal Response Report* which recorded that the decommissioning of the older stations and the increased use of the newer, less emitting, Medupi and Kusile will result in a substantial decrease in emissions.
- 9.3 Eskom's assumptions that Medupi and Kusile will be continue operating under constraints until 2025 due to their construction defects.
- 9.4 Eskom's proposed emission reduction plan submitted to its Board estimating that approximately R37,180 billion is expected to be spent only on emission reduction projects at Kusile and Medupi.

[10] The applicants' quest for information further covers areas such as:

- 10.1 Information about the closure of Komati power station and the alleged application for a loan of US\$ 9 billion from the World Bank to repurpose the said Komati.
- 10.2 Decisions around the closure of the rest of the coal powered power stations and how the loss in generation will be made up once they are decommissioned.
- 10.3 Initiatives by Eskom to transition away from fossil fuels, and how such transition is being managed in a manner that meets the nation's electricity demands, including minutes of meetings and decisions taken on the maintenance and management of the coal-fired generation fleet.
- 10.4 Documents relating to Kusile and Medupi. As regards Kusile, information on procurement process for the design, construction, commissioning, extension of contracts, delays on timelines, costs overruns and related information.

[11] Adv Ngcukaitobi SC on behalf of the applicants urged the Court not to take a narrow view of the application but to consider it “broadly” and not limit it to only a rule 53 application, but as a legality review of the decisions.

[12] The application was opposed by both Eskom and the Government respondents.

Objections by Eskom

[13] Eskom raised two principal objections against the application to compel, namely:

- 13.1 The application is incompetent because it was not preceded by a rule 30A notice and the applicants impermissibly seek information in their founding affidavit which was not even mentioned in their letter of 6 April 2023.

13.2 In addition to the records already delivered, Eskom contended that it had already disclosed and furnished additional information and shouldn't belatedly and improperly be pressurized to furnish further information which it considers irrelevant.

[14] Eskom's first point of opposition is on the main procedural. The answering affidavit of Thomas Conradie sets out the grounds relied upon in this regard in opposing the application to compel.

[15] Eskom contended that applicants have never filed or delivered a rule 30A notice alleging that Eskom had not complied with its Rule 53 obligations and to what extent it had failed to do so. The court therefore must decide whether substantively there is a proper application before it. The *fons et origo* of this application is correspondence, in particular, the requests in the letters identified as annexures EM1, EM2 and ultimately EM3.

[16] On the applicants' contention that Eskom did not comply with its rule 53 obligations to provide a full review record, Eskom takes the view that it has fully complied. The application lacks specificity as to what items are alleged to be missing from the record furnished. The application is too open-ended and it will be difficult for this court to determine the relevance and ambit of this request.

[17] Adv Bham SC cited as an example of the applicants' overbroad request for further documents, those relating to the process for the design and commissioning of Kusile. He submitted that this documentation dates back to 15 years around 2005, 2006 and 2007. It would be impossible to respond to this vague request for voluminous documentation in the short time provided. Besides the practical impossibility, the request lacks specificity.

[18] On the allegations of corruption, Eskom pointed out that a Commission of inquiry had been set up and had already released reports that ran to thousands of pages (the so-called Zondo Commission).

Objection by Government respondents:

[19] Adv Moerane SC submitted on behalf of the Government that the scope and purpose of rule 53 covers essentially decisions or proceedings that are arrived at through deliberative proceedings. The decision of the President that is sought to be reviewed does not fall within the purview of rule 53.

[20] Rule 53 itself provides:

“Save where any law otherwise provides, all proceedings to bring under review, the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, judicial quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the Court, tribunal or board, or to the officer as the case may be and to all other parties affected:

- (a) calling upon such persons to show cause why such decision or proceeding should not be reviewed and corrected or set aside; and*
- (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch within 15 days after receipt of the notice of motion to the registrar, the record of such proceedings sought to be corrected or set aside, together with such reasons as he or she is by law required or desires to give or make and to notify the applicant that he or she has done so”.*

[21] Referring to the matter of *Democratic Alliance v President*, RSA 2020 (1) SA 428 (CC), Adv Moerane SC further submitted that the President takes executive decisions and not administrative decisions which are subject to a rule 53 review. Adv Moerane SC dwelt on the minority judgment by the learned Jafta J and Nichols AJ who held that the President, when appointing or dismissing Ministers, does not act as one of the functionaries listed in rule 53. In other words, the President was exercising his prerogative powers when he appoints or dismisses Ministers, and that

is beyond the scope of judicial oversight. It was not competent for courts to review those decisions.

[22] However, apart from the non-reviewability of executive decisions and even if there was a legality attack on such a decision, the attack is premature. Minutes of Cabinet Meetings have been produced which indicate that no such decision has yet been taken. Any offer made on an executive or diplomatic level which may have been accepted did not amount to an actual or reviewable decision as no formal loan proposal had been submitted and no terms and conditions have been proposed. As a consequence, no actual decision has yet been taken. Therefore, no record can or need to be produced.

Evaluation

[23] The applicants' application was preceded by letters from their attorneys. In the second letter of 6 April 2023 (EM3), the alleged shortcomings in the record produced by Eskom were identified as follows: *"We have considered the record filed on behalf of your client, Eskom and submit that the record filed is deficient in the following respects:*

- 1.1 It fails to provide an account on the corruption at Kusile Power Station.*
- 1.2 It does not provide reason(s) as to why the new stations are not performing, alternatively to full capacity.*
- 1.3 It makes no mention of the contract with Hitachi and Chancellor House."*

[24] If, on a beneficial interpretation for the applicants, this letter is taken as a substitute for a Rule 30 notice, it has been fully responded to by Eskom. In short, none of the documents requested relate to the three decisions sought to be reviewed. Insofar as the non-optimal performance of the Kusile and Medupi power stations are concerned, this has been fully canvassed already in Eskom's answering affidavit delivered in response to part A of the application and has featured in the judgment already delivered in respect thereof. The applicants' preferred narrative,

namely that it was irrational to have closed some power stations before new ones were optimally running, is not dependent on the records of the decisions to close those power stations or on the documents sought in the letter.

[25] Whether as a realization hereof or not, in the subsequent Notice of Motion delivered in respect of the interlocutory application, voluminous vaguely identified documents were called for by the applicants, purportedly as part of the record, in the following fashion: “... *all documents and all electronic records (including correspondence, contracts, memorandum, advice, recommendations, evaluations, internal deliberations and the like) that relate to the decisions which are the subject of the review application ...*”.

[26] Insofar as Eskom has already delivered a record which it maintains is complete, it was incumbent on the applicants to identify which portions of the record is incomplete. Insofar as the applicants have attempted to do so in EM3, the contents thereof have already been dealt with. It was thereafter impermissible for the applicants to proceed with the application without a fresh indication of non-compliance (preferable in a Rule 30 notice) and to claim documents in the fashion set out in paragraph 25 above. No attempt has been made by the applicants to grapple with what had already been supplied in terms of Rule 53 and therefore one is left in the dark as to exactly what more must or should have been supplied. Even if one were to assume that the notice of motion was intended to make out a case that there has been non-compliance with EM3 (as a substituted Rule 30 notice), the documents called for are too vaguely described to constitute proper relief. If an order were to be granted in the terms claimed, one would never be able to ascertain compliance therewith or be able to enforce it.

[27] The application as against Eskom therefore failed on both the procedural deficiencies as well as the vagueness ground.

[28] The argument of Adv Ngcukaitobi SC referred to in paragraph 11 above that the court should take a “broad view” of the request for documentation, amounted to an impermissible request for discovery rather than request for a record as contemplated in Rule 53.

[29] Insofar as the request for delivery of a record was claimed from the President in respect of the US\$ 8, 5 billion issue, the simple answer that no such decision has yet been taken and that all the documents in existence which lead to the discussions surrounding the foreign countries' willingness to advance such a sum of money in the future had been furnished, was a complete answer. No case had been made out that some other decision in respect of which there must be a record, exists.

[30] In view of the conclusions reached above, we do not deem it necessary to detail the remainder of arguments based on paragraphs 23, 25 and 26 of the applicants' founding affidavit, where the three "classes" of documents (relating to Kusile, Komati and the US\$ 8, 5 billion) were discussed. It all comes down to the same issue, namely that vague and indeterminable volumes of documents were impermissibly being requested by way of a blanket discovery.

[31] It followed that the interlocutory application had to fail. We found no cogent reason why costs should not follow the event. We reiterate that the third applicant is excluded from the orders, having not partaken in the interlocutory application.

[32] In the circumstances, the following order was made:

1. The applicant's interlocutory application in case no 005779/2023 heard on 5 May 2023, is dismissed.
2. The applicants are ordered to pay the opposing respondents' costs, including the costs of three counsel, where so employed.

JS NYATHI

Judge of the High Court
Gauteng Division, Pretoria

I agree.

N DAVIS

Judge of the High Court
Gauteng Division, Pretoria

I agree.

C COLLIS

Judge of the High Court
Gauteng Division, Pretoria

Date of Hearing: 05 May 2023
Date of order: 16 May 2023
Reasons delivered: 7 June 2023

APPEARANCES in Case No 005779/2023:

For the Applicants (excluding the 3rd Applicant): Adv T N Ngcukaitobi SC
together with Adv R Tulk;
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