



**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: 16 MAY 2024

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

Nineth 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

ORDER

The applications for leave to appeal are refused with costs, such costs to be paid by the applicants for leave to appeal jointly and severally and which are to include the costs of both senior and junior counsel, where employed.

J U D G M E N T
(In the application for leave to appeal)

This matter has been heard in open court but the judgment and order are published and distributed electronically. The date of handing down is deemed to be 16 May 2024.

THE COURT (DAVIS et COLLIS et NYATHI JJ)

Introduction

[1] On 1 December 2023 this court, after hearing argument over a number of days and in respect of a joint hearing of three different applications, involving multiple parties and with documents spanning thousands of pages, declared a number of actions by organs of state which eventually culminated in the country's "loadshedding" crisis, as having breached various sections of the Constitution. It was further held that these actions infringed numerous rights guaranteed in the Bill of Rights on a continuing basis.

[2] In addition to the above, this court granted an order in the following terms:

“3. *The Minister of Electricity is ordered to take all reasonable steps by no later than 31 January 2024, whether in conjunction with Eskom and 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:*

3.1 *All “public health establishments” as defined in the National Health Act 61 of 2003, including all hospitals, clinics, and other establishments or facilities;*

3.2 *All “public schools” as defined in the South African Schools Act 84 of 1996;*

3.3 *The “South African Police Service and Police Stations” as envisaged in the South African Police Services Act 68 of 1995, including satellite station”.*

[3] A review application against tariff determinations by the National Energy Regulator of South Africa (NERSA) was also dismissed but that order had subsequently been dealt with by way of a separate application for leave to appeal.

[4] The current applications for leave to appeal are in general terms against the orders referred to in paragraphs [1] in particular against the relief quoted in paragraph [2] above. The applications for leave to appeal have been launched by the President of South Africa, the Minister of Public Enterprises, the Minister of Mineral Resources and Energy, Minister of Cooperative Government and the Minister of Electricity. These parties have been cited in the main applications as

“the Government” and also referred to as such in oral argument before us. We shall therefore do the same in this judgment. A separate application for leave to appeal has also been launched by Eskom Holdings SOC Ltd (Eskom).

The Government’s application for leave to appeal

[5] In its application for leave to appeal, the Government respondents raised a plethora of grounds, but in oral argument before us, these were distilled into three main arguments: (1) the relief fashioned by the court was impermissible, (2) the evidence of Constitutional breaches was not contained in the applicants’ founding papers and (3) the relief granted lacked the required specificity. We shall deal with these grounds individually hereunder.

The fashioning of the relief being impermissible

[6] In one of the main applications, being that in case no 005779/2023, a number of applicants, led by the UDM, previously sought and obtained virtually the same relief as that referred to in par [2] above as part A of its notice of motion, on an interim basis. That relief was, however not implemented as the Government had launched an application for leave to appeal against that order, principally on the basis that the Minister of Public Enterprises lacked the authority to implement that order. When the matters came before us again, the UDM did not persist with part B of its application and later withdrew it, while another applicant, Action SA, still valiantly sought to have the relief, which it had labelled “humanitarian relief” retained. The withdrawal of the UDM application, however rendered the interim relief granted in Part A moot.

[7] It was for this reason that the Government, in its current application for leave to appeal, argued that the same relief could not be granted afresh in the second main application, despite it this time being directed against the Minister of Electricity.

[8] The long and extensive argument of the Government, with respect to senior counsel, misses the point. Once a court has determined that there has been a breach of a Constitutional obligation, it is duty-bound to grant relief with a view of having the breach remedied. In terms of section 172(1)(b) of the Constitution, such relief must be “just and equitable”.

[9] We have in the main judgment explained why we considered the relief in question to be just and equitable and the fact that it accorded with what had been sought in part A of an application that was no longer before us, might as well have been coincidental, as long as the relief is still just and equitable.

[10] In the recent matter of *Ex parte Minister of Home Affairs*¹ Majiedt J reminded us that “Section 172(1)(b) affords this court the power to grant just and equitable relief. The ambit of that power is wide and flexible. In *Economic Freedom Fighters II*² this court expressed it thus: ‘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’”.

[11] The argument that this Court impermissibly “borrowed” wording from a Notice of Motion which was no longer before the Court, is therefore flawed. In crafting just and equitable relief, the “wide and flexible” powers of this Court allowed it to formulate the same relief afresh and the fact that it coincided with previous interim relief was therefore entirely Constitutionally mandated.

¹ 2024 (2) SA 58 (CC) at [39].

² *Economic Freedom Fighters & Others v Speaker of the National Assembly and Another* 2018 (2) SA 571 (CC) at [211].

[12] We therefore find that there is no prospect of success on appeal on this point.

The evidence of Constitutional breaches

[13] Adv Moerane SC on behalf of the Government argued that this court, when it made the declarations in respect of Constitutional breaches, had relied on facts placed before the Court by the respondents and not the applicants. This was also the point made expressly in par 30 of the notice of application for leave to appeal.

[14] The premise of the argument is that in motion proceedings an applicant must make out its case in its founding papers³, which constitutes both its pleadings and its evidence.⁴ However, it is also trite that once an allegation has been admitted, it is then placed beyond dispute and unless withdrawn, is binding on a party and prohibits any further dispute thereof.⁵

[15] The President deposed to affidavits in both main applications. In the UDM-application in particular, various acts by organs of state were described by the deponent on behalf of Eskom, Mr De Ruyter, as constituting a series of Governmental or executive failures to guarantee or uphold rights enshrined in the Bill of Rights which were infringed upon as a result of loadshedding.

[16] Both applications were heard together and, as a consequence, the DA incorporated by reference reliance on the admissions made by the Government in the UDM matter, to the extent that it even amended its notice of motion on 31 March 2023 by expressly claiming declaratory relief in respect of breaches which led to the energy crisis.

³ *Director of Hospital Services v Mistry* 1979 (1) SA 626 (A) and the numerous annotations thereof.

⁴ *SA Diamond Workers Union v Master Diamond Cutters Association of SA* 1948 (2) 672 (W) and *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA).

⁵ *Water Renovation (Pty) Ltd v Goldfields of SA Ltd* 1994 (2) SA 588 (A) at 605H.

[17] By the time that the amended notice of motion had been delivered, the President had already in the UDM-matter, on 22 February 2023, conceded the instances of “factors” which had led to the energy crisis. In the second affidavit by the President, that is the one in the DA matter, deposed to on 8 August 2023, these “factors” were now labelled “causes”, but the factual concessions previously made were not retracted. In this later affidavit the President expressly referred to the UDM matter and the DA’s amended notice of motion. It is these “factors” and “causes” which this court had found constituted the breaches declared in paragraphs 1 and 2 of this court’s order.

[18] The applicants in the application for leave to appeal do not allege that the DA had not proven its case, but argue that the court was wrong to rely on the evidence of the Government responses. We fail to fathom this argument. Once accusations of breaches of Constitutional obligations have been levelled, albeit only in broad terms, and those accusations have in effect been conceded, in this case, in detailed terms, then a court would be as entitled as it would have been in motion proceedings to have regard to the respondents’ exculpatory statements, to also have regard to such respondents’ own admissions and concessions.

[19] The above proposition is exactly what underpins the *Plascon-Evans*-principle⁶, which incorporated the following dictum from *Stellenbosch Farmers Winery Ltd*⁷:

“... where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondent together with the admitted facts in the applicant’s affidavits justify such an order Where it is clear that facts,

⁶ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A).

⁷ *Stellenbosch Farmers Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-G.

though not formally admitted, cannot be denied, they must be regarded as admitted”.

[20] We therefore find no reasonable prospect of success that another court would on appeal find that this court could not have granted orders based on facts conceded by the Government, evidencing Constitutional breaches.

The relief lacked specificity

[21] The Government argued that the Energy Action Plan (the EAP) had not been found to be unreasonable and that the DA's concerns related to the implementation of the plan. The premise of this argument was that the relief granted was “too vague” to discern where or how that relief would fit into the Energy Plan.

[22] We are of the view that this argument also misses the point. As appears from the judgment in the main application, the relief granted was not related to the EAP and care was taken in the formulation of the relief to not interfere with the Government's intended plans but, in addition thereto and until such plans come to fruition (through the EAP or otherwise), it was ordered to ensure that those identified vulnerable and crucial segments of society dependent on Government services receive uninterrupted supply of electricity.

[23] Again, being mindful of the line delineating the separation of powers, the court did not prescribe to the Government how or in what manner or fashion or from which budget allocation even, the relief is to be sourced, procured or rendered, but relied on the Minister of Electricity's own statement put before court relating to his over-arching and co-ordinating authority to ensure that uninterrupted electricity is to be supplied in South Africa.

[24] We therefore find no reasonable prospects of success on appeal on this point.

Eskom's arguments

[25] Eskom's primary argument was that it should never have featured in the order of this court, neither in respect of the declarations of Constitutional breaches, nor as an entity to which the Minister of Electricity could turn to in order to fulfill the "humanitarian relief".

[26] Despite Eskom largely blaming the executive and other spheres of Government for the energy crisis, there can be no denial that Eskom was the "instrument" through which the breaches of Constitutional obligations have taken place. The declarations made in paragraph 1 of the order in the main application, which indirectly included Eskom, primarily relate to the past breaches, but which have resulted in a current continuation of a denial of Constitutional rights. Eskom argued that, on an application of the *Plascon-Evans*-principle, it should have been found to be innocent of the breaches, despite its participation in the energy crisis. It is difficult to conceive how, despite Eskom protesting its innocence, it can divorce itself from the admitted history of sabotage, corruption and criminal activity which took place "on its watch" or even by its own employees, which occurred independently from breaches caused by the executive.

[27] In addition, Adv Katz SC on behalf of the DA, pointed out that Eskom is only obliquely implicated in the declarations of Constitutional delinquency and any specific "excision" of Eskom from the orders, would be of academic consequence only. That is insufficient to constitute a ground on which leave to appeal should be granted.

[28] Eskom further argued that the court "injudiciously" exercised its jurisdiction in formulating the relief which, if implemented, might cause

interference with Eskom's "grid responsibility" or cause it to breach provisions of its enabling statutory provisions. This argument is without foundation. The court ordered no such thing as compelling Eskom to do anything which it may not do. The mandatory relief was against the Minister of Electricity and, should he involve Eskom to assist him, then it must be implied that he cannot compel Eskom to do anything contrary to law.

[29] Eskom also placed substantial reliance on a recent judgment by the Supreme Court of Appeal in *Featherbrooke*⁸. While selected paragraphs of that judgment were relied on, the judgment does not support Eskom's argument. Firstly the facts and the nature of the relief sought in *Featherbrooke* were completely different and distinguishable from the present matter. The basis for the criticism by the SCA of the court a quo in *Featherbrooke* (apart from it having applied an incorrect test in respect of a final interdict) was that its order was inchoate for having ordered a mandamus against the wrong party and that it lacked clarity. In the present matter, by his own admission as to his capabilities and authority, the Minister of Electricity is the correct party to perform the relief ordered. There is also no ambiguity as to what has to be performed: the Minister must simply take reasonable measures to ensure that schools, police stations and hospitals and related entities are supplied with sufficient electricity so that they don't suffer the crippling effects of loadshedding. That the order was not prescriptive as to how the Minister must achieve this was, as already pointed out above, to avoid encroachment into the sphere of Government. Neither of these aspects infringe on any of Eskom's rights and not only is its reliance on *Featherbrooke* misplaced, but no reasonable prospect of success on appeal had been demonstrated by it.

⁸ *Featherbrooke Homeowners Association NPC v Mogale City Local Municipality* (1106/2022) [2024] ZASCA 27 (22 March 2024)

[30] In a last-ditch attempt to secure leave to appeal, both the Government and Eskom submitted that there were compelling reasons of public interest that justified the granting of leave to appeal as contemplated in Section 17(1)(a)(ii) of the Superior Courts Act⁹. Whilst the national energy crisis is of national interest, the “humanitarian relief” granted is to address the rights of a small, albeit vulnerable and important, set of segments of society. The EAP, being the Government’s response to the crisis and everything else that goes with it, which may be of wider public interest, has been left untouched by this court’s order. It is further trite that, even in matters of public interest, the prospects of success on appeal or, in this case, the lack thereof, remains a weighty factor. We find that, in the circumstances of this case, there are insufficient “compelling reasons” to warrant the granting of leave to appeal.

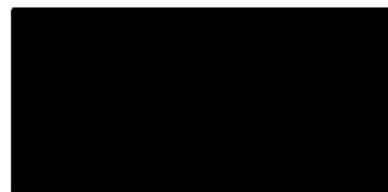
[31] We further find no reason to depart from the customary rule that costs should follow the event and we also find that this includes Action SA who, as Adv Benson had pointed out, may initially have made common cause with the UDM, but had not withdrawn its participation in the main applications.

Order

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

The applications for leave to appeal are refused with costs, such costs to be paid by the applicants for leave to appeal jointly and severally, and which are to include the costs of both senior and junior counsel, where employed.

⁹ 10 of 2013.



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: 27 March 2024

Judgment delivered: 16 May 2024

APPEARANCES in Case No 005779/2023:

For the 3rd Applicant

Adv G Benson

For the 1st Respondent:

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For Government Respondents:

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Attorneys for Government Respondents:

The State Attorney, Pretoria

In Case no: 003615/2023:

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