

Dispute Resolution ALERT

23 MAY 2023



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INCORPORATING
KIETI LAW LLP, KENYA

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High Court considers the impact of loadshedding on fundamental constitutional human rights

On Friday, 5 May 2023, a full court of the Gauteng Division of the High Court sitting in Pretoria delivered a judgment in *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others* Case No: 5779/2023, compelling the Minister of Public Enterprises (Minister) to take all reasonable steps within 60 days from the date of the order, whether in conjunction with other organs of state or not, to ensure that there is sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to all public health facilities, public schools and police stations.



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High Court considers the impact of loadshedding on fundamental constitutional human rights

On Friday, 5 May 2023, a full court of the Gauteng Division of the High Court sitting in Pretoria delivered a judgment in *United Democratic Movement and Others v Eskom Holdings SOC Ltd and Others* Case No: 5779/2023, compelling the Minister of Public Enterprises (Minister) to take all reasonable steps within 60 days from the date of the order, whether in conjunction with other organs of state or not, to ensure that there is sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to all public health facilities, public schools and police stations.

For anyone unfamiliar with the term, “loadshedding” refers to the ongoing rotational interruption to electricity supply in South Africa, which has been employed to safeguard the integrity of the national energy infrastructure (i.e. the grid) from a national blackout scenario where demand outweighs the supply. It is widely accepted by all (including Eskom in the matter at hand) that “loadshedding causes human suffering and has a detrimental impact on a variety of constitutionally protected rights”.

By Monday, 8 May 2023, the Department of Public Enterprises (Department) had issued a media statement announcing that the Minister would be lodging an urgent appeal to set aside the judgment. Apparently, the Department “has serious concerns about the implications of the court ruling on the current efforts to stabilise the national grid and get the country out of loadshedding”. Further, that the Department has “studied the ruling and has determined through legal advice that the prudent step

to take is to lodge an appeal to set aside the ruling and allow for the ongoing efforts to end loadshedding to proceed without putting undue risk on the country’s grid infrastructure”.

Superior Courts Act

It appears that the Department’s legal strategy is to rely on the provisions of the Superior Courts Act 10 of 2013 that suspend the operation and execution of a decision which is the subject of an appeal. Scrutinising whether that would be successful is not the purpose of this note, rather, the purpose of mentioning these facts at the outset is to demonstrate that the judgment has caused quite a stir and prompted immediate action by the state respondents even before the implications of its application had been given an opportunity to be tested.

With that in mind, it is appropriate to turn to the judgment itself.

The application consisted of two parts: Part A and Part B. The High Court only heard Part A of the application and Part B of the



Dispute Resolution 2023 Rankings

Dispute Resolution practice is ranked in Tier 1.

Leading Individuals:
Tim Fletcher

Recommended Lawyers:
Jackwell Feris | Anja Hofmeyr | Corné Lewis
Rishaban Moodley | Mongezi Mpahlwa
Kgosi Nkaiseng Lucinde Rhoodie
Clive Rumsey | Tim Smit

Next Generation Lawyers:
Kgosi Nkaiseng | Tim Smit

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application will be heard at a later date. The relief sought in Part A was to reduce the prejudicial impact of loadshedding on public health facilities, police stations and schools that do not have sufficient alternative energy sources available. The relief was premised on the assumption that Eskom, the Minister and the other state respondents have a constitutional and statutory obligation to provide electricity and that failure to do so violates fundamental constitutional rights, such as the right of access to healthcare services and the right to life.

Constitutional and statutory obligation

The High Court found that the state respondents do have a constitutional and statutory obligation to provide uninterrupted electricity to public health facilities, police stations and schools and that its conduct in implementing loadshedding amounted to a violation of the constitutional and statutory rights

cited by the applicants. The High Court thus ordered the Minister, pending determination of Part B of the application, to take all reasonable steps within 60 days from the date of the order, whether in conjunction with other organs of state or not, to ensure that there is sufficient supply or generation of electricity to prevent any interruption of supply as a result of loadshedding to all public health facilities, public schools and police stations.

The court order does not prescribe how the Minister should provide uninterrupted power to these facilities but is crafted widely to provide the Minister with the discretion to decide how to deal with the power cuts at the relevant public institutions. However, the High Court held that the Minister must provide alternate sources of energy to maintain uninterrupted power in cases where it is difficult to isolate embedded structures/facilities to spare them from the effects of loadshedding.

Given the swift reaction by the Minister to appeal against the judgment, it is perhaps fruitless to consider the practical implications that it would or could have had, save to note that it could have unintended consequences like: (i) providing a basis for claims for common law damages or, alternatively, constitutional damages as a punitive measure; and (ii) cost implications on the fiscus, and so forth.

Nevertheless, while the nation awaits the outcome of this legal process it is useful to touch on other aspects relating to ongoing interventions to end loadshedding.

Energy Action Plan

In that regard, early in January 2023, the Government published an updated Energy Action Plan that sets out measures to be adopted by Government to steer the country away from the energy crises. Such measures include a roadmap for increasing the generation capacity

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between 2023 to beyond 2024. Furthermore, Government has continued to explore and investigate alternatives and strategies to navigate through the loadshedding such as turning public sector buildings into green buildings by installing rooftop solar projects. To account for the requirement for additional generation capacity, the Integrated Resource Plan (IRP) is being examined.

In accordance with section 35(4) of the Electricity Regulation Act 4 of 2006 read with regulation 4 of the Electricity Regulations on New Generation Capacity, the Minister developed the IRP, an electricity capacity plan, in consultation with the National Energy Regulator of South Africa. It outlines a framework

for planning the expansion of generation capacity, interventions to control South Africa's electricity demand from various sources of energy, and implementation timelines. The IRP is a "living plan" that must be periodically changed to account for and address the effects of shifting conditions affecting the supply and demand for electricity, but it has not been revised since 2019. On a positive note, the IPP office has recently issued a request for proposals for the battery energy storage to purchase 513 MW of capacity in the Northern Cape. The lack of grid capacity is anticipated to be somewhat alleviated by the new battery developments.

Tiffany Jegels, Imraan Abdullah and Kelo Seleka



Cliffe Dekker Hofmeyr

2023 RESULTS

Chambers Global 2022 - 2023 ranked our Dispute Resolution practice in **Band 2: Dispute Resolution**.

Chambers Global 2018–2023 ranked us in **Band 2** for Restructuring/Insolvency.

Tim Fletcher ranked by **Chambers Global 2022 - 2023** in **Band 2: Dispute Resolution**.

Clive Rumsey ranked by **Chambers Global 2019 - 2023** in **Band 4: Dispute Resolution**.

Tobie Jordaan ranked by **Chambers Global 2022 - 2023** in **Band 4: Restructuring/Insolvency**.

Lucinde Rhoodie ranked by **Chambers Global 2023** in **Band 4: Dispute Resolution**.

Jackwell Feris ranked by **Chambers Global 2023** as an upcoming dispute resolution lawyer.

Kylene Weyers ranked by **Chambers Global 2023** as an upcoming restructuring/insolvency lawyer.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

PLEASE NOTE

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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