IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

Case no:

In the matter between:

ORGANISATION UNDOING TAX ABUSE NPC **(Registration no: 2012/064213/08)**	**Applicant**

and

THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA N.O.	**First Respondent**
THE HEAD OF NATIONAL DISASTER MANAGEMENT CENTRE N.O.	**Second Respondent**
THE MINISTER FOR CO-OPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS N.O.	**Third Respondent**
THE MINISTER OF MINERAL RESOURCES AND ENERGY N.O.	**Fourth Respondent**
THE MINISTER OF PUBLIC ENTERPRISES N.O.	**Fifth Respondent**
SPEAKER OF THE NATIONAL ASSEMBLY N.O.	**Sixth Respondent**
CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES N.O.	**Seventh Respondent**
ESKOM HOLDINGS (SOC) LTD **(Registration no: 2002/015527/30)**	**Eighth Respondent**

FOUNDING AFFIDAVIT

I, the undersigned,

STEFANIE FICK

do hereby make oath and say:

1. I am an adult female executive director of the applicant's Accountability Division with offices situated at Unit 4, Boskruin Village, Cnr President Fouche and Hawken Road, Bromhof, Johannesburg, Gauteng. I am duly authorised by resolution from the applicant's executive committee to represent the applicant in these proceedings and depose to this affidavit on behalf of the applicant. The resolution is attached as annexure **"FA1"**.

2. The facts contained herein fall within my personal knowledge, save where otherwise indicated or appears from the context, and are true and correct.

3. Submissions of a legal nature are made on the advice of the applicant's legal representatives, which advice I accept as correct and in respect of which I do not waive privilege.

A. THE PARTIES:

(i) Applicant:

4. The applicant is the ORGANISATION UNDOING TAX ABUSE NPC (hereinafter referred to as "OUTA"), a non-profit company duly registered in accordance with the Company laws of the Republic of South Africa with registration number 2012/064213/08 and principal place of business at Unit 4,

Boskruin Village, Cnr President Fouche & Hawken Roads, Bromhof, Johannesburg, Gauteng, 2188.

5. As will more fully discussed below, this is an application to review and set aside on an urgent basis the decision by the second respondent to classify the present electricity constraints in South Africa as a national disaster on 9 February 2023, and further the decision by the third respondent to declare a national state of disaster on 9 February 2023.

6. In his address to the nation on 25 July 2022, the first respondent, His Excellency President Cyril Ramaphosa, stated:

"We do not need a state of emergency or national disaster to implement common sense regulations that should help in resolving our energy crisis".

(Speech published on the official Government website at https://www.gov.za/speeches/president-cyril-ramaphosa-address-nation-energy-crisis-25-jul-2022-0000)

7. Although the first respondent has since made an about-turn on the issue, OUTA is in agreement with the above statement and brings this application on the basis that the decision to declare a national state of disaster was *ultra vires* and will have an adverse impact on the South African public and the economy, and has potential once again lead to government overreach and rampant corruption as was recently seen during the COVID-19 state of disaster.

8. OUTA derives its standing to bring this application and challenge the decisions referred to above from section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution"), which guaranteed the right to lawful, reasonable and procedurally fair administrative action to everyone, read with section 38 of the Constitution, which *inter alia* grants anyone acting in the interest of a group or in the public interest alleging that a right in the Bill of Rights has been infringed or threatened, the right to approach a competent court.

9. OUTA has further been approved as a public benefit organisation in terms of section 30(1) of the Income Tax Act of 1962, with its principal objective set out in clause 3.1 of its Memorandum of Incorporation ("MOI") as:

"…the promotion and advocacy of human rights and democracy in South Africa through the advancement and protection of rights, values and principles enshrined in the constitution of the Republic of South Africa."

10. Clause 3.2 of OUTA's MOI continues to define its objectives:

"3.2 In particular the Company shall, through conducting Activities, focus on-

3.2.1 promoting Taxpayer's rights by-

3.2.1.1 legitimately challenging the unlawful squandering, maladministration an/or corrupt use of Government Funding; and

3.2.1.2 legitimately challenging laws, policies and regulations which are irrational or ineffective for their intended purposes."

11. OUTA accordingly has the requisite *locus standi* to launch review proceedings such as the current one where the legitimacy and rationality of decisions that affect taxpayer's rights to transparency and accountability and the public interest is challenged.

(ii) <u>Respondents:</u>

12. The first respondent is THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA, cited in his official capacity as Head of State and of the National Executive c/o The State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria. The first respondent announced the national state of disaster in his State of the Nation address on 9 February 2023.

13. The second respondent is the HEAD: NATIONAL DISASTER MANAGEMENT CENTRE, cited in his official capacity as the official in charge of the Disaster Management Centre established in terms of Section 8 of the Disaster Management Act, 57 of 2002 ("the DMA"), with principal place of business at Riverside Office Park, Letaba Building, 2nd Floor, 1303 Heuwel Avenue, Centurion, 0157.

13.1 The second respondent is the party responsible for the classification of the impact of the electricity supply constraint as a national disaster in

terms of section 23(3) of the DMA and as published in Government Gazette No 48009 of 9 February 2023. The publication is attached as annexure **"FA2"**.

14. The third respondent is the MINISTER FOR COOPERATIVE GOVERNANCE AND TRADITIONAL AFFAIRS, cited in her official capacity as the designated Cabinet Member under section 3 of the DMA to administer the DMA, c/o the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria.

14.1 The third respondent declared a national disaster in terms of the DMA by issuing a notice entitled "DECLARATION OF A NATIONAL STATE OF DISASTER: IMPACT OF SEVER ELECTRICITY SUPPLY CONSTRAINT" by way of publication in the Government Gazette No 48009 of 9 February 2023. The publication is attached as annexure **"FA3"**.

15. The fourth respondent is THE MINISTER OF MINERAL RESOURCES AND ENERGY, cited in his official capacity as Minister responsible for energy c/o the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria. The fourth respondent is, as part of his ministerial portfolio, tasked with managing, coordinating, and monitoring programmes and projects focused on access to mineral and energy resources.

16. The fifth respondent is THE MINISTER OF PUBLIC ENTERPRISES, cited in his official capacity as head of the Department of Public Enterprises c/o the State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria.

16.1 The Department of Public Enterprises is the shareholder of the state-owned eighth respondent ("Eskom") and oversight responsibility for Eskom, which generates approximately 95% of electricity used in South Africa and approximately 45% of electricity used in Africa (as per information published on the Department of Public Enterprises website at https://dpe.gov.za/state-owned-companies/Eskom/).

17. The sixth respondent is the SPEAKER OF THE NATIONAL ASSEMBLY, cited in her official capacity as leader of the National Assembly, c/o The State Attorney, SALU Building, 316 Thabo Sehume Street, Pretoria. The sixth respondent is cited as an interested party and no relief will be requested against her save in the event of opposition.

18. The seventh respondent is the CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES, cited in his official capacity as the official presiding over the National Council of Provinces ("NCOP") with a constitutional and institutional mandate at NCOP and parliamentary levels. The seventh respondent is cited as an interested party and no relief will be requested against him save in the event of opposition.

19. The eighth respondent is ESKOM HOLDINGS (SOC) LTD ("Eskom"), a state-owned company duly registered and incorporated in accordance with the Company Laws of South Africa, with registration number 2002/015527/30 and registered offices at Megawatt Park, 2 Maxwell Drive, Sunninghill, Johannesburg, Gauteng. Eskom is cited as an interested party and no relief will be requested against it save in the event of opposition.

B. PURPOSE OF THE APPLICATION:

20. The purpose of this application is two-fold:

(i) a review application brought in terms of Rule 53 of the Uniform Rules of Court to have the decisions on 9 February 2023 of the classification of the energy crisis as a national disaster by the second respondent and the accompanying declaration of the national disaster by the third respondent reviewed and set aside (contained in Part B of the Notice of Motion); and

(ii) to interdict the first to fifth respondents from taking any further steps, or issuing and/or implementing any regulations pursuant to the declaration of a national state of disaster pending finalisation of the application to have the decisions of classification- and declaration of a national state of disaster reviewed and set aside (Part A of the Notice of Motion).

21. The decisions by the second and third respondents respectively (hereinafter interchangeably referred to as “the impugned decisions”) to classify the energy crisis as a national disaster and to declare a state of national disaster fall within the definition of *“administrative action”* as set out in section 1 of the Promotion of Administrative Justice Act, 3 of 2000 (“PAJA”) and are accordingly subject to review in terms of PAJA.

22. Experience has taught the applicant that providing shortened periods for the production of a record by state departments/entities often lead to postponements due to difficulties by such entities to produce voluminous records within shortened timeframes. The applicant has accordingly in Part B of the notice of motion afforded the respondents the normal timeframes as provided for in Rule 53 for the production of the record and the filing of further affidavits. OUTA will, once the affidavits have been filed, seek to set Part B of the application down on the urgent roll, *alternatively* ask for a special allocation due to the substantial public interest involved and the continuing urgency of having South Africa in an unwarranted state of disaster.

23. It is accordingly submitted that, due to inevitable delay with review proceedings in producing the record and filing further affidavits, the granting of an *interim interdict* on an urgent basis as contained in Part A of the notice of motion, pending finalisation of the review application contained in Part B of the notice of motion, is warranted.

24. Moreover, the crisis was caused by the Government who now seeks to rely on its own mismanagement of the national power grid in the past consisting *inter alia* of years of a lack of maintenance of the power plants, the devastating effects of state capture and the failure to deal with the pervasive corruption and theft at several power stations as justification for the declaration for the state of disaster. These aspects were all referred to by the first respondent in his State of the Nation address on 9 February 2023.

25. South Africa has had load shedding since approximately 2008 and the difficulties experienced with electricity supply is nothing new. There is no indication whatsoever that the declaration of a state of national disaster will make any difference to the situation, other than to open up the procurement process and method of delivery to a potential new wave of corruption similar to what was seen during the Covid-19 national state of disaster.

26. There is further no evidence that a total blackout will occur. The declaration by the third respondent (**"FA3"**) merely refers to a *"possible progression to a total blackout".*

C. APPLICABLE LEGISLATIVE FRAMEWORK:

27. Section 33 of the Constitution of the Republic of South Africa, 108 of 1996 ("the Constitution") guaranteed the right to just administrative action:

"33. Just administrative action:

(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.

(2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

(3) National legislation must be enacted to give effect to these rights, and must –

(a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;

(b) impose a duty on the state to give effect to the rights in subsection (1) and (2); and

(c) promote an efficient administration."

28. "***Disaster***" is defined in section 1 of the DMA as follows:

" "disaster" means a progressive or sudden, widespread or localized, natural or human-caused occurrence which –

(a) causes or threatens to cause –

(i) death, injury or disease;
(ii) damage to property, infrastructure or the environment; or
(iii) disruption of the life of a community; and

(b) is of a magnitude that exceeds the ability of those affected by disaster to cope with its effects using only their own resources."

29. Section 2(1) and (2) of the DMA:

"2. Application of the Act

(1) This Act does not apply to an occurrence falling within the definition of "disaster" in section 1 –

(a) if, and from the date on which, a state of emergency is declared to deal with that occurrence in term of the State of Emergency Act, 1997 (Act No 64 of 1997); or

(b) to the extent that that occurrence can be dealt with effectively in terms of other national legislation-

(i) aimed at reducing the risk, and addressing the consequences, of occurrences of that nature; and

(ii) identified by the Minister by notice in the Gazette.

(2) The Minister may, in consultation with Cabinet members responsible for the administration of national legislation referred to in subsection (1)(b), issue guidelines on the application of that subsection.

30. Section 23(1), (2), (3) and (8) of the DMA:

"Classification and recording of disasters

23. (1) When a disastrous event occurs or threatens to occur. the National Centre must, for the purpose of the proper application of this Act, determine whether the event

should be regarded as a disaster in terms of this Act, and if so, the National Centre must immediately-

(a) assess the magnitude and severity or potential magnitude and severity of the disaster;

(b) classify the disaster as a local, provincial or national disaster in accordance with subsections(4),(5)and (6); and

(c) record the prescribed particulars concerning the disaster in the prescribed register.

(2) When assessing the magnitude and severity or potential magnitude and severity of a disaster, the National Centre-

(a) must consider any information and recommendations concerning the disaster received from a provincial or municipal disaster management centre in terms of section 35 or 49; and

(b) may enlist the assistance of an independent assessor to evaluate the disaster on site.

(3) The National Centre may reclassify a disaster classified in terms of subsection (1)(b) as a local, provincial or national disaster at any time after consultation with the relevant provincial or municipal disaster management centres, if the magnitude and severity or potential magnitude and severity of the disaster is greater or lesser than the initial assessment.

……..

(8) The classification of a disaster in terms of this section designates primary responsibility to a particular sphere of government for the co-ordination and

management of the disaster, but an organ of state in another sphere may assist the sphere having primary responsibility to deal with the disaster and its consequences."

31. Section 27(1) of the DMA states:

"27. National state of disaster

(1) In the event of a national disaster, the Minister may, by notice in the Gazette, declare a national state of disaster if-

(a) existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster; or

(b) other special circumstances warrant the declaration of a national state of disaster.

32. Section 34 of the Electricity Regulation Act, 4 of 2006 ("the ERA") gives the fourth respondent the authority to enter into agreements to for new generation capacity to ensure the continued uninterrupted supply of electricity. The section reads:

"34. New generation capacity

(1) The Minister may, in consultation with the Regulator-

(a) determine that new generation capacity is needed to ensure the continued uninterrupted supply of electricity;

(b) determine the types of energy sources from which electricity must be generated, and the percentages of electricity that must be generated from such sources;

(c) determine that electricity thus produced may only be sold to the persons or in the manner set out in such notice;

(d) determine that electricity thus produced must be purchased by the persons set out in such notice;

(e) require that new generation capacity must-

(i) be established through a tendering procedure which is fair, equitable, transparent, competitive and cost effective;

(ii) provide for private sector participation.

(2) The Minister has such powers as may be necessary or incidental to any purpose set out in subsection (1), including the power to-

(a) undertake such management and development activities, including entering into contracts, as may be necessary to organise tenders and to facilitate the tendering process for the development, construction, commissioning and operation of such new electricity generation capacity;

(b) purchase, hire or let anything or acquire or grant any right or incur obligations for or on behalf of the State or prospective tenderers for the purpose of transferring such thing or right to a successful tenderer;

(c) apply for and hold such permits, licences, consents, authorisations or exemptions required in terms of the Environmental Conservation Act, 1989 (Act 73 of 1989) or the National Environmental Management Act, 1998 (Act 107 of 1998), or as may be required by any other law, for or on behalf of the State or

prospective tenderers for the purpose of transferring any such permit, licence, consent, authorisation or exemption to a successful tenderer;

(d) undertake such management activities and enter into such contracts as may be necessary or expedient for the effective establishment and operation of a public or privately owned electricity generation business;

(e) subject to the Public Finance Management Act, 1999 (Act 1 of 1999), issue any guarantee, indemnity or security or enter into any other transaction that binds the State to any future financial commitment that is necessary or expedient for the development, construction, commissioning or effective operation of a public or privately owned electricity generation business.

(3) The Regulator, in issuing a generation licence-

(a) is bound by any determination made by the Minister in terms of subsection (1);

(b) may facilitate the conclusion of an agreement to buy and sell power between a generator and a purchaser of that electricity.

(4) In exercising the powers under this section the Minister is not bound by the State Tender Board Act, 1968 (Act 86 of 1968).”

33. Sections 17 and 18 of the National Energy Act, 34 of 2008 (“the NEA”) deal with the security of energy supply:

“SECURITY OF SUPPLY (ss 17-18)

17. Acquisition and maintenance of national strategic energy feedstocks and carriers

(1) The Minister may, in a prescribed manner, for the purposes of ensuring security of supply, direct any state-owned entity to acquire, maintain, monitor and manage national strategic energy feedstocks and carriers.

(2) The nominated state-owned entity must perform the functions contemplated in subsection (1) in accordance with the relevant published security of supply strategies or policies.

(3) The strategies or policies contemplated in subsection (2) may contain but not be limited to-

(a) the minimum level of energy carrier or energy feedstock for the production of an energy carrier;

(b) the conditions under which-

(i) the strategic energy feedstocks and carriers may be built; and

(ii) withdrawals may be made from such strategic energy feedstocks and carriers;

(c) cost and benefit analysis;

(d) funding mechanism for such energy feedstock or carrier; and

(e) obligations to be imposed, on producers of energy feedstocks, to supply to the nominated state-owned entity the requisite energy feedstock, in a manner prescribed by regulation.

(4) Before finalising the strategy or policy, the Minister must-

(a) invite public comments on such strategy or policy; and

(b) duly consider such comments.

18. Investment in and maintenance of Energy Infrastructure

The Minister may, for the purposes of ensuring security of supply, direct any state-owned entity, in a prescribed manner, to-

(a) undertake security of supply measures;

(b) provide for adequate investment in energy infrastructure;

(c) invest in critical energy infrastructure; and

(d) ensure upkeep of all critical energy infrastructure.

34. Section 16(1) of the Public Finance Management Act, 1 of 1999 ("PFMA") provides for the use of funds in emergency situations:

16. Use of funds in emergency situations

(1) The Minister may authorise the use of funds from the National Revenue Fund to defray expenditure of an exceptional nature which is currently not provided for and which cannot, without serious prejudice to the public interest, be postponed to a future parliamentary appropriation of funds.

35. Sections 6(1) and (2) of PAJA set out the grounds for judicial review of administrative action:

"6. Judicial review of administrative action

(1) Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

(2) A court or tribunal has the power to judicially review an administrative action if—

(a) the administrator who took it—

(i) was not authorised to do so by the empowering provision;

(ii) acted under a delegation of power which was not authorised by the empowering provision; or

(iii) was biased or reasonably suspected of bias;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action was procedurally unfair;

(d) the action was materially influenced by an error of law;

(e) the action was taken—

(i) for a reason not authorised by the empowering provision;

(ii) for an ulterior purpose or motive;

(iii) because irrelevant considerations were taken into account or relevant considerations were not considered;

(iv) because of the unauthorised or unwarranted dictates of another person or body;

(v) in bad faith; or

(vi) arbitrarily or capriciously;

(f) the action itself—

(i) contravenes a law or is not authorised by the empowering provision; or

(ii) is not rationally connected to-

(aa) the purpose for which it was taken;
(bb) the purpose of the empowering provision;
(cc) the information before the administrator;

(g) the action concerned consists of a failure to take a decision;

(h) the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or

(i) the action is otherwise unconstitutional or unlawful.

D. RELEVANT CONSIDERATIONS:

a) Existing legislation and instruments already in place to effectively deal with emergency electricity procurement

36. Section 27(1) of the DMA is clear that a national state of disaster may only be declared by the Minister if existing legislation and contingency arrangements do not adequately provide for the national executive to deal effectively with the disaster, or where other special circumstances warrant the declaration of a national state of disaster.

37. There are no special circumstances that warrant such a declaration. The electricity problems in South Africa are not new and have existed for over 15 years.

38. Section 34 of the ERA as quoted above gives the fourth respondent the authority to enter into agreements for new generation capacity to ensure the continued uninterrupted supply of electricity. In terms of this section the fourth respondent can *inter alia* publish emergency procurement regulations in consultation with the National Energy Regulator ("NERSA"). A national state of disaster is not required for the Minister to act in terms of this section.

39. Section 17 of the NEA as quoted above empowers the Minister to ensure the security of supply, to direct any state-owned entity to acquire, maintain, monitor, and manage national strategic energy feedstocks and carriers. A national state of disaster is not required for the Minister to act in terms of this section.

40. Section 18 of the NEA as quoted above further sets out various steps that the Minister may take for purposes of investment in and maintenance of the energy infrastructure. A national state of disaster is not a prerequisite for the Minister to act in terms of this section.

41. Section 16 of the PFMA as quoted above provides for the procedure to be followed for the use of funds in emergency situations. A national state of disaster is not a prerequisite for this section to be utilised.

42. It is accordingly submitted that the fourth respondent is already empowered by existing legislation to procure an emergency supply of power and that a national state of disaster is not a prerequisite for such emergency procurement.

b) <u>Two existing Ministers already in place to oversee the electricity crisis and emergency supply in terms of existing legislation</u>

43. According to the mission statement on the Department of Mineral Resources and Energy website (at https://www.energy.gov.za/files/au_frame.html), the Department's mission is *"To regulate, transform and promote the minerals and energy sectors, providing sustainable and affordable energy for growth and development, and ensuring that all South Africans derive sustainable benefit from the country's mineral wealth".*

44. Part of the fourth respondent's portfolio is that he is specifically tasked with managing, coordinating, and monitoring programmes and projects focused on access to mineral and energy resources.

45. The fifth respondent, in turn, has oversight responsibility and powers over Eskom. The fifth respondent can direct the board of Eskom to put emergency measures in place and act to alleviate loadshedding. In fact, he has done just that on 8 December 2022 as is evident from the official media statement by the Department of Public Enterprises attached as annexure **"FA4".**

46. There are therefore already two members of Cabinet with specific oversight functions over electricity generation and supply in South Africa and powers to procure emergency supplies through publication in the Government Gazette. No national state of disaster is required for these ministers to perform their functions and take emergency steps in terms of existing legislation.

47. The first respondent has further stated in his SONA address on 9 February 2023 that a Minister of Energy in the Presidency will be appointed to assume full responsibility for overseeing all aspects of the electricity crisis response. Although it remains to be seen if such a further ministerial post will produce tangible results, it falls within the first respondent's existing powers to appoint such a Minister and set up a point of centralised coordination (insofar as it does not already exist). The declaration of a state of disaster is not required for these measures to be taken.

c) <u>The Energy Action Plan</u>

48. On 25 July 2022 the first respondent announced the Energy Action Plan which, according to the announcement, was developed though extensive consultation and endorsed by energy experts as providing the best and fastest path towards energy security. The Energy Action Plan was presented as a clear way out of the energy crisis. A copy of the Energy Action Plan is attached as annexure **"FA5"**.

49. During the first respondent's address to the nation on 22 July 2022 already referred to in paragraph 6 above, he also stated with regards to the measures introduced at the time:

"These measures are preferable to declaring a state of disaster, or even emergency, as some have suggested.

These interventions will allow us to do what is necessary to escalate new generation capacity while protecting the rights of all South Africans and upholding the rule of law."

50. Following the announcement of the Energy Action Plan, the National Energy Crisis Committee ("NECOM") was established to oversee the implementation of five key interventions:

(i) to fix Eskom and improve the availability of existing supply;

(ii) to enable and accelerate private investment in generation capacity;

(iii) to accelerate procurement of new capacity from renewables, gas, and battery storage;

(iv) to unleash businesses and households to invest in rooftop solar; and

(v) to fundamentally transform the electricity sector to achieve long-term energy security.

51. In January 2023, NECOM published a six-month update report (published at https://www.thepresidency.gov.za/content/update-energy-action-plan-january-2023) attached as annexure **"FA6",** which lists key achievements to date and contains a "Roadmap to End Load Shedding" on page 3 thereof. There is no mention of an imminent national disaster in this update report from January 2023.

52. It is evident from the Energy Action Plan and the subsequent NECOM update report that contingency arrangements have already been put in place to adequately deal with the energy crisis, and that there is a clear plan to end loadshedding that does not require the declaration of a state of disaster.

53. In addition to the two existing ministers already tasked with the energy crisis, NECOM was also established to address the crisis. The measures and instruments to deal with the crisis already exist.

d) <u>The Integrated Resources Plan</u>

54. The following is stated by the Department of Mineral Resources and Energy ("DMRE") on their website regarding its Integrated Resource Plan:

"The Integrated Resources Plan ("IRP") was promulgated in March 2011. It was indicated at the time that the IRP should be a "living plan"."

55. The Integrated Resource Plan was last reviewed and published by the fourth respondent in October 2019 in terms of section 35(4) of the Electricity

Regulation Act, 4 of 2006, read with item 4 of the Electricity Regulations on New Generation, 2011. It is a document exceeding 100 pages in length published on the Department of Mineral Resources and Energy website at https://www.energy.gov.za/irp/2019/IRP-2019.pdf.

56. I only attach the Government Notice signed by the fourth respondent and the index to this as annexure **"FA7"**, as it is a voluminous document and only relevant for this application insofar as it is yet another plan that was published by the Government with proposed solutions for the electricity demand which did not lead to a resolving of the energy crisis.

57. The IRP plan has further not been reviewed for a period of over three years, yet the national state of disaster will again introduce new plans/regulations to deal with the crisis without attending to the existing plans. It is submitted that Government, and in particular the fourth and fifth respondents, should start efficiently implementing the existing plans instead of continuously introducing new plans that bear little fruit.

e) <u>State of disaster cannot be declared on pure speculation of a blackout</u>

58. As mentioned earlier, there is no evidence that a total blackout will occur. The declaration by the third respondent (**"FA3"**) merely refers to a *"possible progression to a total blackout".*

59. Only once the disaster has occurred, the potential magnitude and severity thereof may be taken into account. People and communities in South Africa have been affected by the electricity shortage for over 15 years. It is submitted that this could not overnight transform into a national disaster.

60. The above view is supported by the definition of *"response"* contained in section 1 of the DMA:

""response" in relation to a disaster, means measures taken during or immediately after a disaster in order to bring relief to people and communities affected by the disaster."

61. Moreover, on 22 January 2023 Eskom issued the media statement attached as annexure **"FA8"** wherein it *inter alia* stated:

"Although the stages of loadshedding have been high and for extended periods, this does not indicate that the power system is approaching a blackout. In fact, loadshedding is implemented to ensure the appropriate reserve margins are maintained to manage the risk of a blackout. Therefore, there is no higher risk of a blackout than normal." (Emphasis added)

62. The above shows that the third respondent has simply speculated about a possible progression to a blackout without having consulted Eskom on such a possibility or taking into account the relevant and existing facts in coming to the decision.

63. It further appears from Eskom's reaction in the media that it (Eskom) was not consulted in the decision to declare a national state of disaster. Eskom spokesperson Sikonathi Manshatha said on eNCA news on 10 February 2023:

"With regards to the president's speech in the State of the Nation address, declaring a state of electricity disaster, Eskom will study the detail in the Government Gazette to understand the implications of the declaration before it can provide any further comment. With regards to the creation of a new government department for electricity, Eskom is unable to comment on any policy decision and, of course, will continue to work with the government through the shareholder ministry."

64. A copy of the video clip of the above will be made available to the Honourable Court at the hearing if required. It follows that if Eskom is in the proverbial dark about the implications of the national disaster, Eskom was not duly consulted prior to the decision being taken to declare the national state of disaster. This adds to the uncertainty as to what assessment meathods were used to reach the impuned decisions.

65. Moreover, two days prior to the declaration of a national state of disaster, Eskom did a *"Presentation to the Joint Portfolio Committee on Public Enterprises, Mineral Resources and Energy and the Select Committee on Public Enterprises and Communication*". A copy of the presentation is attached as annexure **"FA9"**.

66. Nowhere in the presentation referred to above did Eskom allude to the situation as being so dire that it warranted the declaration of a national state of disaster.

In fact, Eskom stated in the presentation that the most viable solution to minimise loadshedding in the short-term is to ensure that Eskom has the funds to run Open Cycle Gas Turbines ("OCGT's").

67. Eskom further *inter alia* touted the relaxation of some requirements by National Treasury to speed up procurement as one of the successes thus far. This proves that procurement requirements can be relaxed with success without the necessity of a national state of disaster.

68. It is submitted that discussion with and input from Eskom about the implications of a national state of disaster specifically where it pertains to the electricity crisis would be material and of great relevance, especially where two days prior to this declaration Eskom was still addressing the relevant parliamentary committees on immediate to medium term solutions to loadshedding.

69. Eskom, as a party to these proceedings, is invited to confirm whether it was consulted on the declaration of the national disaster prior to the announcement thereof and, if so, what the nature of the consultation was and what views were expressed by Eskom about the need for a national state of disaster to deal with the energy crisis.

f) <u>What will the "removal of red tape" entail?</u>

70. Other than the appointment of a new Minister of Energy, there has been no indication from any of the respondents as to what will be done differently or

what steps will be taken in terms of the declared national state of disaster other than steps that can be taken in existing legislation. The first respondent's 2023 SONA was filled with platitudes about removing red tape and accelerating energy projects, but no details provided as to how this will be achieved and how it will make a difference. At the time of deposing to this affidavit, a Minister of Energy is yet to be appointed and regulations are yet to be *gazetted.*

71. OUTA is at present involved in litigation in the form of review proceedings *inter alia* with NERSA and the fourth respondent regarding the controversial Karpowership projects and the awarding of electricity generation licences to Karpowership. These proceedings are pending under case number 23017/2022 in the above Honourable Court and OUTA filed an interlocutory application in January 2023 for production of the full record, as there is a pending dispute about the record. The non-profit environmental organisation Green Connection NPC, also has a review application pending against the fourth respondent, NERSA and Karpowership under case number 23339/2022 in the above Honourable Court.

72. Although I do not wish to dwell on the merits of that matter in the present proceedings, it is of relevance that there are review proceedings pending pertaining to the Karpowership projects.

73. Of great concern are comments made by the fourth respondent during an address at the recent ANC Energy Dialogue held in Johannesburg in January 2023, where he referred to the Karpowership projects as an emergency power

option to help alleviate South Africa's energy crisis. In his address he further alluded to the idea that the contracts with Karpowership can be reduced to a shorter period but *"it will cost us a little bit more per unit…it will be a little bit expensive, but cheaper than the cost of load shedding on the economy."*

74. One of the key points of dispute in OUTA's review application in the Karpowership matter is the cost of these projects and the impact that it will have on the South African taxpayer. From the remarks made by the fourth respondent, one cannot help but draw the conclusion that this state of disaster will assist him in attempting to circumvent pending review proceedings and the concerns raised therein.

75. It is further submitted that it is a reasonable concern that the decision to declare a national state of disaster will assist government departments to fast-track reckless and environmentally harmful procurement processes and strategies without the requisite oversight.

76. Such potential abuse of power is unfortunately not limited to the energy sector as it is not only the respondents in the present matter that could be issuing emergency regulations without parliamentary oversight, but under a national state of disaster this tool could potentially be utilised by any government department.

g) <u>Lessons from the most recent Covid-19 national state of disaster</u>

77. The most recent guidance available for understanding and evaluating Government's preparedness for and managing of a national disaster is the COVID-19 state of disaster that was initially announced in March 2020 and was extended several times to have remained for a period of approximately 750 days.

78. In its first Citizen's Report on the Financial Management of Government's Covid-19 Initiatives published in September 2020, several very concerning aspects were raised, which I highlight by way of making reference to the headings (as underlined) used by the Auditor-General to describe the respective deficiencies. The relevant pages from the report, where these headings are elaborated upon are attached as annexure **"FA10"**.

a) Slow progress in getting initiatives off the ground. This was the case despite fast-tracked and streamlined procurement processes put in place.

b) Inefficiencies and the silo effect. This referred to the fact that government departments tend to operate in silos and data between government departments is not integrated and shared.

c) Poor record keeping is rife. The AG found that poor record-keeping across many of Government's covid-19 initiatives was a common feature.

d) Quality concerns crop up. Poor quality supplies can have an adverse impact on the health and well-being of citizens, problems with PPR quality and

delivery contributed to the delayed reopening of schools and some suppliers delivered PPE that did not meet the required specifications. Importantly, under this heading the AG noted that *"Emergency water supply was another life-protecting initiative that was plagued by quality issues, as well as delivery delays."*

e) Signs of overpricing, unfair processes, and potential fraud. The AG found that the already compromised control environment in government departments coupled with the urgent response required, heightened the risk of public resourced being abused or misused and stated *"…The risk of fraud looms particularly large in procurement and contract management processes, as well as in the approval and payment of social grants and benefits."*

79. The Second Special Report by the AG are equally scathing where it pertains to procurement processes followed by the Government, despite the ongoing auditing of covid-19 funding having been in place. To avoid unnecessary prolixity, I only attach the relevant pages from the Media Release in respect of the Second Reports by the Auditor-General's offices on 9 December 2020, where the key findings on the Procurement Process are summarised. The reports are also published on the official website of the Auditor General. These are in short:

a) the auditors continued to find instances where competitive processes were not followed resulting in contracts being awarded to suppliers without the necessary motivations or approval for such deviations;

b) the requirement as per National Treasury's instruction notes of favouring local producers was not consistently applied in the PPE procurement processes;

c) there was a failure to ensure that suppliers' tax affairs were in order for the award of PPE contracts, reducing the incentive for government suppliers to pay their dues;

d) businesses that provide PPE across the country were not treated in a fair and equal manner;

e) the audit identified various red flags such as fairness with the selection process which can lead to fraud or abuse of the supply chain management process, potential cover quoting and signs that the procurement processes had been manipulated.

80. In respect of emergency water supplies, the key findings were equally concerning. I quote from the summarised media release, the relevant pages of which are attached as annexure **"FA11"**:

*"**Emergency water supply to communities***

The AG says the shortcomings that have often been observed in the coordination, monitoring and oversight between the different role-players in the water services sector – departments, water boards as implementing agents and municipalities – were again apparent.

- *Auditors could not reconcile some of the information on the registers of the water tanks with what they found at the sites and match it to the original needs analyses performed.*

  ….

  The poor record keeping also affected the quality of the information reported to the National Water Disaster Command Centre. We could not find some of the tanks at the locations specified in the registers and there are unconfirmed claims that the tanks were moved by the municipalities. At some of the sites we found tanks that were empty and tanks with poor quality installations.

Emergency water to schools

- *The analysis performed to determine which schools needed water tanks and the required capacity of the tanks were incorrect because the provincial departments provided unreliable data. As a result, a large proportion of schools that received water tanks did not need them and some schools that received water tanks were not on the original project list.*

- *For the delivery of water to schools, Rand Water's registers of the water tanks were inadequate and inconsistent with what we observed on site visits. We also observed similar poor installations of water tanks.*

- *Auditors identified instances of non-compliance with legislation in the procurement processes followed by Rand Water, as well as indications of unfairness in the appointment process.*

- *In addition, the payments made for some of the water tankering services were questionable because there was supporting documentation that was inadequate, calculation errors were made and payments were made for water*

supplies to schools and other sites that were not part of this programme."

(Emphasis added)

81. The above shows how Government dealt with emergency utility supplies during the recent national disaster. There is no reason to believe that emergency electricity procurement and supply under the new national disaster will be dealt with any differently.

82. It further illustrates that, despite the request by the President during the Covid crisis for the AG's office to undertake an audit of the covid-19 government initiatives and the spending as it occurred, such a "live" audit in real-time could not prevent the multiple irregularities as an when they occurred. By the time the reports were produced, the damage was done.

83. The first respondent's assurance during the State of the Nation that *"the Auditor-General will be brought in to ensure continuous monitoring of expenditure, in order to guard against any abuses of the funds needed to the disaster"* also offers little comfort. As was seen during the Covid-19 disaster where the AG was also tasked with real-time auditing, the AG could not prevent corruption, irregularity, and illegality as it occurred.

84. It is therefore not unreasonable to foresee that the same could happen again, and that the irregularities pertaining to the procurement process that happened during the Covid-19 state of disaster could be repeated, albeit in a different sector this time around.

h) Potential opening of the floodgates

85. As far back as December 1998, the cabinet approved a "White Paper on Energy Policy of the Republic of South Africa" (published at https://www.energy.gov.za/files/policies/whitepaper_energypolicy_1998.pdf), which was developed through an active consultation process with role players in the industry and energy sector.

86. The White Paper is voluminous and in order not to burden the Honourable Court with unnecessary papers I do not attach it hereto. I point out, however, that the report contained various warnings as to what the future would hold and attempted to raise an awareness of timely maintenance that would be required. For example, under the heading ***"Meeting growth in electricity demand",*** it is stated in paragraph 7.1.5.5 of the report:

Eskom is the world's fourth largest electricity utility, with an installed generating capacity of about 39 000 MW in 1997. The maximum demand in 1997 was about 28 330 MW. Eskom's latest Integrated Electricity Plan forecasts for an assumed demand growth of 4,2% that Eskom's present generation capacity surplus will be fully utilised by about 2007. Timely steps will have to be taken to ensure that demand does not exceed available supply capacity and that appropriate strategies, including those with long lead times, are implemented in time. The next decision on supply-side investments will probably have to be taken by the end of 1999 to ensure that the electricity needs of the next decade are met. (Emphasis added)

87. Also, under the heading "***Integrated resource planning and electricity supply" in*** paragraph 7.1 5.6 it is stated:

"Government will require the use of integrated resource planning methodologies in evaluating further electricity supply investments and the decommissioning of older power stations."

88. At the ANC Energy Dialogue in held in Johannesburg in January 2023, the fifth respondent made the following remarks:

"There is a serious lack of accountability. There is a dysfunctional culture. The engineering discipline has been badly diluted. There's a lack of routine and proper planned maintenance of the right quality….

There is a skills exodus that has to be dealt with…there's inadequate funding available for outages and maintenance. There is criminality around, and in Eskom itself, the level of corruption is huge around power stations."
(Emphasis added)

89. The alarms bells were rung in 1998 already that proper planning and maintenance would be required to ensure sufficient future electricity supply. Although construction of the Medupi and Kusile power plants started as far back as 2007, it is well publicized and in the public domain that these plants have been plagued with *inter alia* design defects and lengthy construction delays. Had these plants been built according to proper specification, completed within

the initially set timeframes and operated and maintained as intended, South Africa would not have been in the current crisis.

90. Despite the alert raised as far back as 1998, loadshedding has been a regular occurrence in South Africa since 2008. As illustrated above, various plans have been announced by Government through the years to address the energy supply difficulties and the construction of two power plants have been commissioned. Two ministers have oversight positions in respect of electricity supply. None of these resolved the energy crisis.

91. It is irrational to think that a national state of disaster will now suddenly resolve a situation that has been in the making for at least 15 years. The existing plans that are in place must just be implemented. A national state of disaster is not required for this to be done.

92. With reference to the concerns that were highlighted by the fifth respondent as quoted above, a state of disaster will not:

(i) miraculously end the corruption to which the fifth respondent referred. To the contrary, the Covid-19 national state of disaster has shown that the lack of proper oversight and the increased powers to cut “red tape” invites more corruption;

(ii) resolve with the requisite urgency the extensive theft of cables and criminality surrounding electricity supplies;

(iii) suddenly instill routine and proper maintenance planning that have been lacking for years;

(iv) stop the skills exodus with the required urgency; and

(v) overnight fix the dysfunctional culture referred to by the fifth respondent and the lack of accountability that were years in the making.

93. Moreover, if the decision to declare a national state of disaster due to this self-created crisis by the Government is allowed to stand, it will open the floodgates for further such disasters to be declared in various other sectors that suffered from similar dysfunction, mismanagement, and corruption. Declaring a national state of disaster will in effect become a tool for the Government to circumvent accountability and hide behind the excuse of a disaster to reach an apparent "quick-fix" for problems that were years in the making.

94. It is submitted that this can never be the intention with which the DMA was drafted.

E. EXPERT OPINION OF PROFESSOR DEWALD VAN NIEKERK: HEAD OF THE AFRICAN CENTRE FOR DISASTER STUDIES AT NORTH-WEST UNIVERSITY:

95. I attach hereto as annexure **"FA12"** a short preliminary report and abbreviated *curriculum vitae* of Professor Dewald Van Niekerk, head of the African Centre for Disaster Studies at North-West University and expert in disaster risk

governance. Professor Van Niekerk played an active role in the drafting and development of the DMA as well as the National Disaster Framework of 2005.

96. The key points expressed in Professor Van Niekerk's report can be summarised as follows:

96.1 as exceptional legislation, the DMA makes provisions for unforeseen circumstances which warrant extraordinary measures to either prevent an anthropogenic or natural hazard from turning into a disaster or to respond to a disastrous event (PARA 1);

96.2 he does not believe that the DMA, nor the declaration of a national State of Disaster, is the correct legislative and response mechanism to use for the electricity crisis (PARA 1);

96.3 in the case of the electricity crisis, his concern is that once again the Government is resorting to exceptional law which has a direct impact on the democratic institutions of South Africa and Parliamentary oversight (PARA 2);

96.4 in trying to identify the hazard which drives this disaster, the argument that the electricity crisis is a disaster as per the definition in the DMA falls short. As it currently stands it is unclear on which assessment the Head of the National Disaster Management Centre (NDMC) based his

classification of the disaster (see Section 23 of the DMA) which led to the declaration of the State of Disaster for the electricity crisis (PARA 3);

96.5 the DMA was never meant to be applied to circumstances which fall outside the scope of the hazard, risk and vulnerability paradigm. The DMA cannot be used to fix governance and management failures. It is therefore clearly not the intention of the DMA to make provision for institutional failures of whichever nature. However, this State of Disaster declaration opens the possibility for other spheres of government to abuse exceptional law to address ordinary developmental or self-induced problems (PARA 4);

96.6 reading through the reported successes of the Energy Action Plan and comparing this to the reasons given for the declaration of a State of Disaster leaves one flabbergasted (PARA 5);

96.7 as of the time of writing the report, regulations pertaining to the current State of Disaster for the electricity crisis are yet to be gazetted. This begs the question of the urgency of this State of Disaster compared to the period of regulations gazetted in other States of Disaster. The Minister can also extend the period of a State of Disaster for 30 days without any Parliamentary oversight. This gives the Minister considerable powers (PARA 5);

96.8 one would expect that before a declaration of a State of Disaster, the Government must be able to prove that it considered all other legal instruments and found them to be inadequate (PARA 5). He does not believe the envisaged period of 11 months (end of 2023) would be enough to solve this crisis. The problems are too great, and the time needed to solve them is not enough, even under the State of Disaster (PARA 6).

97. It is accordingly Professor van Niekerk's opinion that the definition of "disaster" as intended by the DMA is not met and that the declaration of a national state of disaster is not the correct legislative and response mechanism to use for the electricity crisis. A confirmatory affidavit for Professor van Niekerk is attached as annexure **"FA13"**.

F. GROUNDS FOR REVIEW:

a) Decision by the second respondent to classify a national disaster

98. The second respondent failed to act in accordance with the provisions of the DMA in that he classified a national disaster in circumstances where:

(i) there is existing national legislation in place aimed at reducing the risk and addressing the consequences of the electricity crisis;

(ii) he is prohibited by section 2(1) of the DMA to classify a national disaster in circumstances where existing legislation aimed at reducing the risk and addressing the consequences of the occurrence is in place;

(iii) there is no evidence of a sudden national disaster in circumstances where the problem has been ongoing for more than 15 years;

(iv) he failed to take into account Eskom's position that a total collapse of the grid was not imminent and that there is no greater threat of a blackout than normal;

(v) upon a proper interpretation of the DMA the definition of a "disaster" is not properly met.

99. It is accordingly submitted that the decision of the second respondent to classify the electricity crisis as a national disaster falls to be reviewed and set aside on the following grounds:

a) that the second respondent failed to comply with a mandatory and material procedure or condition prescribed by an empowering provision as required by section 6(2)(b) of PAJA in that he classified a national disaster in circumstances where he was prohibited by section 2(b) of the DMA to do so;

b) that the decision was taken in circumstances where irrelevant considerations were taken into account or relevant considerations were not considered as provided for in section 6(2)(e)(iii) PAJA;

c) in conjunction with the above, that the decision was taken arbitrarily or capriciously as set out in section 6(2)(e)(vi) of PAJA;

d) that the decision is not rationally connected to the purpose of the empowering provision and to the information before the administrator as per section 6(2)(f)(ii) of PAJA.

b) <u>Decision by the third respondent to declare a national state of disaster</u>

100. The third defendant declared a national state of disaster where she was prohibited by the provisions of section 27(1) of the DMA to do so in circumstances where there is existing legislation and contingency arrangements in place to adequately deal with the electricity situation, and where no other special circumstances exist that would enable her to do so. As such, the decision was taken *ultra vires* of the enabling statutory provisions.

101. A mandatory and material condition prescribed by the empowering provision was accordingly not complied with and the decision falls to be reviewed and set aside in terms of section 6(2)(b) of PAJA.

102. The decision was further:

(i) taken because irrelevant considerations were taken into account or relevant considerations were not taken into account, especially with regards to the history of the matter, the fact that the crisis was self-created, Eskom's position that the risk of a blackout is no greater than normal, and the failure to properly consult Eskom prior to the declaration of the national state of disaster *inter alia* on the necessity and the impact thereof. As such, it falls to be reviewed and set aside in terms of section 6(2)(e)(iii) of PAJA;

(ii) taken arbitrarily or capriciously, when in July 2022 the first respondent still clearly expressed the view that a state of national state of disaster was not required, where the situation has endured for more than 15 years and where there are no facts to support the speculation that the total collapse of the grid or a nationwide blackout is imminent, and falls to be reviewed and set aside in terms of section 6(2)(e)(vi) of PAJA;

(iii) irrational in that it was not rationally connected to the purpose for which it was taken, and/or to the purpose of the empowering provisions and/or to the information before the administrator, and falls to be reviewed and set aside in terms of section 6(2)(f)(ii) of PAJA;

(iv) is unlawful due to the fact that it was taken *ultra vires* and contrary to the provisions of section 27(1) of the DMA, and falls to be reviewed and set aside in terms of section 6(2)(i) of PAJA.

G. REQUIREMENTS FOR INTERIM INTERDICT:

103. I am advised that an applicant requesting *interim* interdictory relief must meet four requirements:

(i) the existence of a *prima facie* right;

(ii) a reasonable apprehension of irreparable harm if the interim relief is not granted;

(iii) that the balance of convenience favours the granting of a temporary interdict; and

(iv) that there is no alternative satisfactory remedy.

(i) *Prima facie* right

104. It is submitted that OUTA has illustrated in this affidavit that there are prospects of success in the review application and has established a *prima facie* right to have the decisions by the second and third respondents reviewed and set aside.

105. Section 33 of the Constitution guarantees the right to lawful, reasonable, and procedurally fair administrative action. The applicant has demonstrated *prima*

facie that the second and third respondents have acted beyond their powers in classifying a national disaster and declaring a national state of disaster in circumstances where there is adequate existing legislation and contingency measures in place to deal with the electricity crisis. As such these decisions were unlawful.

106. Any further steps taken or regulations issued in terms of these decisions that were taken will also be unlawful. There is harm to the public interest if further unconstitutional and/or unlawful administrative actions flowing from the original unlawful and irrational decisions are allowed to be taken and implemented.

107. There can further be no dispute that the lack of maintenance and the issues raised by the fifth respondent in January 2023 at the ANC Energy Dialogue have had an adverse impact on most, if not all, South Africans. The nation has a self-standing entitlement to consistent electricity supply. The applicant has a right to challenge the impugned decisions in circumstances where such adverse impact was caused by the actions (or inactions) of Government itself.

(ii) <u>Reasonable apprehension of irreparable harm</u>

108. The greatest harm if the interdictory relief requested in Part A is not granted, would lie in the continuation of the unlawfulness by allowing the Government to take further steps and create measures built on a foundation that was laid though decisions taken *ultra vires.*

109. It has further been illustrated by the AG's reports referred to above that a national state of disaster opens the door to potential corruption, overpricing, unfair processes, and fraud. The real-time audit by the AG's offices during the Covid-19 national state of disaster could not prevent the rampant corruption that took place. It is submitted that there is a reasonable apprehension that the same harm will again occur with the emergency procurement and supply of electricity where the normal oversight processes are circumvented, and the "red tape" is cut with unfettered powers.

110. A National state of disaster gives extraordinary powers to officials to, in the words of Professor van Niekerk *"bypass normal legal instruments, rights and freedoms, or create new instruments".* The public interest will be adversely affected if such extraordinary powers are allowed to be exercised prior to a review of the impugned decisions.

111. It is accordingly submitted that there is a reasonable apprehension of irreparable harm if the interdictory relief contained in Part A of the Notice of Motion is not granted.

(iii) <u>Balance of convenience</u>

112. There is no prejudice for the respondents if the interdictory relief contained in Part A of the Notice of Motion is granted. The electricity crisis has been ongoing for a period of more than 15 years. Eskom has confirmed that there is no greater possibility of a blackout now than there was before. At the time of deposing to

this affidavit no regulations in terms of the national state of disaster have been published.

113. No statutory powers will be constrained if the interdictory relief is granted. Government can continue implementing the Energy Action Plan. The fourth and fifth respondents can continue to act in accordance with existing legislation to address the supply of electricity. The first respondent can continue to appoint a Minister of Electricity in the Presidency.

114. On the other hand, if the temporary interdict is not granted the applicant, acting in the public interest, will suffer harm as set out under the heading dealing with the reasonable apprehension of irreparable harm above. It is accordingly submitted that the balance of convenience favours the applicant.

115. Although the applicant has afforded the second and third respondents in Part B of the application the normal period of 15 (fifteen) days as prescribed by Rule 53 to file the record, these respondents are free to file it sooner so that the review application can progress quicker to Court. If the respondents are therefore of the view that there is any prejudice for them in having a temporary interdict in place pending the review proceedings, it will be in the hands of the second and third respondents to have it heard sooner by filing the record as well as their answering affidavit(s) in respect of the review proceedings within a shortened period.

(iv) No other satisfactory remedy

116. It is submitted that the applicant has no other satisfactory remedy to prevent further unlawful actions being taken pending the finalisation of the review application in respect of the impugned decisions contained in Part B of the Notice of Motion.

117. As the Honourable Court will not be able to hear the review application without the benefit of the record, and further steps taken by any or all of the first to fifth respondents in terms of the impugned decisions are imminent, a temporary interdict to immediately halt all such further steps is the only remedy that will afford a fair and satisfactory solution pending the finalisation of the review proceedings.

H. URGENCY:

118. The declaration of a national state of disaster, especially where it pertains to the emotionally laden subject of loadshedding, is of considerable public interest that touches upon the lives of everyone living in South Africa. Years of state capture, mismanagement and a dysfunctional culture cannot be a rational justification for the declaration of a national state of disaster.

119. As illustrated above, the declaration of a national state of disaster was not only *ultra vires* and thus unlawful in circumstances where existing legislation and

contingency arrangements adequately provide for the national executive to deal with the electricity crisis, but also wholly unnecessary and irrational in circumstances where South Africans have been subjected to loadshedding for more than 15 years.

120. The declaration of a national state of disaster provides extraordinary powers to government officials to make far-reaching decisions without Parliamentary oversight. It is submitted that urgent interdictory- and review proceedings as prayed for in the Notice of Motion are justified in circumstances where Government grants extensive and extraordinary powers to itself, especially where such powers are granted to those who in the first place bear responsibility for the crisis.

121. A continuation of actions in terms of a decision that was taken *ultra vires* will merely amplify the irregularity and cause a continuous infringement of section 33 of the Constitution which guarantees the right to administrative action that is lawful, reasonable, and procedurally fair.

122. The applicant will not be able to obtain substantial redress in due course. It is submitted that the granting of an interdict as prayer for in Part A holds no prejudice for the respondents and is the only way to prevent the amplification of decisions that are *prima facie* unlawful by allowing further steps to be taken consequent upon those decisions.

123. It is submitted that there was no delay by the applicant in launching these proceedings. Following the first respondent's SONA on the evening of 9 February 2023, the applicant immediately contacted its attorney and arranged for consultations with its legal representatives as soon as they were available.

I. CONCLUSION:

124. The electricity crisis is one that evokes great emotion and anger across all sectors of civil society in South Africa. There is no instant solution to resolve the crisis overnight by arbitrarily transforming it into a national state of disaster. It will take time to root out corruption and the dysfunctional management of our electricity resources that have prevailed over so many years.

125. OUTA supports the Electricity Action Plan that was announced by the first respondent in July 2022 and believes that efficient implementation of this plan, investment in alternative energy supply resources and employing and training a workforce with the necessary critical skills, together with other emergency measures that may from time be required (and for which provision is made in the existing legislation) is the only way to ensure that South Africa gets out of this crisis.

126. A national state of disaster where more public funds are spent on further officials consequent upon the impugned decisions and doors to potential corrupt procurement practices being opened once again, is not the answer and will not provide a "quick-fix". In fact, there is no evidence that the declaration of

a national state of disaster will make any difference whatsoever, as the announcement was not coupled with any tangible proof of differences that would occur.

127. It is submitted that it will be in the public interest to suspend any further steps to be taken in terms of the national state of disaster pending the review of the impugned decisions by the second and third respondents. Allowing these decisions to go unchallenged will not only have an adverse impact on South Africa society as a whole but will leave the door wide open for future abuse where Government is looking for a speedy solutions to appease public dissatisfaction without proper oversight.

128. In the premises it is submitted that the applicant has made out a proper case for the relief sought. I will accordingly pray for an order in terms of prayers 1 and 2 contained in Part A of the Notice of Motion , with the relief in the remaining prayers to be postponed *sine die* for purposes of a hearing once the record and further affidavits pertaining to Part B of the application (the review application) have been filed.

_____

DEPONENT

Signed and sworn before me at _____ on this ____ day of FEBRUARY 2023 after the deponent declared that she knows and understands the content of this declaration, has no objection to taking the prescribed oath and considers the prescribed oath to be binding on her conscience. There has been compliance with the requirements of the Regulations contained in Government Gazette R1258, dated 21 July 1972 (as amended).

_____
COMMISSIONER OF OATHS

FULL NAMES:
ADDRESS:
EX OFFICIO: