

Parliamentary Submission:

Eskom Debt Relief Bill

Introduction

1. I am an advocate of the High Court of South Africa and an academic in the Department of Commercial Law at the University of Cape Town. My areas of specialisation are tax law and public finance.
2. The following submissions are made, in my personal capacity, in respect of the Eskom Debt Relief Bill (the 'Bill').
3. I further request that the Committee afford me the opportunity to make brief supplementary oral submissions.

Preliminary Comment

4. Before making submissions, I wish to first commend the state law advisors and officials in the National Government who drafted the Bill.
5. The Bill is innovatively drafted and I would submit a timely intervention in the management of Eskom Holdings SOC Ltd's ('Eskom') financial position.
6. I do, however, wish to make specific submissions regarding the power or authority granted to the Minister of Finance to impose conditions on the conversion of the envisaged debt instruments to equity in terms of the Bill.

Authority to impose conditions on Eskom

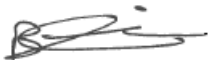
7. I submit that the envisaged section 2(b) in the Bill is excessively broad in its framing and threatens to undermine the lawfulness of the entire proposed statute.
8. Parliament when granting this power is duty bound to ensure that the authority granted is not excessively broad in its discretion or unfettered.
9. Previously the Constitutional Court has held that it is not sufficient to assess the potential abuse of broad discretionary powers after the fact and that Parliament is actively duty bound to reduce this risk when passing legislative provisions into law.

10. In judgement of *Dawood v Minister of Home Affairs* 2000 (3) SA 936 (CC) the Constitutional Court held that excessively broad authority should not only be tested after the fact, but that Parliament must consider appropriate guidance in the drafting of legislation.
11. In the judgement of *Janse van Rensburg v Minister of Trade and Industry NO* 2001 (1) SA 29 (CC), which criticised unfettered and unguided administrative powers, the Constitutional Court expressly recognised that in the absence of legislative guidance contributed to the unjustifiable limitation of rights in that case.

Submission recommendation

12. In conclusion I submit that it would be prudent for Parliament, when considering the Bill, amend section 2(b):
 - 12.1. by setting appropriate guidelines for the use of the power to impose conditions;
 - 12.2. the Bill is, correctly, to be tagged as a section 77 money Bill in terms of the Constitution and is therefore limited in its scope to issues of money and ancillary matters – meaning such conditions must be limited to monetary matters and cannot be centered on non-financial considerations; and
 - 12.3. the conditions should rationally be connected to the central purpose of the envisaged statute – which is ostensibly the reduction of debt in Eskom.

Yours sincerely,



Benjamin Cronin